



NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – II
CHENNAI

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH, HELD ON 22-03-2023 (WEDNESDAY) AT 10.30 A.M. THROUGH VIDEO CONFERENCING:

PRESENT SHRI SANJIV JAIN, HON'BLE MEMBER (JUDICIAL)
SHRI. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPLICATION NUMBER : --
PETITION NUMBER : IBA/432/2020
NAME OF THE PETITIONER : Fagioli India Pvt Ltd
NAME OF THE RESPONDENT(S) : EDAC Engineering Ltd
UNDER SECTION : Sec 9 Rule 6 of IBC, 2016

ORDER

Order pronounced in the Open Court, vide separate sheet. Be uploaded on the NCLT website.


SAMEER KAKAR
Member (Technical)

vs


SANJIV JAIN
Member (Judicial)

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

IBA/432/2020

*(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. EDAC Engineering Limited

M/s. FAGIOLI INDIA PRIVATE LIMITED,
1208, Cyber One Greenscape,
Swami Pranabananda Marg,
Sector 30A,
Near CIDCO Exhibition Centre, Vashi,
Navi Mumbai-400 703

... Applicant / Operational Creditor

-Vs-

M/s. EDAC ENGINEERING LIMITED,
Regd Office:
97, Mount Road,
Chennai -600 032

... Respondent / Corporate Debtor

Order Pronounced on 22nd March, 2023

CORAM:

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

*For Operational Creditor: Mr. Tejas Rajesh Balsara, Advocate
For Corporate Debtor: Mr. Arvind Subramaniam, Advocate*

ORDER

Per: SANJIV JAIN, MEMBER (JUDICIAL)

This application under Section 9(1) of the Insolvency &
Bankruptcy Code, 2016 (in short "IBC") read with Rule 6 of The
Insolvency & Bankruptcy Code (Application to Adjudicating



Authority) Rules, 2016 has been filed by **M/s.FAGIOLI INDIA PRIVATE LIMITED** (herein referred to as "**Operational Creditor**") against **M/s. EDAC ENGINEERING LIMITED** (hereinafter referred to as "**Corporate Debtor**") for initiating Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor.

2. The Operational Creditor is a Private Limited Company who has filed the present Application. The Operational Creditor has its business at No. 1208, Cyber One Greenscape, Swami Pranabananda Marg, Sector 30A, Near CIDCO Exhibition Centre, Vashi, Navi Mumbai-400 703.

3. Part - II of the Application lays down the details of the Corporate Debtor. It is seen from the application that the Corporate Debtor is a Private limited company incorporated under the Companies Act, 1956 on 26.06.1987 with CIN: U45201TN1987PLC014584. The Registered Office of the Corporate Debtor is situated at No. 97, Mount Road, Guindy, Chennai - 600 032. The Authorised Share Capital of the Corporate Debtor and Paid-up Share Capital are stated to be Rs. 1,97,20,00,000/- and Rs. 1,65,59,34,000/- respectively.

4. From Part-IV of the Application, it is seen that a total sum of Rs.47,68,143/- (Rupees Forty Seven Lakhs Sixty Eight Thousand



One Hundred and Forty Three only) is being claimed by the Operational Creditor as the Operational Debt. Out of the said dues, a sum of Rs. 40,92,826/- is stated to be the Principal Debt and a sum of Rs. 6,75,317/- towards interest @ 18% per annum. The date of default is mentioned as 30.03.2017.

6. Part – V of the Application discloses about the details of the documents which have been filed by the Operational Creditor in order to prove the 'Operational debt', which are extracted as follows:

1. HSBC Bank summary of account as on 29.02.2020.
2. Total 9 invoices which were unpaid(Exhibit-2).
3. Work Order copy from the Corporate Debtor dated 27.02.2017(Exhibit-3).
4. Leger Account Entries in the books of Operational Creditors from 01/04/2016 to 29/02/2020 (Exhibit 4).
5. HSBC Bank Statement showing the payment received a on date from the Corporate Debtor (Exhibit 5).
6. Form-3 issued by Operational Creditor to Corporate Debtor dated 23.01.2020 (Exhibit 1).
7. Reply received from the Corporate Debtor on 13.02.2020 (Exhibit 6).



8. Board Resolution for authorizing Mr. Shailesh D. Shirwadkar for conducting the matter against the Corporate Debtor (Exhibit 7).
9. Board Resolution for authorizing CS Prashant G. Tayshete and Adv. Tejas Rajesh Balsara for conducting the matter against the Corporate Debtor (Exhibit 8).

7. As per the averments made in the application, the Corporate Debtor had issued Work Ordersto the Operational Creditor to execute Skidding/Dragging and Positioning of HP & LP Condenser of Unit 1 and Unit 2 x 660 MW TANDA STPP Uttar Pradesh and Lifting and Placement of Generator Stator at 1 x 150 MW Nagai Power Plant at Okkur Village Nagapattinam District, Tamil Nadu for Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lakhs only) and Rs. 46,00,000/- (Rupees Forty Six Lakhs only) respectively.

8. The Operational Creditor completed the work at the sites and raised the invoices. During execution of Unit-II at Tanda Project, the Corporate Debtor informed the Operational Creditor that it wishes to get the balance work completed from another vendor. On this, the Operational Creditor raised its protest stating that it had already dispatched the required material to Unit-II and deployed the manpower at the work site at Tanda Project at Uttar Pradesh. It also raised the claim for the work done including compensation. A meeting was held and vide Minutes of the



Meeting dated 16.08.2019, they entered into a settlement. The Operational Creditor then submitted the invoices towards the work done for Unit-I and II as detailed in para-4 claiming an outstanding amount of Rs.47,68,143/- (Rupees Forty Seven Lakhs Sixty Eight One Hundred and Forty Three only). It accordingly sent a Demand Notice to the Corporate Debtor on 23.01.2020 which was acknowledged and replied by the Corporate Debtor alleging that the dispute was already resolved through the minutes of the meeting dated 16.08.2019. It is alleged that on 13.02.2020, it received a letter from the Corporate Debtor for invocation of Arbitration Clause in the work orders. It is stated that this letter/action of the Respondent was an afterthought as there was no civil or arbitration proceedings ongoing before the date of filing of present application. It is alleged that after filing the present petition, the Corporate Debtor filed the petition vide O.P. No. 526/2020 in the High Court of Judicature at Madras for invocation of arbitration clause in the work order from where an Arbitrator was appointed.

9. It is alleged that the invoices given in Form-3 and Form-5 were on the basis of the work done which remained unpaid and therefore the Corporate Debtor made the default by not paying the amounts of Rs.40,92,826/- (Rupees Forty Lakhs Ninety Two Thousand Eight Hundred and Twenty Six only) details given in



Form-5. The Petitioner also filed the copy of the invoices as detailed in para-4 of the petition (9 invoices). It is stated that against the invoices raised till date for Rs.1,62,72,598/- (Rupees One Crore Sixty Two Lakhs Seventy Two Thousand Five Hundred and Ninety Eight only), the Operational Creditor received Rs. 1,15,04,455/- (Rupees One Crore Fifteen Lakhs Four Thousand Four Hundred and Fifty Five only) from the Corporate Debtor. Hence there remained an outstanding of Rs.47,68,143/- (Rupees Forty Seven Lakhs Sixty Eight Thousand One Hundred and Forty Three only). It is stated that the Operational Creditor is entitled to 18% per annum interest charge which amounts to Rs. 6,75,317/- (Rupees Six Lakhs Seventy Five Thousand Three Hundred and Seventeen only).

