

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
COURT - IV

Item No. 116
IB/521/ND/2022

IN THE MATTER OF:

DB Power Ltd.

...

Applicant

Versus

Kreate Energy (I) Pvt. Ltd.

...

Respondent

Order under Section 9 of IBC, 2016.

Order delivered on 31.10.2023

CORAM:

MR. MANNI SANKARIAH SHANMUGA SUNDARAM,

HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA,

HON'BLE MEMBER (TECHNICAL)

ORDER

IB/521/ND/2022 stands dismissed.

Sd/-

DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)

Sd/-

MANNI SANKARIAH SHANMUGA SUNDARAM
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

COMPANY PETITION NO.(IB)-521/ND/2022

**Under Section 9 of the Insolvency and Bankruptcy Code, 2016
read with Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority), Rules, 2016**

IN THE MATTER OF:

M/s. DB POWER LIMITED

.... Applicant/ Operational Creditor

Vs.

M/s. KREATE ENERGY (I) PRIVATE LIMITED

.... Corporate Debtor

CORAM:

**SH. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)**

Date of Order:31.10.2023

ORDER

PER: SH. MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (JUDICIAL)

The instant application is filed by on behalf of M/s. DB Power Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Kreate Energy

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(I) Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor') for defaulting the payment of Rs.9,62,38,371/- including principal amount of Rs.7,08,98,749/- and interest amounting Rs.2,53,39,62/-.

2. The Respondent Company M/s. Kreate Energy (I) Private Limited having CIN:U17113DL1997PTC089292 incorporated under the provisions of the Companies Act, 1956 and having its registered office situated at Unit No. 1002, Tenth Floor, Antriksh Bhawan, 22 KG Marg, Connaught Place, New Delhi-110001. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

AVERMENTS BY THE APPLICANT

3. Succinctly stated facts of the present case as averred by the applicant are that the Applicant is operating a 1200 (2x600) MW coal based thermal power plant in District Janjgir Champa, Chhattisgarh. The Corporate Debtor vide its communication dated 06.08.2020 offered to purchase 105 MW of RTC power for the period 01.09.2020 to 30.09.2020 @ Rs 2.75/KWh at Regional Periphery and the said offer was accepted by the Applicant vide its mail dated 06.08.2020. Pursuant to the said arrangement, the Applicant had supplied 105 MW of RTC power for the period 01.09.2020 to 30.09.2020 for which bill/invoice no. 100006518 dated 01.10.2020 for the sum of Rs 20,87,05,151.88/- (Rupees Twenty crore Eighty-Seven Lakhs Five Thousand One Hundred Fifty One and Eighty Eight paise) was duly raised by the Applicant and the same was due for payment on 01.12.2020.

4. Further, the applicant submitted that after lot of follow up and persuasion, part payments totalling to Rs 13,78,06,403 /- during the period 08.01.2021 to 14.12.2021, was made, in instalments, by the Corporate Debtor against the energy bill invoice no. 100006518 dated 01.10.2020. Accordingly, an aggregate outstanding amount, of Rs. 7,08,98,749/- (principal amount) (Rupees Seven Crore Eight Lakhs Ninety-Eight Thousand Seven Hundred Forty Nine Only) was outstanding after the adjusting the part-payments received. The applicant had sent several reminders to the Corporate Debtor, however, the Corporate Debtor did not respond the reminders. The Applicant had served Statutory Demand notice dated 21.10.2021 in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) on the Corporate Debtor under Section 8 of the IBC for demanding payment of the aforesaid operational debt and the said statutory demand notice was duly served on 21.10.2021 through email and on 22.10.2021 through speed post.
5. The applicant submitted that the Corporate Debtor has failed to pay the outstanding amount of Rs. 9,62,38,371/- (including Principal amount of Rs. 7,08,98,749.00 and interest amount of Rs. 2,53,39,622.00 as on 31.05.2022), even the cheque issued by the corporate debtor towards part payment of the aforesaid invoice has been dishonoured. Moreover, the Corporate Debtor has failed to raise or bring any dispute, as envisaged under the provisions of the Code, to the notice of the Applicant. Accordingly, the applicant prays for initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.

