IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
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CP (IB) No. 127/CTB/2019

In the matter of:

An application 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;

-And-

In the matter of:

DAGA POWER SYSTEMS & ENGINEERS PRIVATE LIMITED, having its registered office at 32 Ezra Street, Room No. 505, 5th Floor, Kolkata- 700 001, West Bengal, India.

... Applicant/Operational Creditor

-Versus-

SIDDHARTHA ENGINEERING LIMITED, having its registered office at Plot No. 1015, Near NH 5, Nayapali, Bhubaneswar 751012, Orissa, India.

... Respondent /Corporate Debtor

Coram:

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

Appearances (through video conferencing)

For the Applicant	:	
For the Respondent	:	Mr. Laxmi Dhar Sahoo, Adv.

Order reserved on: 29.11.2021

Order pronounced on: 01.12.2021

ORDER

Per: Satya Ranjan Prasad, Member (Technical)

1. This application has been filed by **DAGA POWER SYSTEMS & ENGINEERS PRIVATE LIMITED,** (CIN: U40105WB2003PTC095634)

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having its registered office at 32, Ezra Street, Room No. 505, 5th Floor, Kolkata , West Bengal, India, the Operational Creditor herein, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as " **IBC, 2016**") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (**CIRP**) against **SIDDHARTHA ENGINEERING LIMITED,** (CIN: U74210OR1986PLC001762) **t**he Respondent Corporate Debtor herein, having its registered office at Plot No. 1015, near NH 5, Nayapali, Bhubaneswar – 751012, in the State of Odisha.

2. The brief facts of the case are that the Corporate Debtor issued Purchase Orders dated 09.05.2015 and 25.05.2016 upon the Operational Creditor for Design, Engineering, Drawing, Manufacture and supply of GI RS Joits, H Poles, V Cross Arms, Angles, Channels for DP/Guarding etc. It is stated in the Application that the Operational Creditor supplied the same from 02.01.2017 to 30.03.2018 and that as per the terms of payment, the applicant Operational Creditor was to receive payment within 90-days of the date of dispatch of the goods (i.e., by 27.06.2018) but only part payment has been received by them and allegedly ₹69,05, 873/- along with the applicable interest, is outstanding and due for payment from the Corporate Debtor. Also, that in the matter, the Operational Creditor issued reminders to Corporate Debtor for the payment of outstanding dues and thereafter a Demand Notice in Form - 3 on 22.07.2019 through its Learned Advocate, despite that payment has not been received.

3. The Corporate Debtor has made submissions to the effect that they had bagged order from the Odisha Distribution System Strengthening Project (**ODSSP**), Bhubaneswar, a Government undertaking for construction of 33/11KV Sub-station and associated Transmission Line executing the projects for Puri and Kendrapara Districts in the State of Odisha. In order

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to execute the said works, the Corporate Debtor placed an order with the Operational Creditor on 08.05.2015 for supply of GI RS Joist, 'H' Poles, 'V' Cross Arms, Channels for DP/Guarding etc. allegedly on "back-to-back" basis as per the requirements of ODSSP. Another purchase order amending the original purchase order dated 08.05.2015, was placed on the Operational Creditor on 25.05.2016 in view of the revised requirement of ODSSP. Further, that the Operational Creditor has supplied the materials as per approved drawings and issued invoices at a price contrary to the conditions of the purchase order. The invoices were raised on the basis of number of electric poles supplied instead of on the basis of weight of such poles in Kgs., as specified in the purchase order. The rate charged for each pole on different invoices is different. The weight of each pole supplied by the Operational Creditor comes to 630 to 650 Kg., if the rate charged for each pole supplied is divided with the rate per Kg as mentioned in the purchase Order. Further, that the Corporate Debtor submitted bills to the end user ODSSP on such supplies made by the Operational Creditor. ODSSP certified and corrected the invoice amount on the basis of the actual weight of the poles at 613.04 Kg. The weight of each pole, as per specifications mentioned in the order is 701 Kg. Accordingly, ODSSP passed the invoices submitted by the Corporate Debtor as per actual weights of the poles by deducting the excess amount charged for the weight of the pole in excess of 613.04 Kg. On query the Corporate Debtor also submitted at the time of hearing that weight of poles were determined by ODSSP not on actuals but on sample basis by taking average of any five poles.

