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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IBA/441/2020

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of ***M/s. Brother Engineering and Erectors Limited***

M/s. Fagioli India Private Limited.,
1208, Cyber One Greenscape,
Swami Pranabananda Marg, Sector 30-A,
Near CIDCO Exhibition Centre,
Vashi, Navi Mumbai – 400 703

...Operational Creditor

-Vs-

M/s. Brother Engineering and Erectors Limited,
17/6, 6th Street,
Nanadanam Extension,
Chennai – 600 035.

... Corporate Debtor

Order pronounced on 2nd September 2021

CORAM :

**R.SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

For Operational Creditor : Prashant Tayshete, Authorized Representative

For Corporate Debtor : V.V. Sivakumar, Advocate

ORDER

Per: R.SUCHARITHA, MEMBER (JUDICIAL)

This is an Application filed by M/s. Fagioli India Private Limited (*hereinafter referred to as "Operational Creditor"*) under Section 9 of the Insolvency and Bankruptcy Code, 2016 against M/s. Brother Engineering and Erectors Limited, (*hereinafter*

referred as the "**Corporate Debtor**") seeking thereof to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor.

2. From Part I of this Application, it is seen that the Operational Creditor is a Private Limited Company incorporated under the provisions of the Companies Act, 2013. From Part II, it is seen that the Corporate Debtor is a Limited Company incorporated on 27.01.1999 bearing CIN: U45204TN1999PLC041770 and the Registered Office address of the Corporate Debtor as per the Application it is stated that it is situated at 17/6, 6th Street, Nandanam Extension, Chennai – 600 035. From Part III of the Application, it is seen that the Operational Creditor has not proposed the name of the IRP and left it to the discretion of this Tribunal to appoint the same.

3. Part IV of the Application states that a sum of Rs.1,11,13,091/- is due and payable by the Corporate Debtor. Part V of the Application discloses the list of the documents which had been filed by the Operational Creditor in order to prove about the Operational Debt incurred and it is seen that the Operational Creditor has attached the copies of the work order issued by the Corporate Debtor and the invoices which were raised by the

Operational Creditor and also the Ledger Account entries in the Books of Accounts of the Operational Creditor and the Bank Statement they show that the payments were received from the Corporate Debtor as on date.

4. The Learned Authorized Representative (AR) for the Operational Creditor submitted that the Operational Creditor is engaged in the business of providing service of heavy lifting, engineering and logistics work and the Corporate Debtor had issued work order No. BEEL/NTPC-RAM-FAG-001 dated 28.12.2017 for the work at Unit -01 and Unit-02-800MW ABFPPL-GE/NTPC – Ramagundam. Further, it was submitted by the Learned Authorized Representative for the Operational Creditor that the Operational Creditor was allotted a contract for work Order No.BEEL/NTPC-RAM-FAG-001 dated 28.12.2017 for designing and supplying of assembly bed material; for fabrication and dragging of condenser parts including lifting of Condenser Neck at Unit – 01 & Unit – 02 – 800MW and that the period for completion of the total work authorized for 1 unit was 5.5 months as mentioned in the work schedule at Ramagundam.

5. It was submitted by Learned AR for the Operational Creditor that the Operational Creditor has started the work at the site and

also raised the invoices for part of the work completion and the Corporate Debtor had also accepted all the invoices for Unit 01 and Unit 02 along with the terms and conditions mentioned in the said invoices.

6. The Learned AR for the Operational Creditor submitted that the Operational Creditor had issued invoices for work done for Unit 01 and Unit 02 i.e., Invoice Nos.18001066/L dated 10.12.2018, 18001073/L dated 24.12.2018, 18001096/L dated 05.03.2019, 18001097/L dated 05.03.2019, 19001089/L dated 12.12.2019 and 19000008/D dated 20.01.2020 and the balance outstanding payable by the Corporate Debtor as per the said invoices aggregates to a sum of Rs.1,11,13,091/- as per their ledger account.

7. Further it was submitted by the Learned AR for the Operational Creditor that the Corporate Debtor had issued a letter dated 02.03.2020 along with the de-scope details of worksheet which reflected the revised order value payable was for a sum of Rs.97,75,000/-, which according to the Operational Creditor was amounting to admission of liability on the part of the Corporate Debtor.