10. On getting notice of the application, the Respondent/Corporate Debtor filed its counter/reply admitting that it had engaged the Operational Creditor as its sub-contractor for the said work and had issued Letters of Intent dated 06.01.2017 and 15.03.2017 for the said works. It has also admitted that a sum of Rs.40,92,826/- (Rupees Forty Lakhs Ninety Two Thousand Eight Hundred and Twenty Six only) was claimed by the Operational Creditor from the Corporate Debtor but alleged that in the claim, it was not specified as to how it arrived at such claim. It is alleged that the Operational Creditor had completed the work



only till Sl. No. 1 of the scope of LOI Tanda and not completed the work for Sl. No.2 of the scope of work. It also removed all its core equipments at site without any authorisation which made the Corporate Debtor send the mails dated 31.05.2019 and 01.06.2019. The Corporate Debtor was also forced to engage another sub-contractor to complete the work. It is alleged that the Operational Creditor has made an extra claim which is much more than the contract price and the same is a question of dispute. The Corporate Debtor has admitted to have received Form-3 notice dated 20.01.2020 but stated that in reply dated 13.02.2020, it had informed the Operational Creditor that no amounts were due to the Operational Creditor. The Corporate Debtor rather made a counterclaim for the cost incurred by it for completing the works. The Corporate Debtor also filed a petition under Section 11(6) of The Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator in O.P. No.526 of 2020 in which the Operational Creditor also filed a detailed reply, however, the Hon'ble High Court vide order dated 17.02.2021 allowed the arbitration petition and appointed the Arbitrator as there were questions of dispute between the parties. It is stated that since in the present case the arbitration proceedings have been initiated, the application deserves to be dismissed. Question of limitation is also raised alleging that the invoices were raised in 2017 whereas the petition has been filed on 12.03.2020.

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11. We have heard Ld. Counsel Mr. Tejas Rajesh Balsara for the Operational Creditor and Mr. Arvind Subramaniam for the Corporate Debtor. Parties also filed written synopsis in support of their arguments.

12. Ld. Counsel for the Petitioner submits that though the Petitioner wanted to complete the balance work at TANDA project but the Corporate Debtor engaged another sub-contractor. It had raised the protest but the Corporate Debtor got the work completed from another vendor. It however agreed in the meeting dated 16.08.2019 to pay additional compensation and make the payments against the invoices for the works completed till the introduction of new vendor by the Corporate Debtor. Ld. Counsel stated that the minutes of the meeting annexed as **ANNEX-1** is a conclusive evidence showing that there was no dispute between the parties in respect of the work done. Ld. Counsel referred the invoices in Form-3 and Form-5 and stated that the outstanding payable by the Corporate Debtor till date is Rs.47,68,143/- (Rupees Forty Seven Lakhs Sixty Eight Thousand One Hundred and Forty Three only). He referred the demand notice dated 23.01.2020 and stated that it was duly acknowledged by the Corporate Debtor but it sent a vague reply claiming that the dispute was already resolved through the minutes of the meeting dated 16.08.2019, Ld. Counsel stated that there was no disputes



as on date of sending Form-3 demand notice and even after a year, and the notice given by the Operational Creditor dated 13.02.2020 regarding invocation of arbitration clause in the work order was completely an afterthought action. Ld. Counsel stated that after filing present application, the Respondent filed the petition for invocation of arbitration clause and as such this application for CIRP is maintainable. Ld. Counsel referred the case of "**Agarwal Coal Corporation Pvt. Ltd. vs. Impex Ferro Tech Ltd. [Company Petition 440/KB/2017] Kolkata NCLT Bench order dated 09.11.2017**" to contend that in the present case the disputes raised by the Corporate Debtor were afterthought just to avoid and escape from legal debt. He contended that Section 238 of IBC overrides the Arbitration and Conciliation Act, 2015.

12. Ld. Counsel for the Respondent/Corporate Debtor *per contra* argued that in respect of the work pertaining to Unit-I, the Operational Creditor had completed the work and was paid in terms of the work order. In regard to Unit-II, the Corporate Debtor is not liable to pay the alleged outstanding liability of Rs.47,68,143/- since it miserably failed to complete the work. Since the work order contained an arbitration clause, it approached the Hon'ble High Court from where the arbitrator was appointed. Ld. Counsel contended that though the petitioner in the present case has claimed Rs.47,68,143/- but in reply to the petition, it had



stated to have settled it for Rs.22,00,000/- (Rupees Twenty Two Lakhs only). It remained silent whether it had completed the work in respect of Unit-2. Since the Operational Creditor has claimed different amounts in different forums, so there remains a dispute. Ld. Counsel contended that since the dispute is pending adjudication before the Arbitral Tribunal, this Tribunal does not have jurisdiction to entertain and decide the petition.

13. We have considered the contentions raised by the counsels for the parties and perused the documents on record.

14. It is not in dispute that the Applicant was awarded two work orders for Rs.1,25,00,000/- and Rs.46,00,000/- for the site at Nagapattinam District, Tamil Nadu and TANDA District, Uttar Pradesh. The Applicant had completed the work in respect of the site Unit-I but not completed the work at site Unit-II. The Corporate Debtor engaged another sub-contractor and got the work completed. The Corporate Debtor had sent the mails dated 31.05.2019 and 01.06.2019 in this regard alleging that the Applicant removed the equipments at site without its authorisation and it was forced to engage another sub-contractor to complete the work. The dispute was raised prior to the receipt of Form-3 notice dated 20.01.2020. The Respondent/Corporate Debtor immediately responded to the notice making reference to the arbitration clause containing in the work orders for resolution of



disputes. It also filed a petition before Hon'ble High Court for appointment of the Arbitrator. The Arbitrator was appointed to resolve the disputes by the Hon'ble High Court. Records show that the Applicant/Operational Creditor had filed statement of claims before the Arbitrator for adjudication of disputes, thus Operational Creditor submitted to the jurisdiction of the Arbitral Tribunal. There is also discrepancy as to the amount claimed and the amount settled between the parties vide Minutes of the Meeting dated 16.08.2019 i.e. prior to sending the Form-3 notice by the Applicant. All these acts of the Operational Creditor go on to establish that the Operational Creditor accepted that there were disputes between the parties.

15. Section 8 of IBC, 2016 provides that an Operational Creditor may, on the occurrence of default, deliver a demand notice of unpaid operational debtor, copy of an invoice demanding payment of the amount involved in the default to the Corporate Debtor.....and the Corporate Debtor shall, within a period of ten days of receipt of the demand notice.....bring to the notice of the Operational Debtor existence of a dispute if any or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

16. In the present case, the Respondent/Corporate Debtor had sent mails prior to initiation of CIRP raising the disputes. It had



responded within ten days of receipt of the demand notice referring to the arbitration clause and for resolution of disputes through arbitration. Nonetheless, the petition for appointment of the Arbitrator was filed after receipt of the notice in Form-3 but the pleadings make it clear that the Hon'ble High Court being satisfied of the existence of dispute, allowed the Arbitration Petition filed by the Corporate Debtor under Section 11(6) of the Arbitration and Conciliation Act, 1996 and consequently appointed an Arbitrator for the adjudication of the dispute. The Operational Creditor in fact preferred a claim of the very same debt made under this application, thus, the Arbitral Tribunal is seized of the debt claimed under the present application.

17. From the above findings, it is perceptible that there is a pre-existing dispute between the Operational Creditor and the Corporate Debtor. At this instance it is relevant to place reliance on the decision of the Hon'ble Supreme Court in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited [2017 SCC Online SC 1154]*** wherein it was held as follows,

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to



the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Considering the present circumstances, we are of the view that the present application deserves to be dismissed since the Arbitral Tribunal is already seized of the disputed debt, claimed under this application.

18. Consequently, **IBA/432/2020** stands **dismissed** and **disposed off**.



SAMEER KAKAR
MEMBER (TECHNICAL)

Suguna



SANJIV JAIN
MEMBER (JUDICIAL)