4. Further, that the Corporate Debtor has reconciled the accounts of the Operational Creditor. The Corporate Debtor has billed for a total amount of Rs.16,18,08,178/-. The bill has been passed for payment on the basis of the actual weight of the poles and other materials supplied by the Operational Creditor, as certified by ODSSP, which comes to ₹15,10,84,332/- as against which alleged excess payment of

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₹15,49,95,069/- has been released to the Operational Creditor. In support of its contention the Corporate Debtor has furnished copy of certificate received from ODSSP stating actual weight of the materials supplied by the Operational Creditor, based on which bills of the Corporate Debtor have been passed by them for payment.

5. On the question of making alleged excess payment to the Operational Creditor the Corporate Debtor has submitted that they were making payments to the Operational Creditor against L.C. and advance payment through bank transfers by way of RTGS in accordance with the conditions of the purchase order and in the process made excess payment, as the actual weight of the poles and other materials supplied by the Operational Creditor was less. Corporate Debtor has submitted *inter alia* that they have already paid amount in excess therefore, the question of paying any interest or any other amount in addition to whatever has already been paid to the Operational Creditor, does not arise).

6. The Operational Creditor has disputed the above submissions of the Corporate Debtor that the Corporate Debtor duly acknowledged the goods supplied by them without raising any dispute about the quality or quantity of the same and released several part payments in acknowledgement of such operational debt. The Operational Creditor is maintaining a running continuous account with the Corporate Debtor and the last invoice was issued on 30.03.2018. Therefore, default in payment of Operational Debt occurred on 28.06.2018 (i.e., 90 days from issuance of last invoices dated 30.03.2018 vide number S. Bill DPSE/17-18/G0633 and S. Bill DPSE/17-18/G0634). For realization of alleged outstanding debt, the Operational Creditor issued Demand Notice dated 22.07.2019 in Form – 3, under Sec. 8 (1) of IBC, 2016. Further, that the Corporate Debtor did not respond within 10-days of delivery of Demand Notice in Form -3. It gave a reply letter dated 10.08.2019 and thence, it is a fact that the Corporate Debtor did

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not prefer any reply within 10-days of receipt of Form – 3, under Sec. 8 (2) of IBC, 2016 citing any plausible dispute of the operational debt).

7. Further, the Operational Creditor has brought to notice that the aforesaid work orders placed by the Corporate Debtor do not fall under the category of " back-to-back contract" as the same is actually a contract signed between the "Main Contractor" and the 'Sub-Contractor", which refers to the duplication of the main contract (entered between the "Employer" and the "Main Contractor" at the different levels of project so that the contractual rights and obligations at one level of the project are included in agreements at lower level also. The work order placed by the Corporate Debtor on the Operational Creditor has no reference of the main contract as agreed upon between the employer i.e., ODSSP/ and the Corporate Debtor nor it contains any specific set of standalone terms and conditions regarding the continuing liability of the sub-contractor were incorporated in those purchase orders. No privity of contract ever existed between Operational Creditor and ODSSP and hence Operational Creditor is not liable to bear any loss suffered by the Corporate Debtor, even if it has happened. In support of such contention the Operational Creditor has relied on the judgement of the Hon'ble Supreme Court in **Zonal General Manager, IRCON International Limited Vs. Vinay Heavy Equipment's** reported in (2015) 3 SCC 680 (para nos. 7,10,11 and 13).

8. It is noted from the available records and submissions of the Operational Creditor that weight specified for each unit of H-Pole was 701.8 Kg. But on approval of drawings by the Corporate Debtor weight of each H-Pole was fixed at 660.82 Kg for 11 KV Pole and 666.59 for 33 KV pole, with a general tolerance, plus 5% tolerance as specified (details annexed at pages 50 to 53 of the Rejoinder Affidavit) and on deducting such tolerance levels from the actual weight approved by the Corporate Debtor, the actual average weight of 613.04 Kg is within the permissible limits. Relying on the above details

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the Operational Creditor has submitted that it has invoiced the Corporate Debtor according to the actual weighment basis only for the actual weight of the poles, as per clause 6 of the work order placed by the Corporate Debtor on the Operational Creditor and not on the weight as proposed in the work order.

9. It is noted that as per Clause 4 of the Terms and Conditions of the aforesaid work order which states that - Payment **will be released as per the actual weighment basis.** However, on perusal of the relevant invoices enclosed with the instant Application of the Operational Creditor and also with the reply affidavit of the Corporate Debtor that most of them have been raised on the basis of quantity or number of poles. However, learned counsel of the Applicant submitted and also it has been confirmed by the Applicant in its written submissions made vide rejoinder dated 30.12.2019 that they have issued invoices by converting actual weight of the poles into number of pieces but charged the consignment according to actual weighment basis. The same is also supported from the submissions of the Corporate Debtor, wherein it has been mentioned that the Operational Creditor has charged different rate for poles in different invoices.

10. Apart from the above, the Operational Creditor has raised another issue that what actual weight or rate ODSSP passed the invoice of the Corporate Debtor is an internal matter between the two of them and has no relevance regarding withholding the operational claim of the Operational Creditor. It has further been alleged that if at all some variation in weight of goods supplied was there, it was not disputed or brought to the Notice of Operational Creditor before issuance of demand notice in Form-3. It has been observed that if the Poles/Materials supplied by the Operational Creditor was less in weight or not as per the specifications agreed upon, the Corporate Debtor did not reject but rather consumed them and hence may be deemed to be accepted as per Sec. 42 of the Sales of Goods Act, 1930.

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Operational Creditor has denied and disputed the authenticity of the calculation sheet showing difference in weight and rate and copies of bills of the Corporate Debtor etc. annexed as "R-4" and "R-5" of the Reply Affidavit, substantiating it with the reasoning that the same are neither stamped, sealed or signed by any competent authority or made on the letter head.

11. This Tribunal, heard the Learned Counsels of both the parties in detail. Also, perused the details/documents available on record and based on the facts and circumstances of the case, is of firm view that the Operational Creditor has supplied the goods/services to the Corporate Debtor, whose weight was, *prima facie*, within the acceptable range. Even if, it is presumed that there was some variance in the weight of poles, the same was accepted and consumed by the Corporate Debtor. Further, that some of the related invoices enclosed with the application indicate that the Operational Creditor had invoiced the Corporate Debtor on weighment basis. The Corporate Debtor has acknowledged the goods supplied by the Operational Creditor without raising any dispute earlier about the quality or quantity of the same and has also released part payments. Further, in the stated facts and circumstances of the case the work orders placed by the Corporate Debtor does not fall under the category of "back-to-back" contract.

12. The Operational Creditor has not suggested the name of any Interim Resolution Professional. Therefore, this Tribunal appoints Mr. Prasanta Kumar Mallik (Registration No. IBBI/IPA-002/IP-N00937/2020-2021/13059) residence at GA PLOT NO-212, BHARATPUR, BHUBANESWAR, Bhubaneswar, Orissa ,751003 and **E-mail id.** mallik_prasantakumar@yahoo.com for Interim Resolution Professional, Liquidator, Resolution Professionals and Bankruptcy Trustee for Cuttack Zone, issued by the Insolvency and Bankruptcy Board of India. There is

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nothing on record to say that any disciplinary proceedings against the proposed Interim Resolution Professional is pending.

13. We heard the learned counsels, perused the application, reply, documents, affidavits etc. The "Debt" and default are established. The application is in order as per the Section 9 of the Insolvency and Bankruptcy Code, 2016. Hence, we are inclined to **ADMIT** this application by following Order.

ORDER

(i) The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process against **SIDDHARTHA ENGINEERING LIMITED**.

(ii) Moratorium Order is passed for a public announcement as stated in Sec. 13 of the IBC, 2016. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-Section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

(iii) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other authority;

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b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

(v) The provisions of sub-Section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.

(vii) Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

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(viii) Necessary public announcement as per Section 15 of the IBC, 2016 may be made by the Resolution Professional upon receipt of the copy of this order.

(ix) Mr. Prasanta Kumar Mallik (Registration No. IBBI/IPA-002/IP-N00937/2020-2021/13059) residence at GA PLOT NO-212, BHARATPUR, BHUBANESWAR, Bhubaneswar, Orissa ,751003 and **E-mail id.** mallik_prasantakumar@yahoo.com is appointed as Interim Resolution Professional registered with the ICSI Insolvency Professionals Agency, as Interim Resolution Professional for ascertaining the particulars of Creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

(x) We direct the Operational Creditor to deposit a sum of ₹2.00 lakh with Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016. The needful shall be done within three days from the date of receipt of this Order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

(xi) Directions are also issued to the suspended management to provide all documents in their possession and furnish every information in the knowledge within a period of one week from the date of admission of the petition to the IRP, otherwise coercive steps to follow.

(xii) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

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(xiii) Registry is hereby directed to communicate the order under Section 9 (5) (i) of the I.B. Code, 2016 to the Operational Creditor, Corporate Debtor, ROC Odisha, Cuttack and to the Interim Resolution Professional by Speed Post as well as through E-mail.

Interim Resolution Professional to file 1st Progress Report on 05.01.2022

List the matter on 05.01.2022.

(xiv) Let the certified copy of the order be issued upon compliance with requisite formalities.

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Satya Ranjan Prasad
Member (Technical)

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P. Mohan Raj
Member (Judicial)

Signed this 1st day of December, 2021.

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