REPLY BY THE CORPORATE DEBTOR

6. The Corporate Debtor had filed its reply and submitted that the present application is not maintainable in view of the provisions of Section 10A of the Code, 2016. The Corporate Debtor submitted that the Section 10A of the Code, 2016 is incorporated vide MCA Gazette Notifications dated 23.09.2020 which curbs the filing of any application under Section 7,9 and 10 from being filed where such application is related to any default arising on or after 25.03.2020 for a period of Six Months, which was further extended till 24.03.2021. Further, the Corporate Debtor submitted that the offer for purchase of 105 MW of RTC power was given and accepted by the Applicant on 06.08.2020 for a period of 01.09.2020 to 30.09.2020, for which invoice was raised on 01.10.2020. The date of default in Part-IV of the Application as mentioned by the Applicant is 01.12.2020, therefore, the present application is barred by Section 10A of the Code, 2016. To support the contention, reliance is placed on Hon'ble Supreme Court's judgement in **Ramesh Kymal v. Siemens Gamesa Renewable Power Private Limited [(2021) 3 SCC 224]**

REJOINDER BY THE APPLICANT

7. The Applicant had filed its rejoinder wherein the submissions of the Corporate Debtor are rebutted and the applicant submitted that the default in the present case has arisen after the period of applicability of Section 10A of the Code, 2016. The Applicant submitted that towards the bill dated 01.10.2020, the Corporate Debtor had made part payments to the Applicant in various instalments from a period of 08.01.2021 – 14.12.2021. Further the Corporate Debtor vide its e-mail dated 09.03.2021 undertook to pay the operational debt due to Applicant during 25.03.2021-31.03.2021 i.e, after the expiry of the period mentioned under Section 10A of the Code, 2016. Moreover, the Corporate Debtor vide its

subsequent e-mails dated 09.03.2021, 10.06.2021, 21.06.2021, 11.08.2021 and 25.08.2021 had acknowledged and admitted its liability to pay the operational debt to the applicant, accordingly, this gives rise to the fresh cause of action, for the purpose of present proceedings, which are beyond the Section 10A of the Code, 2016.

8. The Applicant further submitted that the Corporate Debtor had issued a cheque dated 09.07.2021 for an amount of Rs.10,87,05,152/-towards payment of the operational debt, however, the said cheque was returned as dishonoured on 05.10.2021, thereby giving rise to fresh cause of action in view of which statutory demand notice under Section 8(1) of the Code, 2016 was issued and present application under Section 9 of the Code, 2016 is filed.

ANALAYSIS AND FINDING

9. We have heard Ld. Counsels for both the parties and perused the averments made in the application, as well as the reply and rejoinder filed by the parties. The relevant documents annexed with the respective submissions have been examined. Before examining the present matter on the merits of the present case, it is relevant to examine the issue of maintainability of the present application in the light of the provisions of section 10A of the I&B Code 2016 as raised by the Corporate Debtor. The provisions of Section 10A is reproduced herein verbatim:-

“10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

10. Further going into the legislative intent as reflected in the proviso to Section 10A of the Code, which stipulates that “no application shall ever be filed” for the initiation of the CIRP “for the said default occurring during the said period, it is noticed that the expression “shall ever be filed” is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred during 25.03.2020 to 24.03.2021 and therefore, Section 10 A of the Code, 2016 bars the filing of an application in a situation, where the default has occurred during the period from 25.03.2020 to 24.03.2021.
11. It is relevant here to refer the Hon’ble Supreme Court’s judgement in **Ramesh Kymal versus Siemens Gamesa Renewable Power Private Limited”, reported in (2021) 3 SCC 224**, wherein the Hon’ble Supreme Court of India has also clarified that the legislative intent behind Section 10A was not to extinguish the right of the Creditor but safeguard the Corporate Debtor from the rigours of corporate insolvency. Relevant extract is reproduced hereunder:

“...The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that “no application shall ever be filed” for the initiation of the CIRP & “for the said default occurring during the said period”. The expression “shall ever be filed” is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a

default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid19 pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. This would go against the very object of the IBC.””

12. This Adjudicating Authority would like to make a pertinent note of the fact that the criteria for determining the limitation period with respect to the debt and the criteria for determining the date of default with respect to the debt are two different questions of law and fact and cannot be tested on the same scale. The submission of the applicant that the dates of acknowledgement of liability towards the operational debt, the date of the last part payment, the date of issuance of cheque, the date of dishonour of the said cheque, the date of sending the demand notice, and consequential failure of the Respondent to pay the operational debt, would give rise to a fresh cause of action can only be sustained for the purposes of Limitation Act, 1963.
13. The term ‘default’, is defined under Section 3(12) of the code, 2016 and the same is to be considered by this Adjudicating Authority for the purpose of determining the ‘date of default’. The same is reproduced below, for the sake of convenience: -
“3(12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable

and is not paid by the debtor or the corporate debtor, as the case may be;”

