

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 1425/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

**DEVI CONSTRUCTION COMPANY
PRIVATE LIMITED**

[CIN: U45202MH1980PTC022230]

...Operational Creditor/Applicant

V/s

ADIANT INDIA PRIVATE LIMITED

[CIN: U34300PN1996PTC015038]

...Corporate Debtor/Respondent

Order Dated: 09.05.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Rishabh Shah, Ld. Counsel.
For the Respondent(s) : Mr. Vasanth Rajasekhar, Ld. Counsel.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application being C.P. (IB) No. 1425/MB/C-IV/2020 filed on 29/09/2020 by DEVI CONSTRUCTION COMPANY PRIVATE LIMITED, the Operational Creditor/Applicant, under section 9 of Insolvency

& Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of ADIENT INDIA PRIVATE LIMITED, Corporate Debtor.

2. The total amount claimed by the Operational Creditor as specified in the Part IV of the Company Petition is Rs. 22,54,15,255/- alongwith further interest on the Principal amount @18% per annum from September 01, 2020 till date of payment/realization; and the said amount is claimed as due and in default. The date of default is 05.06.2019.

- 2.1. Devi Construction Company Pvt. Ltd. ("Operational Creditor"/"Applicant") is specialist in constructions of industrial and commercial projects. Adient India Private Limited ("Corporate Debtor"/"Respondent") is in the business of developing seat systems and components for various vehicles.

- 2.2. The Corporate Debtor and Operational Creditor entered into discussion for undertaking the construction of projects on turnkey basis by issuing its master plan, layout and other requisite documents till 19.06.2017.

- 2.3. The Corporate Debtor issued a Letter of Intent dated 10.08.2017 to the Operational Creditor awarding the turnkey project for an amount of Rs.57,67,96,619/-. Since the Corporate Debtor sought to enhance the scope of the Project, both had a meeting on 19.04.2018 to discuss the cost summary sheet prepared by the Corporate Debtor dated 19.04.2018 that was accepted by the Corporate Debtor during this meeting.

- 2.4. In furtherance to the above, both parties executed a Design & Build Vendor Agreement dated 22.06.2018 for the enhanced scope of work at the enhanced contract price of Rs. 76,08,00,920/-. The Operational

Creditor was to complete the Project by 20.12.2018. However due to the constant changes being made by the Corporate Debtor in the scope of work and drawings, the Corporate Debtor by its email dated 29.10.2018 extended the Project Completion date to 31.05.2019. At the request of the Corporate Debtor, the Operational Creditor shared a revised payment schedule vide its email of 05.12.2018, which was accepted by the Corporate Debtor. Additionally, both parties signed fresh time line called 'Microsoft Projects' (MSP) dated 19.12.2018 which provided detailed timelines for each of the work items involved in the project including the revised completion date i.e. 31.05.2019.

2.5. On 14.03.2019 and 15.03.2019, the Corporate Debtor sent two emails to the Operational Creditor insisting that the Operational Creditor has to stop all further activities, demobilize and vacate the construction site urgently. The Operational Creditor received another email on 18.03.2019 from the Corporate Debtor terminating the Agreement, without cause or any reason, as well as without giving the requisite termination notice without serving the stipulated notice period as provided in the Agreement. The said termination of the Agreement was rejected by the Operational Creditor by its letter dated 28.03.2019 on various grounds, including failure to give the thirty (30) days' notice period as required under Section 22.1 (a) of the Agreement.

2.6. On May 22, 2019, the Operational Creditor sent an email to the Respondent enclosing five (5) proforma invoices for the work done by it in relation to the Project. The Corporate Debtor paid 4 proforma invoices totalling to an amount of Rs. 5,40,38,481/-. However as regards the proforma invoice No. F5 amounting to Rs 15,65,88,899/- exclusive of

taxes, the Corporate Debtor completely refused to pay the same to the Operational Creditor.

2.7. In view of the above and in spite of repetitive reminders the Operational Creditor issued a Demand Notice dated 19.06.2020 under Section 8 of the Code, thereby claiming the outstanding principal amount of Rs 18,47,74,901/- towards the tax invoice of Final Bill F5, along with interest @ 18% p.a. The Corporate Debtor in its Reply to the Demand Notice has denied and rejected the amount which has been claimed by the Operational Creditor. On the contrary, the Corporate Debtor in its Reply states that he has duly paid and cleared all the invoices of the Operational Creditor as per the terms of the Agreement and the invoice of Final Bill F5 has not been certified by the Project Management Consultant, therefore the same was not paid by the Corporate Debtor.

2.8. It is further stated that since the Corporate Debtor is disputing the claim of Operational Creditor in NCLT and with a view to expeditiously resolve the matter, the Operational Creditor is desirous of invoking arbitration to resolve the pending dispute and receive monies towards its outstanding invoice of 05.02.2020, including applicable interest thereon, up to the date of payment and/or realisation. Additionally, the Operational Creditor further states that in case the dispute has not settled to the satisfaction of the parties under section 26.2 of the Agreement, it shall be finally resolved by arbitration in accordance with the Indian laws of Arbitration. The Operational Creditor reserves its right to make additional claims and pleadings as per the MCIA Rules.

3. The Corporate Debtor vide its reply dated 07.08.2021 has stated that, the Corporate Debtor in exercise of its contractual rights, sought termination of the Agreement and sent emails dated 14.03.2019 and 15.03.2019 ordering suspension of works at the Project site and instructing the Applicant to demobilize. Upon protest by the Operational Creditor to such termination, the parties entered into discussions and subsequent to a meeting dated 12.04.2019, reached a consensus regarding the revised scope of work and agreed that the Agreement would be terminated upon successful execution and hand over of a water tight building by the Applicant to the Respondent. Further the Operational Creditor was instructed to provide invoices to the Project Management Consultant ("PMC"), CBRE for certification and payment.
- 3.1. On 22.05.2019, the Applicant issued five (5) proforma invoices, out of the five (5) proforma invoices issued by the Operational Creditor, only four (4) proforma invoices were accepted by the PMC and last invoice proforma invoice F5 was rejected by the PMC. The parties along with the PMC had various discussions and consequently, payments in relation to four (4) proforma invoices were duly made by the Corporate Debtor.
- 3.2. Upon the full and final satisfaction of the dues payable to the Operational Creditor as per terms of the Agreement, on 17.01.2020 vide letter dated Corporate Debtor handed over the Project site.
- 3.3. The Corporate Debtor vide its email dated 07.02.2020 denied the entitlement of the Operational Creditor to receive money under Invoice F5, stating in clear terms that all dues under the Agreement already stands paid to the Operational Creditor and had intimated the same to the Operational Creditor vide its earlier email dated 15.01.2020.

- 3.4. The Corporate Debtor further states that there is pre-existence of dispute; notice of dispute issued by the Corporate Debtor; the Operational Creditor is seeking damages under the garb of disputed “Operational Debt”.
4. The Operational Creditor has filed Affidavit in Rejoinder dated 31.07.2021 stating that the said reply is a moonshine defence and has denied each allegation raised by the Corporate Debtor.

Findings

5. This bench heard both the Counsels and perused the documents and pleadings available on record.
6. It is noticed that CBRE vide its email dated 31.05.2019 with subject line “Adient PTT-Final bill settlement and payment -Invoice update as per Invoice No.5” informed the Corporate Debtor, in unequivocal terms, that
- Escalation in price of reinforcement steel-Not payable as per contract, ADIENT to decide further.
 - Additional expenses done for tree replantation-Breakup of items required, further ADIENT to decide (100% replantation at site not done). However same is not payable as per contract.
 - Additional expenses done for murum filling with imported murum and disposal of un usable murum & boulders from site. - Per DCCPL & ADIENT understanding murum brought from outside not payable. (same was discussed during contract finalization), Additionally this item is not part of contract. Adient to decide further.

- 6.1. It is also observed that the Operational Creditor is seeking to initiate arbitration proceedings to resolve the matter, which indicates the existence of disputes in relation to claim under invoice No. F5.
- 6.2. This Bench is of the view that, there exists a dispute between the parties which was communicated by the Corporate Debtor to the Operational Creditor vide email dated 07.02.2020, and the same was prior to the issuance of Demand Notice dated 19.06.2020. Further, the issues raised in the communication between the parties, requires adjudication to decide whether any sum is payable or not, considering the e-mail communication from CBRE, the PMC firm who was entrusted with the task of certifying the work of the operational creditor? This Bench does not have power to do so, and its jurisdiction to deal with such matter u/s 9 is precluded by existence of prior dispute in relation to debt claimed in the application.
- 6.3. The Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* held that, in the event there is a pre-existing dispute between the parties, an Application under Section 9 of the Code would have to be rejected.
7. In view of the above, we find that the present application deserve to be dismissed under Section 9(5)(ii)(d) read with Section 8(2)(a) and Section 5(6) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties with respect to the purported claims.

ORDER

8. The petition bearing C.P. (IB) No. 1425/MB/C-IV/2020 filed by DEVI CONSTRUCTION COMPANY PRIVATE LIMITED (“the Operational

Creditor”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against ADIENT INDIA PRIVATE LIMITED (“the Corporate Debtor”), is **Dismissed**.

9. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
09.05.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)