

IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(Through web-based video conferencing)

CP (IB) No.144/BB/2022
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

M/s.Bhanadari Construction and Developers Pvt. Ltd.,

Registered Office at:

I-03, Diamond District, Kodihalli

Old Airport Road

Bengaluru – 560008

...Petitioner/Operational Creditor

Versus

M/s. Furein Constructions Engineering Pvt. Ltd.

Registered Office at:

No. 24, 3rd Floor, Pragati Plaza, Besides SFS Church,

NH 44 Veera Sandra, Hebbagodi Village,

Bengaluru 560 100.

... Respondent/Corporate Debtor

Order delivered on: 07.12.2023

Coram: Hon'ble Justice (Retd) T.Krishnavalli, Member (Judicial)
Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri Shreyas Jayasimha
For the Respondent : Shri Vikram. G

ORDER

Per: Bench

1. The present petition is filed on 05.08.2022 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the I&B (Application to Adjudicating Authority) Rules 2016, by M/s **Bhanadari Construction and Developers**

Pvt. Ltd (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s. **Furein Constructions Engineering Pvt. Ltd** (hereinafter referred as 'Corporate Debtor'/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 15,95,43,882.90/- comprising Principal amount of Rs. 13,76,30,731/-. It is noticed that in form V part IV of the application date of default is not mentioned and the same was found to be defective. Hence, this Tribunal vide its order dated 05.06.2023, directed the applicant to file the revised form 5. The date of default mentioned in the revised form is 09.04.2019.

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:
3. The Operational Creditor entered into a labour contract (First Contract) on 21.12.2018 with corporate debtor to carry out work at their project site at Delta Hosur Factory, Phase -II, Krishnagiri, Tamil Nadu. As agreed between the parties, the operational creditor was only to provide workforce for the project and the remaining task is sole responsibility of CD. It is stated that the CD has failed to manage material arrangement required to assist the labours for their timely works and requested the OC to undertake the responsibility of the material management beyond the scope of the labour. The CD had invested a sum of Rs. 3 Crores on the same for mobilization in construction of F6 structure. On 06.02.2019, the OC and CD had a detailed discussion and the CD offered the OC Rs. 22 crores for material management for F6, F5 & KD2.
4. The operational creditor conveyed its disagreement to entering into a separate agreement but since the OC had already deployed labour at the site and made future investment into the project due to pressure created by the CD to enter into a separate agreement, the OC entered into another Labour Agreement on 23.04.2019

(Second contract) which drastically increased the scope of work for OC from F6 and KD2 from the 1st contract to F6, F5, KD2 and other areas. On 04.07.2019, the OC had been called by the corporate management for an emergent meeting at their site office and had been asked to stop all the work and to deploy and shift all workforce and labour to complete F6 which was to be handed over by October/November, 2019 till second floor roof slab. Neither the OC had been reimbursed the carpenters additional expenses, nor paid the bonus. The OC is entitled for INR 1 Crore bonus in form for actual expenses incurred for additional 100 carpenters.

5. After October 2019, the CD delayed the OC's balance structure work by simultaneously doing MEP & finishing work. On 19.03.2021, the OC had a meeting at the CD registered office wherein the painting item was revised and accepted by both the parties. Although it is jointly signed by both parties, but the Corporate Debtor dishonoured the same, which is not acceptable to the OC and it is entitled for payment at the rate of INR 195/sqm for composite painting work. On 02.07.2021 and 06.09.2021, the operational creditor requested the payment from the CD. Due to failure of making payment by the CD, the operational creditor issued legal notice demanding the payment on 01.11.2021 and 08.12.2021.
6. The CD vide reply dated 16.12.2021 to notice has admitted the debt and dues are payable to the Operational Creditor and have fraudulently raised a dispute as an aftermath after receiving the notice for request of payment from the OC. On 06.06.2022, the operational creditor issued a demand notice to the CD under section 8 of the IBC, 2016. The CD vide its email dated 14.06.2022 responded to the demand notice stating that they will settle the payment of the operational creditor. Thereafter, raised disputes on 01.07.2022.
7. The notice in the present case was issued on 29.08.2022. The Learned Counsel for the Petitioner has filed copy of proof of service

Diary Nos. 4018 dated 22.09.2022. On 22.11.2022, the respondent filed its statement of objection vide diary no: 5014 by contending that on 14.10.2021, the CD has given a reply to the OC for the letter dated 06.09.2021 through email by attaching the letter raising a dispute. The invoices raised in the period between 25.03.202 to 24.03.2021 is falling the 10A period. Further, stated that as per the Contract under clause 6.2 “*GST invoices must be provided before each payment for the project. Otherwise party A may temporarily refuse to pay, and the responsibility arising therefrom shall be borne by party B*”.