14. Coming to the facts of the present case, the parties had vide email dated 06.08.2020 had entered into an arrangement, pursuant to which the Applicant had supplied the energy to the Corporate Debtor from 01.09.2020 to 30.09.2020 and an invoice dated 01.10.2020 bearing no. 100006518 for a principal sum of Rs.20,87,05,151.88/- was issued. The payment terms as mentioned in the invoice dated 01.10.2020 provides that “payment due on 60 days from the date of receipt of invoice by KEIPL. No rebate applicable. For payment outstanding beyond due date, 15% p.a. late payment. Surcharges shall be payable on day- to -day basis. Other terms of the Contract.” The extract of invoice dated 01.10.2020 bearing no. 100006518 is reproduced below:-

D B POWER LIMITED					
CIN: U40109MP2006PLC019008					
Address for Correspondence: 3 rd Floor, Naman Corporate Link, Opposite Dena Bank, C-31, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051, Tel No +91-22-7156 6000, Fax: 09699610110					
Billed from Address: Power Sale Department, D B Power Limited, Village – Baradarha, Post – Kanwali, Tehsil – Dabhra, District – Janjgir Champa, Chhattisgarh – 495695, Email: sales@dbpower.in					
To, Kreate Energy (I) Pvt. Ltd. (Mittal Processors Pvt. Ltd.) G.T. Road, SEWAH Panipat Haryana-132103	Invoice No. 100006518/DBPL/PSR/KEIPL/HPPC/ST/Inv Document Date : 01-10-2020 Due Date of Payment : 01-12-2020 Consumer Main Code : 300085 Sale Order : 300000156 DBPL PAN No.: AACCD5475F DBPL GST No. : 22AACCD5475F1ZW				
Ref: (a) NRLDC Approvals 82990/A. (b) KEIPL LOI No. KEIPL/DEL/CP/PT/06082020. (c) E-mail Communication dt. 09.08.2020 between DBPL & KEIPL.					
Subject: DBPL Monthly Invoice for supply of power to HPPC through KEIPL for period 01.09.2020 to 30.09.2020.					
Dear Sir/ Madam, Pursuant to above referred documents, we have supplied power to HPPC through KEIPL in subject period. We submit herewith this invoice for supply of power as per agreed terms.					
Bill details:					
No.	Description	Qty. (MWh)	Price (Rs./ MWh)	Billing Head	Total Amount (Rs.)
1350	1100000001 Power HSN 2716000	75,892.7825	2,750.00	Energy Charge	20,87,05,151.88
Total Rounded off					20,87,05,152.00
Bill Amount in Words: Rupees Twenty Crore Eighty-Seven Lakh Five Thousand One Hundred Fifty-Two Only.					
Payment term & Rebate: Payment due on 60 days from the date of receipt of invoice by KEIPL. No rebate applicable. For payment outstanding beyond due date, 15% p.a. late payment Surcharge shall be payable on day-to-day basis. Other terms as per contract.					
Please arrange to deposit the bill amount in our following bank a/c. Name of Account: D B Power Limited, Banker - State Bank of India, CAG Branch, 23 Neville House, J N Heredia Marg, Ballard Estate Mumbai IFSC Code: SBIN0009995, A/c No. 31774817920 Annexure: (a) NRLDC Approval 82990/A. (b) E-mail Comm. dt. 09.08.2020 between DBPL & KEIPL.				Yours Truly For DB Power Limited  Authorized Signatory	

15. Further, the applicant had raised invoice dated 04.10.2021, for an amount of Rs.11,59,379/- for Late payment surcharge, wherein it is categorically mentioned that, “Under the terms of LoI, if the payment is not remitted with in due date, bill payment lying outstanding beyond due date, attracts Late Payment Charges.”

16. The Applicant in Row 2, Part IV of Form—5 of the present application which provides for the Date of Default had clearly mentioned that the Principal Amount of Rs.7,08,98,749/- fell due on 01.12.2020. The extract of the Row 2, Part IV of Form—5 of the present application is reproduced below:-

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)	Rs. 9,62,38,371.00 (Principal amount of Rs. 7,08,98,749.00 which fell due on 01.12.2020 and interest amount of Rs. 2,53,39,622.00 as on 31.05.2022). A calculation Sheet giving details of the aggregate amount outstanding towards principal along with interest, is enclosed herewith as <i>Annexure - 9</i> .
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17. Having regard to the conspectus of facts and circumstances, this Adjudicating Authority is of the considered view that operational debt of Rs.20,87,05,151.88/- raised through an invoice dated 01.10.2020 bearing no. 100006518 was to be paid within 60 days of issue i.e., on or before 01.12.2020. The Corporate Debtor had defaulted in the payment of the entire due as per invoice dated 01.10.2020 within the stipulated period of 60 days and accordingly, the date of default in the present case is 01.12.2020, as correctly mentioned by the Applicant in the Part IV of the instant Application.