8. Further it was submitted by the Learned AR that the Corporate Debtor had arbitrarily de-scoped the work order without the consent of the Operational Creditor and committed a default under the provisions of the IBC, 2016 and all the above acts of the Corporate Debtor were done after issuance of the Demand Notice by the Operational Creditor under Form - 3. The Learned AR for the Operational Creditor submitted that the Operational Creditor had issued a Demand Notice as stipulated under the Section 8 of the IBC, 2016 on 23.01.2020 and the same was acknowledged by the Corporate Debtor.

9. Further it was submitted by the Learned AR that the Corporate Debtor had failed to reply to the said Demand Notice within the stipulated time period of ten days and that on 09.02.2020 the Corporate Debtor had sent an e-mail to the Operational Creditor in respect of the contract work which were awarded to the Operational Creditor and had raised certain disputes related to the work order which are all afterthought and do not qualify to be classified as a 'dispute' under Section 8 of IBC, 2016.

10. Further it was submitted by Learned AR for the Operational Creditor that on 12.02.2020, the Operational Creditor had sent a

reply to the e-mail of the Corporate Debtor dated 09.02.2020 wherein they have demanded to pay the outstanding amount and since no amount was forthcoming from the Corporate Debtor, the Operational Creditor had moved the present Application under Section 9 of the IBC, 2016 before this Tribunal on 12.03.2020 seeking initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.

11. The Respondent has filed the counter. The Learned Counsel for the Respondent at the outset submits that the present Application is not maintainable in view of the fact that there is a dispute between the parties. The Learned Counsel for the Corporate Debtor submitted that the Operational Creditor had approached the Corporate Debtor in the month of November 2017 and expressed its interest in execution of the project in its entirety and in furtherance to the same, the Corporate Debtor had addressed through an e-mail dated 27.11.2017, wherein the requirements in relation to the execution of the erection of condenser at the project site along with their proposed erection strategy were set out. Further it was submitted that for execution of the scope of work, the offer letter contains certain material terms and conditions which would form a part of the contract conditions and the same are reproduced below:-



- a. *Clause E : Duration Charges: 4 (Four) months at site per Unit after site mobilization (Major Equipment)”*
- b. *Note : Point 3 : “Work Completion Certificate: After lifting of the said equipment and before demobilization, you will issue/handover the Work Completion Certificate to our Site Supervisor”.*

12. It was submitted by the Learned Counsel for the Corporate Debtor that in accordance with the terms and conditions contained in the said work order, the Operational Creditor is required to execute the scope of work within a period of 11 months. However, there was a considerable delay on the part of the Operational Creditor in executing the said project work.

13. Further it was submitted that in terms of the contract issued by the customer to the Corporate Debtor, the erection of Unit - 01 was to be commenced by 15.01.2018 and to be completed within a period of 5.5 month and the said contract further provided for erection of the Unit-02 to be commenced with a phase gap of 6 months from the commencement of Unit-01. It was submitted by Learned Counsel for the Corporate Debtor that there was a considerable delay on the part of the customer in providing access to the Civil Turn Over (CTO) and in terms of the contract, the erection of Unit 01 was to be commenced by 06.01.2018.



However, the CTO was made available to the Corporate Debtor only on 19.09.2018 with a delay of more than 8 months.

14. Further it was submitted by the Learned Counsel for the Corporate Debtor that the Corporate Debtor vide an e-mail dated 28.09.2018 communicated the status of erection of Unit – 01 to the Operational Creditor and further sought LP module lifting jacks and jack up columns and despite the above referred e-mail the Operational Creditor did not come forward to mobilize the required resources. Therefore, it was submitted that the Corporate Debtor was constrained to issue another e-mail dated 02.11.2018 intimating the Operational Creditor that there was only one set of skid track which was being used for erection of Unit 01 LP Condenser, and further communicated their need for another set of skid tracks, which was agreed between the parties and the same was reflected in the plan, discussions and documents.

15. The Learned Counsel for the Corporate Debtor submitted that in the meantime the execution of the erection of Unit 02 was already delayed by a period of 5 months owing to the customer's failure to provide the CTO and that the Corporate Debtor did not wish to further delay the project by waiting for the Operational Creditor to execute the work relating to Unit 01 and then



subsequently redeploying the same resources to Unit 02 since the arrangement between the parties clearly required that the Operational Creditor will be necessitated to mobilize enough resources to execute the erection of both the units simultaneously.