8. On 21.08.2023, the petitioner was directed to file a memo as to how the limitation is aspect is satisfied. The petitioner filed a memo clarifying the limitation vide diary no: 4537 dated 31.08.2023.
9. The Learned Counsel for the Petitioner in his written submission placed relied on the decisions of Hon’ble NCLAT, Principal Bench New Delhi dated 31.03.2023 in the case of “Deepak Modi Vs. Shalfeyo Industries Pvt. Ltd.” 2023 SCC Online NCLAT 169 and in the case of Ahluwalia Contracts (India) Limited Vs. Raheja Developers Limited 2019 SCC Online NCLAT 942.
10. The learned counsel for respondent in his written submission stated that proforma invoices does not contain description and is not supported by the back-up sheets. In so far as the tax invoices are concerned payments were made. Also stated that there exist a pre-existing dispute, demand notice dated 06.06.2022 does not contain the date of default and hence it is defective. Further stated that the invoices dated from 30.04.2020 to 05.02.2021 is falling under 10A period.
11. We have considered the pleadings and material available on record. Subsequent to hearing the parties, the matter was reserved for orders on 27.09.2023, and both parties were granted liberty to file brief synopsis within a weeks’ time. Both the Petitioner and the Respondent have filed the brief synopsis on 04.10.2023 vide diary

nos.5083 and 5091 respectively. In the written submissions filed by the Respondent the following points were raised:

a. Proforma Invoiced are not as per the Contract.

i. *It is contended by the respondent at para 9 and 10 of the reply and a para 13 of the Sur Reply filed by the respondent that the petitioner has not raised invoices as per the contract. Clause 6.2 of the contract dated 23/05/2019 at page 101 (Vol-1) of the petition states that:*

“GST invoices must be provided before each payment request for the project...”

In the instant petition, admittedly GST invoices have not been raised. The petitioner is relying on Proforma Invoices at Annexure-A11 (Page 144 to 187 of Vol – 1) of the petition. Unless GST invoices are raised as per clause 6.2 of the contract, it cannot be said to be valid invoices and therefore cannot be construed as ‘Debt’. The respondent is not liable to pay any amount.

b. Petition is liable to be rejected under Sec.9 (5) (ii) © if the Insolvency and Bankruptcy Code 2016 for not delivering Proforma Invoices:

i. *Proforma Invoices were never handed over to the respondent. The assertion of the petitioner at para 49 (page 29 of the petition (Vol-1) that transportation bills (postal & courier receipts) were annexed along with the petition was denied. The further assertion that the transportation bills were annexed along with the demand notice dated 06/06/2022 at page 200 of the petition (Vol-1) was also denied by the respondent in its statement of reply at para 8)page 7 of statement of reply filed by the respondent)*

ii. *The petitioner in its rejoinder has stated at apara 13 (page 6) that “the transportation slips as mentioned in paragraph 49 (page 29 of the petition Vol-1) in the petition is an error and the invoices were physically handed over to the site manager.”*

However, at para 36 of the rejoinder, the petitioner states that the respondent was not accepting the invoices.

iii. Therefore, there is no proof that the invoices were either handed physically or was sent either through courier, post or email. The proforma invoices were never handed over. Therefore, the petition is liable to be rejected as per Sec.9 (5) (ii) (c) of the Insolvency and Bankruptcy Code 2016.

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e. Pre- Existing Dispute :

The following are the correspondences between the parties much prior to the issuance of the demand notice dated 06/06/2022 issued under Section 8 of the Insolvency and Bankruptcy Code which goes to show that there are serious disputes between the parties with respect to the claim and counter claim.

i. It is submitted that by letter dated 06/09/2021 at Annexure- A8 colly at page 121 of the petition (Vol-1), the operational creditor called for a meeting to finalise on certain issues with respect to the payment that was allegedly due to it. In fact in the said letter the petitioner itself states that the disputed claims will have to be resolved at para 2 of the page 123 of the petition. Therefore, there was a dispute even before 06/09/2021 as admitted by the petitioner.

ii. The corporate debtor issued a reply dated 14/10/2021 which was attached along with an email dated 14/10/2021, denying its liability to pay any amount and disputing the claims made by the operational creditor by its letter dated 06/09/2021 at Annexure –R1 page 58 of the Reply. The respondent raised issues of delay, quality, and other issues. This reply has been suppressed from the hands of this Hon’ble Tribunal.

iii. The petitioner got issued a legal notice dated 1st November 2021 at Annexure-A9 in response to the respondent’s reply dated 14/10/2021 issued by the corporate debtor.

iv. The Corporate Debtor again denied its liability to pay the amount demanded by the Operational Creditor by its reply dated 16th December 2021 at Annexure-A10(page 134-Vol-1 of the petition) and made a counter claim of Rs 9,50,87,176/0 towards the losses suffered by it.

v. There is a serious dispute on the amounts claimed by the operational creditor. The claims and the counter claims will have to be adjudicated. The agreement 23rd April 2019 provides for disputes to be resolved through arbitration.”

- 12.** During the course of proceedings before the Adjudicating Authority, the Counsel for the Respondent had raised the arguments that since the GST invoices were not provided for the invoices, in compliance to the Clause 6.2 of the Agreement, these invoices were not liable to be paid by the Respondent. For this our attention was invited to the invoices attached at Annexure-A11 of the C.P., from page 144 onwards. It is further mentioned that some of the invoices also relates to the period which are covered under the exclusion period under 10A of the IBC.
- 13.** The Counsel for the Respondent has also flagged various documents which have reflected the pre-existing disputes. It is stated that vide letter dated 06.09.2021, the Operational Creditor pointed out that the Corporate Debtor had disputed the release of payment and also reminded for the payment. In the reply dated 14.10.2021, the Corporate Debtor has the listed various issues which point towards the existence of dispute as on that date. The contents of the letter dated **06.09.2021** were denied, and it was stated that there was never a delay in providing the drawings and materials by Furein; but the Operational Creditor was not having sufficient man power for the work. Further, the Operational Creditor failed to complete the work in the extended time period and did not complete single building as per the contract; there was no bonus or compensation clause applicable, and therefore Furein never promised to pay the same. Moreover, as per the contract the

prices were fixed and there was no price fluctuation clause till completion of the project. Also, the contract clearly stated that concrete materials may not be supplied in time, still the Operational Creditor shall not refuse to work overtime stating that it was too late, and that there was no extra work done by the Operational Creditor. Further, the price of all activities was included in the contract therefore there was no price fluctuation admissible. The Corporate Debtor also raised the issue regarding the GST payments and invoices as stated above.

- 14.** In response to this letter, the Operational Creditor issued a legal notice dated 01.11.2021, which was followed by another legal notice dated 08.12.2021, for the recovery of outstanding dues from the Corporate Debtor. In this legal notice the Operational Creditor disputed and contradicted all the issues raised by the Corporate Debtor. From the Second legal notice dated 08.12.2021, paras 5-7 are being reproduced as under:

“5. That it is again reiterated that any default to pay the amount by Furein will call for strict legal action as sated above and BCD shall be constrained to appropriate legal action against Furein all its directors, authorized representatives and other concerned officials addressed above who have time and again admitted to the dues of BCD but has now refused to pay the same. It is clear that Furein has cheated BCD by taking them in trust that Furein will pay for the services rendered by BCD, however, when Furein availed such services, now at this stage are flatly denying paying for the same.

6. Further, BCD shall reserve its right even to further claim recovery of the said amount by taking appropriate recourse as per law apart from various other legal actions against you are detailed above.

7. In view of the above, you are finally called upon and advised to clear the due and outstanding amount in favour of BCD, failing which BCD shall be initiating legal action against Furein and all its

Director(s)/concerned officials as addressed above as may be advised in law at your risk, cost and consequence.

You are further called upon to pay a sum of Rs.55,000/- to my clients as costs for issuance of the present legal notice.”

- 15.** A reply dated 16.12.2021 was also sent by Corporate Debtor to this legal notice, in which a counter claim of Rs.9,50,87,176/- was made on the Operational Creditor towards the losses suffered by the Corporate Debtor.
- 16.** The above details of the correspondences, legal notices etc. clearly establish the fact that there were disputes in the matter existing much before the issue of the Statutory Demand Notice under Section 8 by the Operational Creditor by speed post on 06.06.2022. Thus the contention of the Corporate Debtor regarding there being a pre-existing dispute in the matter has been established. Accordingly, the Petition under Section 9 of the IBC is not maintainable.
- 17.** Accordingly, this Tribunal is of the considered opinion that this Petition is not a fit case for admission since there is a pre-existing dispute among the parties. Therefore, the instant petition **CP (IB) No. 144/BB/2022** is hereby **dismissed**. However, this order shall not preclude the petitioner from pursuing other remedies in accordance with law, if so advised.

-Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd/-

**(T.KRISHNAVALLI)
MEMBER (JUDICIAL)**