18. The Applicant had placed reliance on Hon'ble NCLAT's judgement in **Shri Abhinandan Jain, Suspended Director of Risa International Limited v. M/s. Tanaya Enterprises Limited [C.A(AT)(INS)/1017/2020; para 29]** to support the contention with regard to shifting of date of default on account of later acknowledgements. On perusal of the judgement relied upon, this Adjudicating Authority is of the view that the facts of the present case are distinguishable from the case relied upon, on the ground that in the case relied upon, the question adjudicated by the Hon'ble NCLAT is with regard to ascertaining whether the Application was filed within the period of Limitation or not considering the nature of running account of the business, whereas in the case before us, the question is with regard to determining the date of default. Therefore, the relied judgement is not helpful for the Applicant. Further, the Applicant had relied on other judgements of the Hon'ble NCLAT, wherein the issue is related to the Limitation, accordingly, the relied judgements cannot be helpful to the Applicant. Here, it is pertinent to refer the judgement of the Hon'ble NCLAT in **SLB Welfare Association v. PSA IMPEX Private Limited & others [C.A(AT)(INS)No. 905/2022; judgement dated 04.11.202]** wherein it was held that the mere fact that acknowledgement has been given by Corporate Debtor on 03.06.2021 accepting the debt, shall not change the date of default. The relevant para of the judgement is extracted herein below:-

"17. The reason given by Adjudicating Authority for rejecting argument of Section 10A was based on alleged acknowledgement letter dated 03.06.2021 received from the Corporate Debtor. When the date of default given by Operational Creditor in Section 9 Application is 31.03.2020, the mere fact that acknowledgement has been given by Corporate Debtor on 03.06.2021 accepting the debt, shall not change the date of default. We, thus, do not agree with the reasons given by the Adjudicating Authority that since acknowledgement is 03.06.2021, the date of default will become 03.06.2021. The date of default and acknowledgement are two different events and date of default is not dependent on

acknowledgement of debt. Hence, the Application filed under Section 9 was also liable to be rejected being hit by Section 10A, especially when on the same ground of date of default, i.e., 31.03.2020 earlier Application filed under Section 9 was dismissed as withdrawn one week before giving fresh Section 8 Notice. In Section 9 Application, which was filed by the Operational Creditor on 24.12.2021, there was not even mention of earlier proceedings initiated by Operational Creditor being IB-461(ND)/2021. As noted above, on 12.01.2022, the Adjudicating Authority itself formed an opinion that it has prima facie satisfied that Application is barred by Section 10A and thereafter time was granted by the Adjudicating Authority to file additional affidavit. The additional affidavit gives only explanation of letter by the Corporate Debtor acknowledging the debt dated 03.06.2021. The letter dated 03.06.2021 was also before Adjudicating Authority, when order dated 29.11.2021 was passed dismissing the earlier Application, which was dismissed as withdrawn.”

19. Accordingly, in view of the discussion, the submission of the applicant that the dates of acknowledgement of liability towards the operational debt, the date of the last part payment, the date of issuance of cheque, the date of dishonour of the said cheque, the date of sending the demand notice, and consequential failure of the Respondent to pay the operational debt, having fallen after the period stipulated under Section 10A of the Code i.e. after 24.03.2021 and each of the said events gave rise to a fresh cause of action, being new date of default on the part of the Corporate Debtor to pay the operational debt to the Applicant, for preferring the present proceedings under Section 9 of the Code, 2016 cannot be accepted.
20. Therefore, on appreciation of the facts of the case, arguments advanced by both parties and the documents mentioned herein above, this Adjudicating Authority is of the view that in the light of provisions of Section 10A of the Code, 2016, the facts of the present case are such that the provisions of Sec 10A are clearly attracted in the present case as the date of default in

this case admittedly fell within the shadow period of Section 10A of the Code, 2016.

21. As per Sec 10A of the Code, 2016, no IBC proceedings can be initiated against the Corporate Debtor for the default which has occurred between the period from 25/03/2020 till 24/03/2021, keeping in view the extended period of Sec 10A of the Code, 2016 and the intention of the legislature, the present Company Application i.e., C.P.(IB)521/2022, filed under Section 9 of the Code, 2016 cannot succeed and is hereby dismissed.
22. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The rights of the applicant before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition as it is barred by the law, in view of insertion of Sec 10A of the Code, 2016.
23. Resultantly, the present application (Company Petition No. (IB)-521(ND)/2022) stands dismissed. No order as to the costs.

Sd/-

**DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)**

Sd/-

**MANNI SANKARIAH SHANMUGA SUNDARAM
MEMBER (JUDICIAL)**