16. In the meantime, it was submitted by the Learned Counsel for the Corporate Debtor that subsequent to the negotiations between the parties, the Corporate Debtor was shocked that the customer had issued a fresh purchase order for supply of an 'additional bed material' required for Unit - 02 LP Condenser directly to the Operational Creditor without the consent of the Corporate Debtor.

17. It was pointed out by the Learned Counsel for the Corporate Debtor that the contract awarded by the customer included the supply of bed material for both the Unit 01 and the Unit 02 and till this date the scope of work has not been altered by the Customer. Thus, with a view to mutually resolve the dispute, it was submitted that the Corporate Debtor had addressed through an e-mail to the Operational Creditor dated 29.11.2018, wherein draft of minutes of the meeting was shared and the Corporate Debtor had agreed not to deduct any price in the contract value of the Operational Creditor on a condition that the Operational Creditor would not raise any



additional claim for Unit – 01 and in case of any additional claim, the same ought to be settled directly with the customer.

18. Thereby it is seen that in response to the e-mail of the Corporate Debtor, the Operational Creditor had sent a reply vide e-mail dated 30.11.2018 stating that supply of an additional bed material had no link with the present contract with the Operational Creditor and if the period is extended then the Operational Creditor would be entitled to change the same.

19. Pursuant to the above, it is seen that the Corporate Debtor through an e-mail dated 30.11.2018 itself notified the fact that the work order issued by the Corporate Debtor was for a period of 11 months and the same would be coming to an end only by the month of February, 2019 and that the delay in execution of the project was only due to lack of access to the CTO at the project site and the cause for the delay is attributable only to the customer in which case the additional claims ought to be borne by the customer and that the Corporate Debtor had further sought for a meeting with the Operational Creditor and the customer to mutually sort out the said dispute.



20. Further it was submitted by the Learned Counsel for the Corporate Debtor that in the absence of any response to the above communication, the Corporate Debtor addressed an e-mail to the customer on 05.12.2018 stating that only 2.85% of the overall project was completed despite the fact that the contract duration was for a period of 30 months and more than 40% of the said duration had elapsed. Further by way of the said e-mail, the Corporate Debtor had also requested the customer to revise the contract price with an additional 15% of the contract value as compensation towards the said delay.

21. In the said backdrop, it was submitted by Learned Counsel for the Corporate Debtor that the dispute had arisen between the parties and the Operational Creditor herein had raised the invoices dated 10.12.2018 and 24.12.2018 towards the alleged mobilization of lifting jacks rollers stand jacks puller arrangement accessories. The Corporate Debtor immediately responded to the Operational Creditor by way of an e-mail dated 13.02.2019 requesting for obtaining Certificate and further stated that they have given details and made payments based on the billing that the Corporate Debtor got certified from one M/s. GE Power.



22. Further it was submitted that the Operational Creditor vide e-mail dated 21.02.2019 informed the Corporate Debtor that they demobilized the module bed assembly material of HP condenser along with hydraulics equipment and further sought the Corporate Debtor's schedule for the remobilization of hydraulics equipment towards execution of erection of Unit-2. It was further submitted by the Learned Counsel for the Corporate Debtor that aforesaid dispute was communicated to the customer and there was no response from them and hence the Corporate Debtor through e-mail dated 15.07.2019 called the Operational Creditor to employ man power for the purpose of pockets cleaning and CTO inspection.

23. It was submitted by Learned Counsel for the Corporate Debtor that they were shocked to receive invoices dated 05.03.2019 and 12.03.2019 towards work which was either not performed or completed to the satisfaction of the customer or which formed part of the Purchase Order issued by the customer directly to the Operational Creditor. Pursuant to the above, it was submitted that the Corporate Debtor vide telephonic conversation had made it clear that they would not be issuing any further payment, until the dispute between the parties was resolved.



24. It was also submitted by the Learned Counsel for the Corporate Debtor that several attempts were made to resolve the dispute between the parties and in the absence of any response and the refusal of the Operational Creditor to the scope of work, the Corporate Debtor was constrained to engage another independent contractor to execute the work relating to the project and further to ensure that no delay attributable to the Corporate Debtor and as such the Corporate Debtor had issued a work order to M/s. Freight Wings Ltd. dated 31.12.2019 and the scope of work as contained in the 2nd Work Order are given below:-

- a. The supply of Strand Jacks (100MT)-04 nos with accessories, hydraulic unit and spares required for lifting necks (200MT)-HP&LP will be in the scope of M/s. Freight Wings.
- b. The supply of Hydraulics Jacks (100MT) – 12 nos. or suitable quantity & Support Units to lift and shift Condenser Module (380) – HP & LP from assembly bed and place it over dragging structure.
- c. Suitable – Hydraulics unit and jacks for placement of Condenser module over Hot-Well, lowering of neck over the Module.

25. The Learned Counsel for the Corporate Debtor, by referring to scope as extracted *supra*, submitted that the said scope forms part of the original scope which was awarded to the Operational Creditor and further in pursuance to the completion of the scope by M/s. Freight Wings Ltd. they have raised invoices, which were also promptly settled by the Corporate Debtor.



26. Under such circumstances, it was submitted by Learned Counsel for the Corporate Debtor that the amount claimed by the Operational Creditor is not in 'default' and that there is a 'dispute' between the parties and certain invoices which were raised by the Operational Creditor were not certified by the Corporate Debtor and under such circumstances the Learned Counsel for the Corporate Debtor has prayed for the dismissal of the present Application.

27. Learned AR for the Operational Creditor has filed the rejoinder as sought to rebut all the averments made in the counter and it was submitted that the delay in execution of the work orders were attributable to their clients and not to the Operational Creditor.

28. Heard the submissions made by the Learned Counsel for the parties. From the facts of the case, it is narrated above it becomes imperative for this Tribunal to adjudicate on the issue to whether there exists a 'dispute' between the parties in relation to the amount which is being claimed by the Operational Creditor for a sum of Rs.1,11,13,091/-.



29. It is seen that the Corporate Debtor has enclosed all e-mail communications which were exchanged between the parties. On the perusal of the said e-mails, it is manifestly made clear that the Corporate Debtor has raised a 'dispute' in relation to the completion of the work on the basis on which the work has been progressed in relation to the Operational Creditor and also it is seen that the Operational Creditor was unable to complete the project within the stipulated time of 5.5 month for a single unit.

30. Further it is also seen that certain invoices were raised by the Operational Creditor for the work over which the purchase order were issued by the customers directly to the Operational Creditor and also it is seen that certain invoices were not certified by the Corporate Debtor and also pursuant to the effect that the Corporate Debtor has issued the second work order in respect of the scope of works which were originally required to be completed by the Operational Creditor and also the scope which forms part of the Operational Creditor's domain.

31. Further in reply to the Demand Notice raised by the Operational Creditor, it is seen that the Corporate Debtor has raised various disputes and deficiencies and the breach of the work which has been carried out by the Operational Creditor and the

said defects / breaches raised by the Corporate Debtor would prove the fact that exists a dispute between the parties and the said dispute is subsisting till date. Further, it is also significant to point out here that it is not for the first time that the Corporate Debtor has raised the dispute in the reply to the Demand Notice. Also, it is required to be noted that the series of e-mails exchanged between the parties show that there is a dispute between the parties in relation to work done by the Operational Creditor.

32. It is required to be noted that the Hon'ble Supreme Court of India in the matter of M/s. **'Mobilox Innovations Pvt. Ltd.' Vs. 'Kirusa Software Pvt. Ltd.'** (2018) 1 SCC 353 has clearly laid down that 'the test for determination for the Adjudicating Authority is to see at the stage of Admitting/rejecting the Application is whether there is a plausible contention which requires further investigation and that the 'Dispute' is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster'. Thus, it is not required for this Adjudicating Authority to enter into the gravity of the dispute which exists between the parties and is only required to see that whether the dispute as raised by the Respondent requires further



investigation and that the dispute is not patently feeble legal argument or an assertion of fact unsupported by evidence.

33. Further this Tribunal being an Adjudicating Authority under the IBC, 2016 and the proceedings before this Tribunal being summary in nature, this Tribunal unlike a Civil Court cannot indulge in the luxury of taking evidence and that the debt and default on the part of the Corporate Debtor is required to be proved by the Operational Creditor beyond reasonable doubt.

34. Thus, from the discussions made *supra* we are of the view that there exists a dispute between the parties and the said dispute required further investigation and hence the Application filed by the Applicant / Operational Creditor under Section 9 of the IBC, 2016 stands **dismissed**. No costs.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond