

IN THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH – I, CHENNAI

CP/IB/11/CHE/2023

(filed under Section 9 Rule 6 of the Insolvency and Bankruptcy (Application to
adjudicating Authority) Rules, 2016)

In the matter of *BGR Boilers Private Limited*

HOWDEN AXIAL FANS AB
Hellstrom Advokatbyra KB
Box 7305
103 90 Stockholm

... Operational Creditor

– Vs –

BGR BOILERS PRIVATE LIMITED
443, Anna Salai,
Teynampet,
Chennai – 600 018

... Corporate Debtor

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Petitioner : *Wamika Trehan, Advocate*
For Khaitan & Co.,

For Respondent : *Satish Parasaran, Senior Advocate*
CP Prasanth Gopal, Advocate
Ramapriya Gopalakrishnan, Advocate

Order pronounced on 6th July 2023

ORDER

(Hearing conducted through VC)

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

Under Adjudication is an Application which has been filed by **Howden Axial Fans AB** (hereinafter referred to as '*Operational Creditor*') under Section 9 of the Insolvency & Bankruptcy Code 2016 (in short, 'IBC 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **BGR Boilers Private Limited** (hereinafter referred to as '*Corporate Debtor*'), to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare a moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out the details of the Applicant which states that the Operational Creditor is a foreign entity and is registered under the laws of Sweden. Part-II of the Application states that the Corporate Debtor is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 and the registered office of the Corporate Debtor is situated at No.443, Anna Salai, Teynampet, Chennai – 600 018. In Part III of the Application, the Operational Creditor has not




proposed the name of the IRP and left it to the discretion of this Tribunal to appoint the IRP.

3. In Part IV of the Application the Operational Creditor has claimed a total sum of EUR 1,680,601.38 as on 10.11.2022 as the default amount which is due and payable by the Corporate Debtor.

4. CASE OF THE OPERATIONAL CREDITOR

4.1. It is stated that the Operational Creditor is a company incorporated in Sweden and is in the business of designing and manufacturing axial fans. The Corporate Debtor is in the business of design, manufacture, installation, commissioning, selling and servicing steam generators.

4.2. The Corporate Debtor is one of the contractors for a number of projects commissioned by National Thermal Power Corporation Limited ("NTPC"), On 17.04.2013, the Corporate Debtor issued four (4) Letters of Intent ("LOIS") indicating its intent to engage the Operational Creditor for carrying out design, engineering, testing and supply of certain fans for two thermal power plant projects owned and operated by NTPC. The said thermal power plant projects

are located at Solapur ("Solapur Project"), Maharashtra and Meja ("Meja Project"), Uttar Pradesh.

- 4.3. By letter dated 30.04.2013, the Operational Creditor duly accepted the LOIs. Subsequently, on 23.05.2013, the Operational Creditor and Corporate Debtor entered into a purchase order ("Solapur Purchase Order") for supply of four primary air fans, four forced draft fans, four induced draft fans and mandatory spares for the Solapur Project, for a total contract price of EUR 3,581,720.
- 4.4. On 03.06.2015, the Operational Creditor and Corporate Debtor signed an amendment in relation to the Solapur Purchase Order increasing the total contract price to EUR 3,585,020 and incorporating a revised price schedule. On 01.08.2015, the parties signed a second amendment in relation to the Solapur Purchase Order to reflect change in name of the Operational Creditor in the original Solapur Purchase Order.
- 4.5. On 23.05.2013, the Operational Creditor and Corporate Debtor signed a purchase order ("Meja Purchase Order") for the supply of certain fans for the Meja Project for a total contract price of EUR 3,144,425. On 03.06.2015, the Operational Creditor and Corporate Debtor signed an

amendment in relation to the Meja Purchase Order increasing the total contract price to EUR 3,147,725 and incorporating a revised price schedule. On 01.08.2015, the parties signed a second amendment in relation to the Meja Purchase Order to reflect change in name of the Operational Creditor in the original Meja Purchase Order.

- 4.6. Pursuant to the Solapur Purchaser Order and Meja Purchase Order, the Operational Creditor carried out the design and fabrication of various fans which it was required to deliver to the Corporate Debtor. The various components and parts were delivered to the Corporate Debtor in approximately 5 batches, the last of which was delivered to the Corporate Debtor for the Meja Project on 22.12.2017.
- 4.7. After having delivered all the goods and materials in relation to both Projects by the end of December 2017, the Operational Creditor issued invoices for the goods delivered till December 2017. It is stated that at the request of the Corporate Debtor, the Operational Creditor issued separate stage payment invoices in the years 2020 and 2021, however, the Corporate Debtor did not accept the above invoices and requested the Operational Creditor to delay issuance of the above invoices until Howden Solyvent India Private Limited ("Howden India") (which is the Indian

subsidiary of the Operational Creditor) completes its obligations under certain purchase orders entered into between Howden India and the Corporate Debtor. It is stated that this was made despite the fact that the purchase orders entered into between Howden India and the Corporate Debtor were completely separate and unrelated with the Meja Purchase Order and/or the Solapur Purchase Order.

- 4.8. It is stated that the Operational Creditor accordingly raised eighteen invoices ("Unpaid Invoices") respectively dated 28.02.2020, 03.03.2020, 29.06.2021 upon the Corporate Debtor. The Unpaid Invoices aggregated to a total sum of EUR 1,926,414.91. The details of the eighteen (18) invoices are hereinbelow:

S. No.	DATE OF INVOICE	INVOICE NO.	AMOUNT (EUR)	PROJECT
1	28.02.2020	202003001	108,499.30	Solapur
2	03.03.2020	201804002	85,323.78	Solapur
3	03.03.2020	201804003	85,323.78	Solapur
4	03.03.2020	201804004	86,073.78	Solapur
5	03.03.2020	201804005	63,600.00	Solapur
6	28.02.2020	202003002	179,251.00	Solapur
7	28.02.2020	202003003	179,251.00	Solapur
8	28.02.2020	202003004	330.00	Solapur
9	28.02.2020	202003005	92,506.00	Meja
10	28.02.2020	202003006	92,652.67	Meja
11	28.02.2020	202003007	92,652.67	Meja
12	28.02.2020	202003008	93,152.80	Meja
13	28.02.2020	202003009	87,176.33	Meja
14	28.02.2020	202003010	157,386.25	Meja

15	28.02.2020	202003011	157,386.25	Meja
16	28.02.2020	202003012	330.00	Meja
17	29.06.2021	202105001	171,404.49	Meja
18	29.06.2021	202106002	194,114.81	Meja
SUB – TOTAL			1,926,414.91	

4.9. It is stated that between February 2018 and January 2020, the Corporate Debtor experienced some failure of blades on one of the three types of fans supplied, namely the PA fan. After conducting a root cause analysis, the Operational Creditor discovered that the fan blades had failed due to a design issue and the parties agreed in a meeting on 24.01.2020, that new blades should be supplied made of stronger material as warranty replacement.

4.10. It is stated that the payment against the 60% of the invoice amount fell due within 30 days against dispatch of material, 20% became due within 30 days on receipt and verification of material at project site and balance as per terms of the Purchase Orders. Between September 2020 till November 2020, several emails were exchanged between the parties wherein the Corporate Debtor categorically admitted its liability to pay and clear the Unpaid Invoices.

4.11. It is stated that in its email dated 29.09.2020, the Corporate Debtor categorically admitted that it was not able to make payments towards the outstanding amounts because it was

yet to obtain "inflow payment from the ultimate client", i.e., the NTPC. Further, by its email dated 20.11.2020, the Corporate Debtor had claimed that the COVID-19 pandemic had affected its ability to realise "inflow payments" from NTPC. It is stated that the Corporate Debtor had clearly admitted that payment towards the invoices had to be made, however it was dodging remitting the invoices stating frivolous reasons.

4.12. It is stated that on 07.01.2021, the parties entered into a supplementary agreement to resolve all issues arising on account of warranty failure of fans and non- payment of dues on part of the Corporate Debtor. The terms of the Supplementary Agreement were twofold:

- a. That the Operational Creditor shall deliver sixty (60) new fan blades to the Corporate Debtor.
- b. In exchange of shipment of the above fan blades, the Corporate Debtor agreed to make a payment of INR 2,20,00,000 (In Euro Equivalent) (Indian Rupees Two Crores Twenty Lakh Only) against the Outstanding Invoices raised by the Operational Creditor.

4.13. It is stated that, in admission of its dues, on 04.02.2021, the Corporate Debtor had made a part payment of EUR

245813.53 to the Operational Creditor. It is further stated that the said payment was made in terms of the Supplementary Agreement dated 07.01.2021.

4.14. It is stated that on 21.04.2021, the Operational Creditor proposed a plan for resolution of PA blade supplies and overdue payments with respect to the Solapur and Meja Projects. Accordingly, vide letter dated 23.07.2021, the Corporate Debtor unequivocally acknowledged its liability of EUR 1,007,330 towards the Unpaid Invoices.

4.15. It is stated that the Operational Creditor on 09.10.2021 issued a response to the letter dated 23.07.2021 whereby it clarified the position on the current outstanding invoices.

4.16. It is stated that, owing to the blatant defaults on part of the Corporate Debtor, the Operational Creditor finally served a Demand Notice dated 30.11.2022 under Section 8 of IBC, 2016 on the Corporate Debtor asking for the payment of the outstanding amount of debt, amounting to EUR 1,680,601 as on 10.11.2022 plus applicable interest thereon (to be payable in INR at the time of actual payment).

4.17. Subsequently, the Corporate Debtor responded to the said Demand Notice vide its reply dated 08.12.2022. It is stated

that in the reply to the Demand Notice, the Corporate Debtor has desperately attempted to create a pre-existing dispute, where there exists none in relation to the operational debt forming subject matter of the present application.

4.18. It is stated that on 12.12.2022, the Operational Creditor issued a rejoinder to the reply dated 08.12.2022 sent by the Corporate Debtor duly clarifying that the Corporate Debtor has categorically admitted its liability towards the outstanding operational debt owed to the Applicant, therefore, no question of a pre-existing dispute arises in the present matter.

4.19. It is stated that under Clause 3 of the Solapur Purchase Order and Clause 3 of the Meja Purchase Order, the Operational Creditor was required to provide certain advance payment guarantees and performance bank guarantees to the Corporate Debtor for securing obligations under the Purchase Orders. Accordingly, in the month of March 2022 and April 2022, the banker of the Operational Creditor issued certain letters demanding the Operational Creditor to extend the term of certain guarantees given by it under the Purchase Orders, failing which, the same shall stand encashed in favour of the Corporate Debtor.



4.20. It is stated that after a series of developments in this regard particularly the Corporate Debtor's mala fide attempts to encash the guarantees extended by the Operational Creditor, the Operational Creditor was constrained to take recourse to legal remedies available with it under Section 12 A of the International Arbitration Act of Singapore (*Singapore being the seat of arbitration under the Purchase Orders*) for seeking a stay on encashment of the bank guarantees in favour of the Corporate Debtor. Vide an order dated 26.09.2022, the Hon'ble High Court of Singapore was pleased to allow the Operational Creditor's request and restrained the Corporate Debtor from encashing the bank guarantees and from receiving any funds consequent to such encashment.

4.21. It is reiterated that the Operational Creditor had delivered all fan blades in relation to the Solapur Project and the Meja Project to the Corporate Debtor by December 2017. While the Operational Creditor agreed to supply warranty replacement blades to the Corporate Debtor in good faith, the replacement of blades and the obligation of the Corporate Debtor to make payment in relation to the Unpaid Invoices are independent of each other. Therefore, in any event, the Corporate Debtor was required to clear payments in relation to the unpaid invoices and it has admittedly failed to do so.



4.22. Even otherwise, the Corporate Debtor has dispatched 60 warranty replacement blades for the Meja Project and further supplied 60 warranty replacement blades for the Meja Project, agreed under the Supplementary Agreement. Additionally, 120 warranty replacement blades have been supplied for the Solapur Project but despite the same, the Corporate Debtor has failed to clear the unpaid invoices. Under such circumstances, the present Application under Section 9 of IBC, 2016 has been filed by the Operational Creditor.

5. CASE OF THE CORPORATE DEBTOR

5.1. It is submitted by the Corporate Debtor that the entire claim of the Operational Creditor is clearly a disputed claim and there is a pre-existing dispute between the parties which is borne out from the number of correspondences exchanged between the parties.

5.2. It is stated that the Corporate Debtor had originally initiated discussion with Flaktwoods AB, Sweden (the predecessor company of the Operational Creditor) for the supply of fans. It was communicated by Flaktwoods AB, Sweden that the supplies would be made by both Flaktwoods AB, Sweden and its group company Flakt (India) Private Limited. Both

Flaktwoods AB Sweden and Flakt (India) Private Limited are the wholly owned subsidiaries of Flaktwoods (Luxembourg) Sarl and part of the Flaktwoods Group (SA) Geneva.

5.3. It was thereafter agreed that the rotary parts including the blades required for the fans would be supplied by Flaktwoods AB, Sweden and the static parts along with its accessories would to be supplied by Flakt (India) Private Limited, Chennai. It is stated that there was a clear understanding that though there would be two different orders for the rotary parts and the static parts as the performance obligations were interrelated and the contractual obligations would be joint and several.

5.4. Based on the understanding, Flakt (India) Private Limited, vide its letter dated 27.08.2012 furnished its Technical Offer to the Corporate Debtor. Since only the group company, viz. Flaktwoods AB, Sweden was in the approved vendor's list of NTPC, a formal vendor approval for inclusion of Flakt (India) Private Limited as a sub supplier was also obtained by the Corporate Debtor vide approval dated 24.01.2013. Based on the discussions, the Corporate Debtor issued two Letter of Intents (LOI) dated 17.04.2013. The LOI for the supply of the rotary components was issued to Flaktwoods AB, Sweden and LOI for the supply of the static components

was issued to the Flakt (India) Private Limited. The LOI's were unconditionally accepted by Flaktwoods AB, Sweden and Flakt (India) Private Limited.

5.5 In the meanwhile, the Corporate Debtor was informed that the business of Flaktwood AB, Sweden was taken over by Solyvent and consequently, Flakt (India) Private Limited also came under the umbrella of Solyvent which came to known as Solyvent Flakt AB, Sweden and its Indian counterpart, came to known as Solyvent Flakt (India) Private Limited. Except for change of name, the agreed terms of the LOI remained unchanged.

5.6. It is stated that the Corporate Debtor issued the Purchase Order BBX-0001-FANS-0014 dated 23.05.2013 in favour of the Solyvent Flakt India for supply of the static parts (Onshore Contract) and Purchase Order BBX-0001-FANS-0015 dated 23/05/2013 in favour of Solyvent Flakt Sweden (the predecessor of the Operational Creditor) for the supply of the rotary parts (Offshore Contract) of the fans. The scope of work envisaged under both the Purchase orders were the same. It was comprehensive and complete for the supply of Primary Air Fans, Forced Draft Fans and Induced Draft Fans as per NTPC/Corporate Debtor specifications. The scope matrix of supply was specified in Annexure 1 of the PO's.

Again, both the PO's were unconditionally accepted by both the Operational Creditor's predecessor, Solyvent Flakt Sweden and Solyvent Flakt India. The terms and conditions of both the Purchase Orders were similar except to the extent of the materials to be supplied, the payment terms and the related tax aspect. This was necessitated in view of the fact that the rotary parts supply was an offshore supply and the static parts was an onshore supply.

- 5.7. It is stated that the scope of work of the Solyvent Flakt India (*the Indian counterpart of Operational Creditor*) categorically provides that it was comprehensive with the scope of the Operational Creditor. Likewise, the scope of work for the offshore items also contained a similar clause that it was comprehensive with the Scope of Work of Solyvent Flakt India. Both the Operational Creditor and Solyvent Flakt India were referred to as Supplier 1 and Supplier 2 in the PO's. It was specifically agreed and accepted by both the Solyvent Flakt India and the Operational Creditor that full scale performance testing shall be carried out at Solyvent Flakt India's facility at Chennai under the supervision of experts from the Operational Creditor. Erection and commissioning, including performance guarantee testing at the project site was to be carried out under the supervision of the Operational Creditor experts.



5.8. It is stated that the Purchase Orders underwent amendments from time to time for which revision orders were issued by the Corporate Debtor. It is stated that pending execution of the POs, there was again a change in ownership of Solyvent Flakt AB, Sweden and Solyvent Flakt (India) Private Limited to Howden Axial Fan AB (Operational Creditor) and Howden Solyvent (India) Private Limited (HSIPL). Accordingly, the POs were amended as amendment 2 dated 01.08.2015 and 09.06.2015. The other revisions were necessitated due to GST implication and due to mutually agreed change in price schedule and payment terms. All other terms of the contract remained unchanged. It is stated that the most crucial obligation on the delivery schedule also was not in the contemplation of the parties and hence remained unchanged.

5.9. It is submitted that the following were the contractual delays on the part of the Operational Creditor

(i) Delay in supplies:-

There was a delay at every stage of Contract execution by the Operational Creditor and its Indian Counterpart Howden Solyvent India Private Ltd (HSIPL) in carrying out the contractual obligations. There was a delay engineering drawing approval and then in manufacturing, type testing and thereafter

delay in delivery of supplies. Details furnished below elaborates the delay caused by the Operational Creditor and HSIPL with respect to Contractual agreement.

(ii) Delay in Engineering Document Approval:

Solapur:

DESCRIPTION	SUBMISSION SCHEDULE AS PER PO	RESUBMITTED AFTER INCORPORATING ALL BGRB COMMENTS	DAE OF APPROVAL AS PER PO	ACTUAL NTPC APPROVAL DATE (CAT II APPROVAL)	NO OF DAYS DELAY
GA drawings	06/06/2013 (2 weeks from PO date)	21/11/2013	20/06/2013	22/12/2013 (for FD & PA fan)	199 (for FD and PA Fan)
				10/03/2014 (for ID Fan)	277 (for ID Fan)
Datasheet	20/06/2013 (4 weeks from PO date)	04/12/2013	04/07/2013	07/03/2014 (for FD Fan)	246 (for FD Fan)
				23/12/2013 (for PA Fan)	172 (for PA Fan)
				24/06/2014 (for ID Fan)	355 (for ID Fan)

Meja:

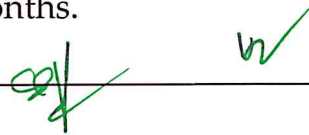
DESCRIPTION	SUBMISSION SCHEDULE AS PER PO	RESUBMITTED AFTER INCORPORATING ALL BGRB COMMENTS	DAE OF APPROVAL AS PER PO	ACTUAL NTPC APPROVAL DATE (CAT II APPROVAL)	NO OF DAYS DELAY
GA drawings	06/06/2013 (2 weeks from PO date)	21/11/2013	20/06/2013	07/01/2014 (for FD fan)	202 (for FD Fan)
				31/12/2013 (for PA Fan)	177 (for PA Fan)
					279 (for ID Fan)

				25/03/2014 (for ID Fan)	
Datasheet	20/06/2013 (4 weeks from PO date)	04/12/2013	04/07/2013	10/01/2014 (for FD Fan)	191 (for FD Fan)
				10/01/2014 (for PA Fan)	191 (for PA Fan)
				23/09/2014 (for ID Fan)	446 (for ID Fan)

b) Type Test Delay:

(i) As per the Contract (Clause 1 (f) and 4 of Offshore PO and Clause 1 (f) and 5 of Onshore PO), issued to the Operational Creditor and HSIPL, it was specifically agreed that the Fans would need to be tested for its performance for clearance by NTPC within 14 months of the date of PO at the testing facility site of HSIPL at Chennai, under the supervision of experts of the Operational Creditor for type test, before dispatch. Type Test is one of the crucial requirements to ensure that the equipment satisfies the needs of NTPC. The rotary component and the static component would be required to be assembled at HSIPL facility and undergoes performance test in the presence of OC representatives HSIPL, NTPC and that of the Corporate Debtor.

(ii) As per the Manufacturing Quality Plan (MQP), one fan each of PA Fan, FD Fan and ID Fan were to undergo type test to ensure performance before despatch. HSIPL had to get its facility ready for this purpose well before the original despatch date of 23/07/2014. However, the Type Test bed readiness report was furnished by HSIPL only on 08/01/2015 with a delay of more than five months.



(iii) The type test would be possible only if one set of both the rotary and the static components are made available. The 1st set of the rotary components supplied by OC was made ready for type test on 27/03/2015, whereas HSIPL could get their first set of the static component ready for type test only by 20/10/2015. Thereby there was delay in conducting the type test itself by more than one year from the date of the original scheduled date of delivery of 23/07/2014.

(iv) Since the CD had to comply with the contractual deadlines of NTPC for achieving the milestone activities of Solapur and Meja project, with great difficulty through employer BGR Energy Systems Ltd (BGRESL), the Corporate Debtor managed to take special approval from NTPC vide letter BGR/NTPC/SOLAPUR/2015/01/101 dated 12/01/2015 to accept the fans without type testing along with the proposal that the type testing would be done on the last set of PA Fan, FD Fan and ID Fan. Due to contractual breach by the Operational Creditor in meeting the agreed timeline for making the type test facility and readiness of both rotary and static components in tandem, the Corporate Debtor was constrained to take the risk both on financial and contractual terms to meet the project milestone of NTPC.

(v) While NTPC permitted the despatch of the materials vide MDCC No. 2007061 dated 14/03/2015 with deferred type test obligation, NTPC withheld the MRC payments to the Corporate Debtor's employer BGRESL. Consequently, the payment to the Corporate Debtor also was not made.

(vi) The Operational Creditor despatched the first set of rotary components of PA, FD & ID fans to Solapur site vide Bill of Lading No GPR 0001055 dated 27/03/2015 and the

corresponding static components manufactured by HSIPL were despatched to Solapur project site vide Invoice No C 1510011 dated 07/12/2015. In spite of the contractual risk undertaken by the Corporate Debtor, HSIPL delayed the supply of static parts by 9 months.

(vii) Due to delay in readiness of type test facility and delay in readiness of static and rotary components, by the Operational Creditor, the Corporate Debtor through BGRESL convinced NTPC for type testing one set of PA, FD & ID fans combining Solapur and Meja project. NTPC therefore to that extent reduced the contract price and issued an amendment to the contract for price reduction to BGRESL, which in turn also impacted our contract price.

(viii) The last set of rotary components, excluding the mandatory spares, was despatched by the Operational Creditor only on 29/02/2016 to HSIPL. The first type test was conducted only on 08/12/2016, due to delay in static component manufacturing and type test facility readiness by HSIPL. Even this type test conducted was unsuccessful due to leakage in pressure measurements. The types test was finally completed only on 09/02/2017. Thus, the delay due to Type test was 932 days (2 years and 6 months).

C) Delay in Delivery & Pending Supply:

PROJECT	OFFSHORE ITEMS (OPERATIONAL CREDITOR'S SCOPE)	ONSHORE ITEMS (HSIPL'S SCOPE)
Solapur	Last despatch on 04/03/2017 (25 months delay) Still 3 sets of PA Fan blades to be supplied the Operational Creditor.	Last despatch on 16/12/2019 (57 months delay) Still supplies are pending and the same has admitted by the HSIPL vide MOM dated on 20/10/2021.

d) Delay in Sequential Supply:

It would be pertinent to print out that there had to be an integration of supplies of both the rotary components supplied by OC and the static component supplied by HSIPL so as to treat the supply of each of the fan as complete. This was provided as part of the Special Condition of the PO. There was no synergy between the supplies made by OC and HSIPL. Consequently, due to non-sequential supplies, there was a subsequent delay in timely supplies of Fans to respective projects. The Non sequential supplies and the consequent delays for each of the supply are given below:

S. No.	ITEM DESCRIPTION	OPERATIONAL CREDITOR SUPPLY (BILL OF LADING) (A)	HSIPL'S MATERIAL READINESS (MDCC/CHP) (B)	NON SEQUENTIAL DELAY IN DAYS (B-A)
1	1 st Set of FD, PA & ID Fan	27-03-2015 for FD, PA & ID	20-10-2015 for FD, PA & ID (Lube Oil Skid)	207
2	2 nd Set of FD, PA & ID Fan	04-08-2015 for FD, PA & ID	13-04-2016 for FD, PA & ID (Lube Oil Skid)	253
3	3 rd Set of FD, PA & ID Fan	08-01-2016 for FD, PA & ID	20-05-2016 for FD 17-02-2017 for PA 07-01-2016 for ID	406
4	4 th Set of FD, PA & ID Fan	29-02-216 for FD, PA & ID	10-09-2018 for FD 29-09-2018 for PA 25-10-2016 for ID	943
5	5 th Set (Mandatory Spares) of FD, PA & ID Fan	04-03-2017 for FD, PA & ID	Still Supply Pending	



Meja:

S. NO.	ITEM DESCRIPTION	OPERATIONAL CREDITOR SUPPLY (BILL OF LADING) (A)	HSIPL'S MATERIAL READINESS (MDCC/CHP) (B)	NON SEQUENTIAL DELAY IN DAYS (B-A)
1	1 st Set of FD, PA & ID Fan	27-03-2015 for FD, PA & ID	20-10-2015 for FD, PA & ID (Lube Oil Skid)	207
2	2 nd Set of FD, PA & ID Fan	04-08-2015 for FD, PA & ID	16-06-2016 for FD, PA & ID (Lube Oil Skid)	317
3	3 rd Set of FD, PA & ID Fan	08-01-2016 for FD, PA & ID	11-10-2018 for FD 16-03-2019 for PA 06-06-2017 for ID	1163
4	4 th Set of FD, PA & ID Fan	11-08-2017 for FD, PA & ID	12-12-2019 for FD 30-09-2019 for PA 24-01-2019 for ID	853
5	5 th Set (Mandatory Spares) of FD, PA & ID Fan	21-12-2017 for FD, PA & ID	Still Supply Pending	

Despite payments being made by the CD, despatches were made by OC at their own convenience and not in line with the erection activity, this non-sequential supply has delayed the erection activity and hindered cash flow of the Corporate Debtor, which was informed to OC through mail dated 29/11/2018.

e) Pending Supplies:

- (i) The following items were not supplied by the Operational Creditor and HSIPL
- (ii)
- a. 3 sets of PA Fan blades for Solapur project
 - b. 5 sets of PA Fan blades for Meja project
 - c. 1 sets of FD Fan blades for Solapur project

- d. Mandatory spares for ID fan casing liner (10 MT) for each project by HSIPL (Payment already paid on 21/01/2021).
 - e. Filter 8 Nos for ID Fan Lube oil system for Meja project by HSIPL (Payment already paid on 21/01/2021)
- (iii) It would be pertinent to state that though the schedule completion date was in July 2014, the supplies were continued by OC and HSIPL till 17/12/2019. It would be worthwhile to note that even the supplied Fan components did not meet the specification requirement and resulted in several failures. Since the offshore supplies of the rotary parts were already made by the Operational Creditor it was necessary that the static components also were to be compatible with the rotary components. The supply would be termed as complete only if both the rotary and the static components were assembled as one composite unit. The Operational Creditor thus became liable for consequence of contractual breaches, more specifically for liquidated damages and which breaches were not condoned by us.
- (iii) It may not be out of place to point out that the fans as such sourced from the OC has its own unique features. The rotary components supplied by the OC would only be compatible with the static components of HSIPL Thus to get any other supplier to supply a portion of the equipment which remained unsupplied would not serve any purpose and the equipment as such would be rendered unusable.

f) Fan Failures:

While the supplies were still in progress, fans supplied started failing



(1) FD Fan failure:

- (i) It was reported that FD Fan Unit-1B was damaged in Solapur on 03/09/2016. The same was communicated to the Operational Creditor vide email dated 06/09/2016. In response, the Operational Creditor vide email dated 06/09/2016 informed the Corporate Debtor that the blades cannot be repaired and would need to be replaced. Site inspection by the Corporate Debtor based on the recommendation of then OC was carried out to ascertain the causes of the damage to the blades. After subsequent investigations of the Fan it was noted that bolts assembled all around the suction box has loosened during the fan operation and one of the bolt has fallen and damaged the blades during the operation. It is observed that the bolts in the suction box are fixed in the reverse direction. The suction box is the part of the static components supplied by HSIPL. Suction box was received from HSIPL in assembled condition with improperly fixed bolts. This was a manufacturing defect of HSIPL. Due to this manufacturing defect the bolt has loosened during the fan operation and fallen in the suction box thereby damaged the Fan blades.
- (ii) The OC was therefore advised to take necessary action and arrange to supply the replacement blades for FD Fan 1B free of cost without any liabilities on the Corporate Debtor. OC had agreed through various mail and MOM (refer mail dated 23/08/2019, MOM dated 22/08/2019 and MOM dated 27/02/2019) to arrange for replacements. However, till date the supplies have not been realized.

(2) PA Fan failure:

- (i) During the commercial operation of the boiler, there had been an incident of Fan blade failure in Unit 1A PA fan of Solapur project on 26/02/2018. Subsequently, there were multiple fan blade failures both at Solapur and Meja projects (4 failure incidents in Solapur project and 3 failure incidents in Meja project) till date. The above failures have happened when the unit was in commercial operation and the shutdown of the unit has caused serious issues to us with NTPC.
- (ii) Subsequently, a detailed investigation was conducted by OC to identify the root cause of the repeated blade failures. The analysis involved review of the fan design, material selection, plant operating data, destructive and non-destructive testing of failed components, site strain gauge testing and further analysis of the stresses measured. A wide range of possible root causes have been factored into for reaching conclusion of the cause of failure.
- (iii) With the details on investigative steps and resulting recommendations, OC had submitted the Root Cause Analysis (RCA) report in Feb'2019 for CD's review. The RCA found that the blades supplied belonged to a particular 'melt number' during manufacturing which did not meet the design criteria and resulting certain abnormal stresses during operation of the PA Fans, The RCA report was shared to NTPC subsequently for its review.

Subsequently, at the joint meeting was organized between NTPC, BGRESL, on 24/01/2020 at NTPC, Noida office for conclusion of the root cause and a solution to set right the fan, it was agreed by the OC that all the sets of blades of PA Fan i.e. 4 sets of main supply & 3 sets of mandatory spare supply by 04/12/2020 in both Solapur and Meja projects would be replaced by them at no additional cost. A delivery schedule for replacement blades vide their correspondence dated 31/01/2020 was also submitted by the OC.

- (iv) Upon readiness of the blades, instead of dispatch commencement, the OC had proposed for the release of MRC payment which was on hold for the completion of blade replacement, which was not accepted by the CD as the supply completion could not be recognized in view the repetitive failure of PA Fan and pending blade replacement by the OC.

- (v) In the midst of the above, there was another failure incident at Meja unit-1 PA Fan during July'2020 and the unit was shut down owing to the non-availability spare blades as they were already utilized during previous failures. Therefore, Corporate Debtor made an interim agreement with the Operational Creditor on 07/01/2021 for the immediate despatch of 2 sets to Meja project as against the total 14 sets of replacement blades as already agreed in the MOM dated 24/01/2020.



- (vi) It is submitted that both the units have suffered repeated PA fan blade failures during the commercial operation of the units and few restoration works have been carried out by NTPC on its own with the spare material available with them for quick restoration of the unit.
- (vii) Notices on account of the above failures due to the delay in supply of replacement blades were also served to the OC informing that all costs on account of the above shall be debited to the OC. Despite the above, there was no firm action plan from the OC for the despatch of balance replacement blades (12 sets).
- (viii) In the midst of the above, there was another failure incident at Solapur unit-1 PA Fan on March 2022 and the unit was shut down owing to the non-availability of any spare blades as they were already utilized during previous failures. Again, after discussions, an interim agreement dated 08/04/2022 for 4 set of blades despatches to Solapur site was made, whereby the supplies were made and obligations were fulfilled by us also.

g) Noise Level:

- (i) As per the Contract here were specific agreements made with regard to Fan Performance which includes Noise level as per NTPC specification requirement, the Operational Creditor's supplies failed to meet the same. The issue was communicated to the OC from 25/04/2017 (ref. no. BBPL/HOWDEN/FANS/04) onwards vide numerous correspondence, but the OC did not make any

attempt to resolve the non-performance of their supplies. NTPC has withheld up to 2 Crores of supply payment on account of the same for Solapur project (refer NTPC letter ref. no. NTPC/Solapur/SG/2022/03/22/01 dated 22/03/2022).

5.10. It is stated that the issues relating to the supplies were expressly acknowledged by the Operational Creditor. It was agreed between the parties vide Supplementary Agreement dated 07.01.2021 that the Operational Creditor would replace the defective supplies and would supply 60 (2 sets) of PA fan blades and that in turn the Corporate Debtor would pay a sum of Rs 22 million against outstanding offshore invoices and Rs 3 million for the on-shore invoices. It is thus clear from the said Supplementary Agreement that both the on shore and offshore contracts were interrelated and the Operational Creditor is not justified in delinking the same for the purpose of the present Application.

5.11. It is stated that pursuant to the agreement, the Corporate Debtor had paid the agreed amount of Rs 22 million to the OC and Rs 3 million to its Indian counterpart. Thus, the factum that there were disputes between the parties is borne out from the terms of the Supplementary Agreement also. It is stated that the Indian Counter part of the Operational Creditor i.e. Howden Solyvent (India) Private Ltd, (HSIPL) has also initiated arbitration against the Corporate Debtor. In the Claim Statement filed by HSIPL, the interrelation

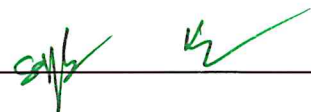
between the Operational Creditor and HSIPL has been clearly admitted. Thus, it is submitted that the Operational Creditor cannot claim any independent right and maintain the present application, when in fact, the claim is disputed and the final rights are to be adjudicated by the appropriate forum.

5.12. It is stated that the Corporate Debtor has not admitted its liability to pay the amounts raised on the said invoices. Because of the contractual defaults on the Operational Creditor's part and failure of the equipment supplied within the warranty period, NTPC withheld the Corporate Debtor's payments which in turn has severely affected its cash flow. It is stated that there has been a clear contractual breach on the part of the Operational Creditor. It is stated that in this context the Corporate Debtor had vide its letter dated 08.09.2022 called upon the Operational Creditor's Bankers The Hongkong & Shanghai Banking Corporation Ltd to extend / invoke the Bank Guarantees bearing Numbers APGMDR923797 for Euro 94711, PEBMDR923789 for Euro 358172, ABGMDR923794 for Euro 41581 and PEBMDR923786 for Euro 314443. Upon issue of the letter, the Operational Creditor had approached the General Division of the High Court of the Republic of Singapore vide HC/OA 579/2022 seeking a restraint order against the said invocation. The General Division of the High Court had

granted a restraint order in Operational Creditor favour on 26.09.2022. In the affidavit filed by Operational Creditor in support before that Court, Operational Creditor had specifically stated that Corporate Debtor are disputing Operational Creditor claim and that Operational Creditor intends to invoke arbitration. Thus, the Operational Creditor itself has admitted that the notice is a disputed one. Under such circumstances, the Corporate Debtor has sought dismissal of the present Application.

6. FINDINGS OF THIS TRIBUNAL

- 6.1. Heard the submissions made by the Learned Senior Counsel for both the parties and perused the records including the pleadings placed on record. From the submissions made by the Learned Senior Counsel for both the parties, the sole issue which arise for consideration and decision by this Tribunal is that *“whether there is any pre-existing dispute in relation to the claim made by the Operational Creditor as against the Corporate Debtor before the issuance of the Demand Notice”*.
- 6.2. From the averments made in the Application, it is seen that there exists dispute between the parties in relation to the supply of materials. The same is evident from the averments made by the Operational Creditor in Part – IV of the Application which are as follows;



"N. *Between February 2018 and January 2020, the Corporate Debtor experienced some warranty failure of blades on one of the three types of fans supplied, namely the PA fan. After conducting a root cause analysis, the Operational Creditor discovered that the said fan blades had failed due to a design issue and the parties agreed at a meeting on 24th January 2020, that new blades should be supplied in a stronger material as warranty replacement.*

6.3. Thereafter, it is seen that a Supplementary Agreement was entered into between the parties as early as on 07.01.2021 to resolve all the issues arising on account of warranty failure of fans and non – payment of dues on the part of the Corporate Debtor. The said Supplementary Agreement dated 07.01.2021 is extracted hereunder:-

**SUPPLEMENTARY AGREEMENT TO CONTRACT Nos.:
BBX-0001-FANS-0015 and 0017**

Dated January 7th 2021

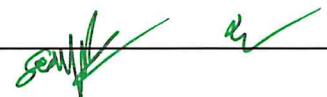
Buyer: BGR Boilers Private Ltd, Chennai, India

The Supplier: Howden Axial Fans AB, SE35187 Växjö, Sweden

Further to Contract Nos B8X-0001-FANS-0015 and 0017 between the Buyer and the Supplier (hereinafter referred to as the "Contracts"), the parties have reached agreement on the following:

1. Background to this Agreement.

While within the warranty period the Buyer experienced problems with blades on the PA fans. supplied under the Contracts. After an in depth investigation, both Parties agreed



on the cause and solution following the submission and approval of a Root Cause Analysis in February 2020

The technical solution agreed was that the Supplier would provide new PA fan blades to the Buyer

2. Object of This Agreement:


Define the first step in the resolution of commercial issues that have prevented the shipment of new blades from the Supplier to the Buyer.

Both Parties understand that future agreement is needed to finalise shipment of all remaining blades and agree to have friendly discussions after this Agreement is fulfilled.

3. Fulfillment Conditions:

This agreement shall be considered fulfilled when the following conditions are met-

- The Supplier delivers by airfreight at his cost, in good condition, 60-off (2 sets) new PA fan blades. This shall be evidenced by release of an Airwaybill for 60 blades consigned to the Buyer.
- In exchange of shipment of these blades by airfreight, The Buyer agrees to pay within 14 days of receipt of the Airwaybill payment of 22 MINR (In Euro equivalent) against outstanding offshore invoices, payment of 3MINR against outstanding onshore invoices and return of all Advance Payment Bonds (except PA fans).
- The Buyer agrees to Import the blades and the Supplier agrees to compensate the Buyer for the import duty and import processing charges (Excluding GST whether central state or other) to the destination address. These charges will be evidenced and deducted from the Supplier's final 5% Retention payment due under the Contracts for the PA fans



4. Contract Conditions

This Supplementary Agreement does not affect the rights of either Party under the Contracts

The Buyer

The Supplier

-Sd-

-Sd-

Mr. R N S Tomar
Director
BGR Boilers Private Ltd

Mr. W. Thomson
Director,
*Howden Fans and
Heaters Europe*

6.4. Based on the above supplementary Agreement entered into between the parties on 07.01.2021, the Learned Counsel for the Operational Creditor has argued that the Operational Creditor shall deliver sixty (60) new fan blades to the Corporate Debtor and in exchange of shipment of the above fan blades, the Corporate Debtor has agreed to make a payment of INR 2,20,00,000 (In Euro Equivalent) (Indian Rupees Two Crores Twenty Lakh Only) against the Outstanding Invoices raised by the Operational Creditor.


6.5. It was submitted by the Learned Counsel for the Operational Creditor, that the Operational Creditor has supplied the 60 new fan blades to the Corporate Debtor, however the Corporate Debtor has defaulted in payment of the amount as per the Supplementary agreement dated 07.01.2021 and there is no dispute in relation to the same and hence sought admission of the present Application.

6.6. Be that as it may, it is pertinent to note here that the supplementary agreement was entered into between the parties on 07.01.2021. As per the terms of the said Agreement, within 14 days from the supply of the blades, the Corporate Debtor is required to make the payment of 22 MINR (In Euro equivalent) against outstanding offshore invoices. The Operational Creditor in Part – IV of the Application has stated as follows;

“Q. In fact, as stated above, in admission of its dues, on 4 February 2021 the Corporate Debtor had made a part payment of EUR 245813.53 to the Operational Creditor. It is noteworthy to mention that the payment was made in terms of the Supplementary Agreement dated 7 January 2021. The receipt of the amount received on 04 February 2021, is already annexed herewith and marked as Annexure 2I.”

6.7. Thus, the Operational Creditor has admitted that a sum of EUR 2,45,813.53 was paid by the Corporate Debtor to the Operational Creditor. It could be seen that the said payment was effected on 04.02.2021. The said payment was made by the Corporate Debtor after supply of 60-off (2 sets) new PA fan blades. Thus, as per the Supplementary Agreement dated 07.01.2021, the default had occurred in the month of February 2021.

6.8. As per Section 10A of IBC, 2016 for the default which had occurred during 25.03.2020 to 25.03.2021, no Application



under Section 7, 9 and 10 of IBC, 2016 can be filed. Section 10A of IBC, 2016 is as follows;

10A. Suspension of Initiation of corporate insolvency resolution process.

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.

6.9. As per the Ministry of Corporate Affairs Notification S.O. 3265(E) dated 24th September 2020, the period of 10A was extended three months from 25th September 2020. Thereafter, the Ministry of Corporate Affairs vide Notification S.O. 4638(E) dated 22.12.2020 has extended the 10A period for three months from 25th December 2020. Thus, the 10A period would fall from 25.03.2020 till 25.03.2021.

6.10. In the present case, the default in relation to the Supplementary Agreement had occurred during the 10A

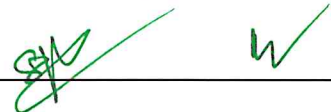


period and as such the present Application filed by the Operational Creditor cannot be admitted.

6.11. It may be pointed out here that this point was not advanced by the Learned Senior Counsel for the Corporate Debtor, however since this is a point of law, the same was considered by this Adjudicating Authority.

6.12. Further, for the default in respect of the Invoices prior to the 10A period, it is clearly admitted by the Operational Creditor itself that there exists dispute between the parties in relation to the same.

6.13. It is also seen that the Supplementary Agreement has set out the payment details in relation to both offshore contract (*Operational Creditor*) and onshore contract (*Indian counterpart of Operational Creditor*). Further, the Indian counterpart of the Operational Creditor i.e. Howden Solyvent (India) Private Limited has initiated two arbitration proceedings against the Corporate Debtor and it has filed its claim statement. In the claim statement filed by Howden Solyvent (India) Private Limited, the interrelation between the Operational Creditor and the Indian counterpart of the Operational Creditor has been clearly admitted. Thus, when the Supplementary



agreement stipulates payment to be made to both offshore contract and onshore contract, the Operational Creditor alone cannot maintain the claim as against the Corporate Debtor independently. Further, the fact that the Indian counterpart of the Operational Creditor has initiated Arbitration proceedings itself would go on to show that there exists dispute between the parties.

6.14. It is also seen from the documents filed by both the parties that the obligation on the part of the Operational Creditor is not fulfilled. The Operational Creditor is yet to supply the materials. From the documents, it is seen that only a proposal letter was exchanged between the parties and there is no final consensus that was arrived at between the parties. Thus, it could be seen that the entire claim of the Operational Creditor on the exchange of said letters / proposal is devoid of merits and cannot qualify to be an 'operational debt'.

6.15. The Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited**; 2017 1 SCC Online SC 353 held that the 'existence of dispute' and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the Demand Notice or Invoice as the case may be and observed as follows;



“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be..”

At paragraph 51 it is held:

“51.Therefore, all that the adjudicating authority is to see at this stage 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.”

6.16. Thus, from the documents placed on record, we are of the view that the default in relation to the Supplementary Agreement falls during the 10A period and also there exists serious dispute between the parties in relation to the claim made by the Operational Creditor.



7. In view of the dispositive reasoning stated above, and also by taking into consideration the decision of the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. (supra)** the present Application filed by the Operational Creditor under Section 9 of IBC, 2016 seeking initiation of CIRP as against the Corporate Debtor is liable to be dismissed and accordingly stands **dismissed**. No order as to costs.



sd/-

SAMEER KAKAR
MEMBER (TECHNICAL)



sd/-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond