

debtor. The petitioner company was incorporated as a company on 09.02.2005 as per the master data of the company at Annexure 14-D. The petitioner company filed the resolution of the Board of Directors of the company dated 19.11.2013 Annexure-14 (C) authorising Mr.Riten Choudhury, Managing Director of the petitioner company to represent the petitioner company in legal matters and proceedings before the Court and other Government authorities. Mr.Sanjay Dayal, Chairman of the Board of Directors and Mr.Anand Sen, Director of the company were authorised to sign the power of attorney for and on behalf of the Board of Directors of the Company under the Common Seal of the Company.

2. When the matter was listed on 17.09.2018, it was noticed that there was no specific decision by the company for filing of a petition under the provisions of the Code. Notice of the defect was given to the petitioner and the learned counsel for the petitioner accepted the notice of defect. Consequently a fresh resolution was filed vide diary No.3667, dated 26.09.2018, which is to the effect that Riten Choudhury, Managing Director was authorised to represent the company before the National Company Law Tribunal and other Courts of competent jurisdiction in respect of the matters relating to the insolvency proceedings under the Code and Rules made thereunder and to do all the necessary acts in the progress of the case. The defect, which was pointed out stands removed.

3. The petitioner-company has filed this petition by moving application in Form 5 as prescribed under Rule 6 (1) of the Insolvency & bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity the 'Rules'). The contents of the application are supported by the affidavit

of Riten Choudhury, the authorised representative of the petitioner, as at Annexure 14-A.

4. The respondent company was incorporated on 15.09.1993 as per the master data of the corporate debtor at page 71 of the paper book, with the authorised share capital of ₹ 30 crores and paid up share capital of ₹23,43,00,000. The respondent-corporate debtor has its registered office at Faridabad in the State of Haryana and, therefore, the matter falls within the territorial jurisdiction of this Tribunal.

5. The facts of the case, briefly stated, are that in February, 2017, the corporate debtor approached the operational creditor for supply of Non Alloy Steel Coils for the Project/Site at Kashipur, Uttarakhand. The respondent issued a Purchase Order dated 28.02.2017 as at Annexure 1-C at page 37 of the paper book and accordingly, the Sales Contract dated 28.02.2017 Annexure-2 was entered into between the parties. The respondent made the payment of ₹14,42,843.36 for executing the supplies. A Letter of Credit dated 27.04.2017 was opened through the Corporation Bank in favour of the operational creditor and Letter of Credit along with its amendment is attached as Annexure 3 and 3A respectively.

6. The petitioner-operational creditor then issued the Commercial Invoice dated 29.04.2017 to the corporate debtor bearing No.274 for part delivery of goods and against this invoice, the goods worth of ₹16,77,132.86 were supplied and Bill of Exchange dated 29.04.2017 for a sum of ₹7,17,598.55 was issued. It was agreed that there was a period of 30 days for honouring the Letter of Credit with interest @ 13.5% of 30

days, after deducting the advance amount. The Commercial Invoice and Bill of Exchange are at Annexure 4 and 5 respectively (at page 46 to 49 of the paper book).

7. Further on 05.05.2017, a Commercial Invoice bearing No.284 was issued to the corporate debtor for delivery of the remaining goods as per the Sale Contract. The supply of material worth ₹34,44,542.86 was made and Bill of Exchange dated 05.05.2017 for ₹29,97,974.74 including interest of 30 days was raised. Copy of the Commercial Invoice and Bill of Exchange are at Annexure 6 and 7 respectively.

8. It is further stated that the invoices were sent to the corporate debtor for the material supplied, which was acknowledged by the corporate debtor without raising any objection. The corporate debtor never complained of the quality or quantity of the material supplied. In this regard, the petitioner-operational creditor has also relied upon the Tax Invoices bearing No.375, 452 and 459, which are at Annexure 8 to 8B and 9 respectively. Thereafter there was some discrepancy pointed out by the banker of the respondent-corporate debtor and when the operational creditor visited the Bank, it was informed that the Bills of Exchange were submitted by the corporate debtor after expiry of the validity period.

9. Thereafter the petitioner received a letter dated 01.09.2017 through e-mail from the respondent requesting the petitioner to co-operate with the corporate debtor till 15.09.2017 to resolve the issue with the corporate debtor's bank. Copy of the said email is at Annexure 10. Subsequent to that more e-mails were sent and a meeting was held

between the representatives of both the parties and it was assured that the dues would be released by 13.10.2017, but the corporate debtor again failed to abide by its promise. It was assured in the meeting dated 27.10.2017 between the parties that the first Bill of Exchange would be cleared by 03.11.2017 and the other by the end of November, 2017, which assurances were not fulfilled. Copy of the e-mail dated 27.10.2017 is at Annexure 11 (at page 60 of the paper book).

10. Thereafter certain more meetings and e-mail exchanges went on. Ultimately on 04.12.2017, the representative of respondent-corporate debtor sent e-mail stating its inability to clear the outstanding dues at once and requested time to clear the same on monthly basis. Some part payments were made by the corporate debtor with regard to the Commercial Invoice No.274. The part payment was earlier made on 22.11.2017. Another part payment was received on 05.01.2018 in respect of Invoice No.284. There was still outstanding ₹26,05,066.29 against the corporate debtor.

11. The petitioner in support of its claim has also filed the copy of its Ledger Account in respect of the respondent-corporate debtor for the period from 01.04.2017 to 28.02.2018 where the outstanding balance is shown to be ₹26,05,066.29 and the amount of interest is ₹3,34,242.06. Copy of the Ledger Account is at Annexure 13 (at page 62 of the paper book).

12. Thereupon the petitioner sent the demand notice to the respondent-corporate debtor in Form 3 as prescribed in Rule 5(1) of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. That notice is dated 15.01.2018, which is at Annexure 1A. The respondent sent reply dated 21.01.2018 to the demand notice, which is annexed at Annexure 1B.

13. Notice of this petition was issued to the respondent-corporate debtor to show cause as to why the petition be not admitted. The respondent has filed the written statement vide diary No.2168, dated 14.06.2018. The first objection was relating to the competency of the person, through whom, the petition was filed, but as already discussed above, this defect has since been removed.

14. With regard to the verification of the affidavit, there was some objection, but the learned counsel for the respondent submits that this objection was only a technical issue, which is not pressed.

15. In reply, the respondent-corporate debtor disputed the liability to pay the amount as demanded in the notice. It is further stated that a dispute was already existing between the parties, which has been highlighted in the reply to the statutory demand notice. It is otherwise admitted that the material was supplied by the operational creditor who was supposed to get the Letter of Credit encashed from the Banker of the corporate debtor by fulfilling the required formalities, but the operational creditor failed to do so.

16. It is also stated that the Letter of Credit was not encashed and the same has come to the rescue of the respondent, as the material valuing ₹ 25 lacs was rejected due to its poor quality and also it did not

match with the specifications mentioned in the purchase order. The remaining payment is said to have been made out of the Invoices raised.

17. Apart from this, on merits it is also stated that the statutory demand notice was not issued by the authorised representative of the petitioner.

18. We have heard the learned counsel for the parties and carefully perused the record.

19. We first deal with the issue with regard to the validity of the demand notice sent by the petitioner in Form 3 as prescribed in Rule 5 (1) of the Rules. This demand notice is issued by Ms.Sonali Thakur, Assistant Manager-Legal of the operational creditor. It was contended that there was no authority in favour of Ms.Sonali Thakur by the petitioner to send the notice. The delegation with regard to the position, which Ms.Sonali Thakur was holding as Assistant Manager-Legal in operational creditor has not been disputed. Otherwise also the operational creditor has adopted this notice and filed the instant petition to initiate the proceedings under Section 9 of the Code. So, this objection cannot be sustained.

20. With regard to the amount demanded in the notice and claimed in the instant petition, the same is supported by abundant evidence comprising of purchase orders, sales contract, invoices and ledger account including e-mails confirmation by the respondent. In the e-mail dated 01.09.2017 Annexure 10, the respondent communicated to the petitioner showing its concern and regret for not making the payment of the outstanding amount. It was stated that the default has occurred because

of unavoidable and unforeseen circumstances. The corporate debtor was working out to resolve the issue and assured that if the matter is not solved by 15th of September from the bank side, the respondent would make the payment directly in the account of the petitioner. Even subsequent to that e-mail dated 27.10.2017 at Annexure 11, the respondent categorically stated that they will clear at least first Bill of Exchange by 3rd November and the second Bill of Exchange by November end.

21. It is pertinent to mention that the respondent-corporate debtor has not placed on record its own ledger account to contradict the entries made in the ledger account relied upon by the petitioner. Even the respondent has not pleaded that it raised any dispute about the defect in the quality of the material at any time before the demand notice was sent to the corporate debtor. The principle of law on the subject is well settled as held by the Hon'ble Supreme Court of India in **Mobilox Innovation Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353 Ltd.** case in para 51 of the judgment, which reads as under:

“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application 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.”

22. In view of the above, we find that there was no pre-existing dispute between the parties in order to disentitle the operational creditor to an order of admission.

23. The petitioner being the operational creditor is not obliged to propose the name of the Resolution Professional to be appointed as the Interim Resolution Professional, but the petitioner in Part-III of the application Form, proposed the name of Mr.Arvind Kumar registered with IBBI having registration No.IBBI/IPA-001/IP-P00178/2017-18/10357 to be appointed as the Interim Resolution Professional in case the petition is admitted.

24. When this matter was listed on 12.12.2018, the written communication in Form 2 furnished by the Insolvency Professional was found defective as the complete particulars in Form 2 were not furnished. In compliance with the said order, the petitioner has filed the fresh Form 2 furnished by Mr.Arvind Kumar, registered professional with Indian Institute of Insolvency Professional of ICAI, giving the necessary particulars vide diary No.4965, dated 17.12.2018. It is declared that he is working as the Resolution Professional in five proceedings. Learned counsel for the petitioner submits that those five proceedings are pertaining to the same group of companies. He has further certified that there are no disciplinary proceedings pending against him with the Board or Indian Institute of Insolvency Professionals of ICAI of which he is a member. He has also furnished the rest of the particulars. We have perused this Form 2 which is found to be in order.

25. In view of the above, the instant petition is admitted. The matter be now listed on 21.12.2018 for passing formal order of declaring moratorium and for appointment of the Interim Resolution Professional.

Sd/-

(Pradeep R.Sethi)
Member (Technical)

Sd/-

(Justice R.P.Nagrath)
Member (Judicial)

December 18, 2018.
Ashwani