S.No.4

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSCIAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
16-02-2024 AT **10:30 AM**

CP(IB) No. 65/9/HDB/2022
u/s. 9 of IBC, 2016

IN THE MATTER OF:
Lumi Vietnam Jsc **…Operational Creditor**

VS

M/s. Hogar Controls India Pvt Ltd **…Corporate Debtor**

C O R A M:-
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

O R D E R

Orders pronounced. In the result, this company petition is admitted. The Corporate Debtor is put under CIRP as per the terms mentioned in the order, IRP appointed and Moratorium is imposed.

SD/- **SD/-**
MEMBER (T) **MEMBER (J)**

Swapna

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-I, HYDERABAD

CP(IB) No. 65/9/HDB/2022

(Under section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (AAA) Rules, 2016)

Between:

M/s. Lumi Vietnam Joint Stock Company, 38, Do Duc, Me Tri Ward, South Tu Lime District, Ha Noi City, Vietnam, Represented by its Chief Executive Officer

…Petitioner / Operational Creditor

verses

M/s Hogar Controls India Pvt. Ltd., having its Registered Office at: Office unit 1002, 10th Floor, Sandhya Techno 1, Gachibowli Road, Opp. Sunshine Hospitals, Raidurg, Hyderabad, Ranga Reddy- 500032.

…Respondent/ Corporate Debtor

Date of order: 16.02.2024

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)
Shri Charan Singh, Hon'ble Member (Technical)

Appearance:

For Applicant: Mr. D.Pavan Kumar, Ms.Nikhita Hari, Advocates for Shri Shivaramkrishnana MS, Advocate.
For Respondent: Mr. V.V.S.N.Raju, and Mr.Srikanth Rathi, Advocates

PER: BENCH

ORDER

This Company Petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 by **M/s Lumi Vietnam Joint Stock Company**, for 'short', the Operational Creditor, seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the respondent **M/s Hogar Controls India Pvt. Ltd,** for 'short' the Corporate Debtor, claiming that the Corporate Debtor *defaulted* in making payment of a sum of Rs. 4,73,79,933/- (Rupees Four Crore Seventy-Three Lakhs Seventy-Nine Thousand Nine Hundred and Thirty-Three only) which is due and payable to the Operational Creditor by the Corporate Debtor.

1) The averments in the Petition in brief are:

1.1. Lumi Vietnam Joint Stock Company (Operational Creditor) is a Joint Stock Company. The Operational Creditor is a software developer for Global Fortune Companies including Google and Apple. Operational creditor is engaged in the business of software development, production and export of software programs for Global Fortune Companies.

1.2. It is averred that on 12.10.2017, the Corporate Debtor had placed an order for delivery and handing over of Complete Source Code of Cloud Server Controller and Mobile Apps ("Software Program") with the Operational Creditor for a consideration equivalent to INR 5,38,20,053/-. It is averred that between 2018 and 2021, the Operational Creditor handed over

the Software Program along with its relevant paperwork to the Corporate Debtor and the same was accepted without any protest. Consequently, the Operational Creditor raised 5 corresponding Commercial Invoices on 17.05.2018; 04.02.2019; 30.12.2019; 13.07.2021 and 26.04.2021.

1.3. It is averred that though the Corporate Debtor employed the software into its devices, has only made a part payment of USD 30,000 equivalent to INR 22,09,923/- of the outstanding Operational Debt to the Operational Creditor till date. Thereafter, Corporate Debtor deliberately failed in making payment and in clearing the balance Outstanding Amount equivalent to INR 4,73,79,933/-. It is submitted that having reliable business relationship with the Corporate Debtor, the Operational Creditor handed over the Software Program without any payment in advance. However, the Corporate Debtor failed to make payment and evaded its payment liability.

1.4. It is averred that Operational Creditor had sent various emails dated 30.08.2021, 10.07.2021, 13.07.2021 & 19.07.2021 to the Corporate Debtor to clear the dues and the Corporate Debtor willingly admitted its liability to pay the Operational Debt to the Operational Creditor. It is averred Corporate Debtor failed to make the payment as per the revised timeline till date. Several rounds of negotiations between the Operational Creditor and Corporate Debtor can be witness in the email correspondences dated 23.02.2021, 26.04.2021, 12.05.2021 and 15.07.2021.

1.6. Further corporate debtor on 14.09.2021, sent an Email to the Operational Creditor claiming that no sum is payable towards the Software Program despite having adapted the Software into its devices and financially

gain for so long. The Corporate Debtor in order to evade its liability to pay the Operational Debt, disputed the very nature of the Software Program delivered and handed over by the Operational Creditor alleging that the Software Program is not originally developed by the Operational Creditor. It is submitted that the Corporate Debtor has done so to fetch and store the Software data for the purposing of employing it for its future use and devices without legally and financially procuring the same from the Operational Creditor.

1.7. It is averred that the invoices are the subject matter of the debt while fell due accordingly and a total amount of INR 4,73,79,933/- is in default by the Corporate Debtor. The said defaults of the amount under the defaulted invoices have taken place in between 17.05.2018 and 26.04.2021.

2) The averments in the Counter in brief are;

2.1. It is averred that the Corporate Debtor is engaged in the business of IOT and Home Automation products sales and services. It is submitted that the Former Management of the Corporate Debtor engaged the services of the Operational Creditor as supplier of source codes, knowledge transfer, training of resources etc on verbal and informal basis. There was no written agreement between the former management of the Corporate Debtor and Operational Creditor. The current management has made several efforts to formalize the agreements to streamline the system but all went in vain.

2.2. While the matter stood thus, that there was a dispute between the parties regarding the quality of the source code that was being developed and provided by the Operational Creditor. Corporate debtor has thus conducted

the audit regarding the Source code which resulted that only 6% of the code supplied was original and the rest was a derivative of open-source available on public platforms. Subsequent to the said audit and several discussions were held between the parties, the Corporate Debtor vide email dated 14.09.2021, rejected all the invoices of the Operational Creditor stating there was an unreasonable demand of the amount towards the code and the same was baseless and unsubstantiated. On 22.09.2021 the Corporate Debtor sent another notice claiming breach of the oral contract and that damages that are required to be paid by the Operational Creditor, the same was replied by the Operational Creditor and rejoinder to that was given by the Operational Creditor.

2.3. It is averred that the Corporate Debtor has given a detailed reply dated 05.10.2021 to the demand notice dated 28.09.2021. It is submitted that around the same time, parallelly there were 5 cyber-attacks on the Corporate Debtor from July to November, 2021 which led to significant loss. A deeper investigation revealed that the Operational Creditor in connivance with the former management of the Corporate Debtor has done these cyber-attacks. An FIR was lodged on 04.04.2022 against the former management, in the complaint the conspiracy hatched by the Former manager and the Operational Creditor was clearly stated for necessary action. The details of the cyber-attack were mentioned in the newspaper in Times of India dated 18.04.2022.

2.4. It is averred that the Corporate Debtor has not promised any amount to the Operational Creditor and that there were no discussions regarding materialisation of agreement. It is submitted that there was no delivery of

Software program, as soon as the current management came to know about the malafide nature of the code, the Corporate Debtor rejected all the invoices and informed that same vide e-mail dated 14.09.2021. A legal notice was also sent on 22.09.2022 claiming USC 2,000,000 as compensation for losses and damages. It is further submitted that there were no purchase orders or the acknowledgment of receipt of the said goods or services as mentioned in the 5 invoices filed by the Operational Creditor.

2.5. It is denied that no amount of USD 30,000 was paid as part payment. The current management was in process of finalization of the agreements with the Operational Creditor before being aware of the dubious nature of the software. The said amount was sent in the context of discussions for future services in good faith and not against any services provided by the Operational Creditor. It is further submitted that when all the invoices are rejected, the question of part payment/ full payment does not raise.

2.6 Thus, it is averred that the present Application is liable to be dismissed as there is pre-existing dispute as per Section 8&9 , otherwise, the respondent will suffer irreparable loss, as the invoices have been rejected due to their dubious nature and not due to the inability of the corporate debtor to pay tthem.

3) Both sides have filed written submissions reiterating their oral contentions, and also relied on the *following rulings*.

Rulings relied on by the Petitioner.

3.1 The Hon'ble NCLT in the matter of **Raghuvir Buildcon Pvt. Ltd v. Ketan Construction Limited [2020 SCC OnLine NCLT 13130]:** states at para 20 that "at a glance itself, it can be said that **a threshold or stage is to be crossed to convert a difference/disagreement into a dispute**. In other words, normally commercial/legal differences per se are not dispute **unless such differences are ascertained into a claim** on which both the parties have opposite/different views and **want to settle the same through some legal process**".

3.2 The Hon'ble NCLAT in the matter of **Aalborg CSP A/S v. Solar Atria Cleantech Pvt. Ltd. [2020 SCC OnLine NCLAT 533]:**, relying on the judgment of the Hon'ble Supreme Court in Mobilox Innovations observed that "**it is the duty of the Adjudicating Authority to see whether there is a plausible contention which requires further 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[…] **If the dispute truly exists and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application**."

Rulings relied on by the Respondent

3.3 Hon'ble Supreme Court in the matter of **Dalip Singh Vs. State of U.P. [(2010) 2 SCC 114]**, wherein it was held that "persons approaching Courts with unclean hands and concealing material facts are not entitled to the relief of equity and as such, the motivated concealment from the end of the Petitioner/Plaintiff amounts to fraud, not only on the opposite party but also on the Court".

3.4 Hon'ble NCLT Hyderabad in the matter of **M/s. Tata International Ltd. V. M/s. Trident Sugars Led (in CP(IB) No. 221/9/HDB/2022)** where is it was held as follows:

"…we are not inclined to accept the above submission of the Ld. Counsel for the petitioner since suppression of material information which is in the knowledge of the petitioner is ex facie, clear and unambiguous. Thus, petitioner's approach is unclean.

18. Here we usefully refer to the ruling of Hon'ble Supreme court of India, in re, Ramjas Foundation & Ors., supra, wherein it was held that;

"The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and Judicial forums."

3.5 Hon'ble NCLT, Hyderabad in the matter of ***Ven Infra Projects V. Srichaitanya Chloridest Pvt Ltd. (Valanties Laboratories Pvt Ltd.) (In CP(IB) No. 54/9/HDB/2020)***, held as follows:

"9. Apart from the issue with regard to the Demand Notice being in proper format, the Counsel for the Respondent raises another issue, which is with regard to the pre-existing dispute between the parties. He draws our attention to an email sent on 28.09.2019, wherein, defects were pointed out by the CD…

10. The counsel for OC submits that they have demanded the amount prior to the issuance of the said email and as a counter blast and to avoid the said payment, this mail was sent. But, absolutely no evidence with regard to the same, is placed before this Tribunal. Hence, we cannot accept the contention of the Counsel for the Petitioner that the email is sent as a counter blast for the demand made by the Petitioner. Even in the email, the pre-existing dispute was very much mentioned. Since the dispute is raised prior to the demand notice, we believe that there is a pre-existing dispute.

11. Hence, in view of the above, this application is liable to be dismissed and is accordingly dismissed."

3.6 Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited (CIVIL APPEAL NO. 9405 OF 2017)*** wherein it was held that;

> *"40.* 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."

4. In the light of the *contest* as aforementioned the points that emerge for our consideration are:

(I) Whether an 'Operational Debt' of a sum exceeding *rupees one crore,* due and payable by the respondent to the petitioner exists? *If so*, whether the respondent has *defaulted* in repayment of the same?

(II) Whether a pre-existing dispute which is *genuine,* as regards the *quality* of the product supplied exists? *If so*, whether the petition is maintainable?

5. We have heard Shri D.Pavan Kumar and Ms.G.Nikhita Hari for Shri Shivaramkrishnan, Ld. Counsels for Petitioners and Mr V.V.S.N.Raju, and with Shri Srikanth Rathi, Ld. Counsels for the respondent. Perused the record, written submissions and the case laws.

Point.1
Whether an 'Operational Debt' of a sum exceeding *rupees one crore,* due and payable by the respondent to the petitioner exists? *If so*, whether the respondent has *defaulted* in repayment of the same?

The Crux of the Submissions

6. Mr.D.Pavan Kumar and Ms Nikhita Hari, Ld. Counsels, for the petitioner, herein after referred to as 'operational creditor', submits that the operational creditor, which is into the business of development, production and export of software programs for applications and devices, has handed over the software products, *namely* '*source code',* developed by the operational creditor along with relevant documentation to the respondent, herein after referred to as 'corporate debtor' and raised invoices dated 04.02.2019, 30.12.2019, 13.07.2021 and 26.04.2021 in all for an amount of Rs.

5,38,20,053/-. Ld. Counsel further contends that, the corporate debtor accepted the said 'product' without any kind of 'demur' and also *utilised* the same, however despite multiple requests made by the operational creditor during the months between July 2021 and August 2021, only a part payment of USD 30,000/- was made on 30.07.2021, and thus, failed in discharging the full amount of the operational debt of a sum of Rs. 4,73,79,933/-.

7. According to the Ld. Counsel, the correspondence that took place between the parties herein, vide emails dated 13.07.2012, 15.07.2021 and 30.08.2021, clearly states that the respondent had never denied the supply of the 'source code' by the operational creditor, on the contrary discloses *part payment* made and the requests *for time to pay* the balance payment. Therefore, according to the Ld. Counsel, an operational debt of a sum exceeding rupees one crore due and payable by the respondent to the petitioner stands admitted clearly and categorically. However, since the said amount has not been paid, a demand notice dated 28.09.2021 in terms of section 8 of IBC, has been sent to the corporate debtor demanding payment of the outstanding

sum of Rs.4,73,79,933/-. As the terms of the said demand notice were not complied by the respondent, the present petition has been filed.

8. Mr. VVSN Raju, Ld. Counsel for the respondent, while refuting the submissions made by learned counsels for the operational creditor vehemently contended that, there are no *purchase orders or the acknowledgement of receipt of the said goods or services as mentioned in the invoice*, as such no amount much less the amount claimed as due and payable by the corporate debtor is due or payable to the Petitioner. According to the Ld. Counsel the operational creditor by merely presenting *fabricated invoices* before this Hon'ble Tribunal, is endeavering to create a concocted case. As regards the sum of rupees thirty thousand dollars paid to the operational creditor is concerned Ld. Counsel contends that, the same was paid only as advance hence cannot be treated as part payment. Ld. Counsel also submitted that, since a '*genuine pre-existing dispute'* as to the *quality of source code supplied* by the petitioner/operational creditor exists in this case, the petition is liable to be *dismissed* on this ground alone.

Our Analysis

Having heard the learned counsels for both sides we wish to state that, in the backdrop of the *firm* contention of the learned counsel for the operational creditor that, vide invoices dated 04.02.2019,30.12.2019,13.07.2021 and 26.04.2021, the operational creditor had supplied the 'source code' but the said invoices were honoured only in *part* and despite clear admission and undertaking to pay the balance sum in due course the corporate debtor breached the undertaking, which pleas are denied stoutly by the corporate debtor, we have carefully perused the, pleadings, and the *e mail* correspondence that admittedly took place between the parties herein, vide emails dated 13.07.2012, 15.07.2021 and 30.08.2021, and *found that the respondent had never denied the supply of the 'source code' by the operational creditor*. In fact, under the *email* dated 15.7.2021, the representative of the Corporate Debtor clearly stated that *"We apologise for the payment delays. We have our own challenges to overcome. We wired $30k as committed and mentioned. That shows our interest in getting back to the usual days of working together"*.

9. However, strangely, in paragraph II (b) of the counter, as well as in the written submissions filed by the corporate debtor, the corporate debtor took a virtual 'U turn', by contending that, *"there are no purchase orders or the acknowledgement of receipt of the said goods or services as mentioned in the invoice, as such no amount by the*

corporate debtor to the operational creditor is payable, it has not received the goods at all, and the plea of supply of source code is a concocted version of the operational creditor ". Needless to say, that the corporate debtor having clearly pleaded that its auditors in their report have observed *quality deficiencies* in the *'source code'* supplied by the *operational creditor* and on the basis on the said report raised the plea of *existence* of a *pre-existing dispute* as to the quality of the 'source code', it does not lie in the mouth of the corporate debtor to turn around and contend that it had *not received* the said product, as without the said product is physically available with the corporate debtor, the alleged 'audit' and the findings regarding the 'quality' of the said product cannot take be done.

10. In Union of India v N. Murugesan (2022 2 SCC 25), the English decisions on the point were cited with approval by the Supreme Court. It is important to notice that the Supreme Court has recognised it as a principle emanating out of the common law and not from the statutory text of Section 115 of the Evidence Act. This is clear from the following observations:

"A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or

disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party."

In our considered view the above ruling fully applies to the case on hand.

11. That apart, it is pertinent to note that, the other plea of the corporate debtor that the subject invoices are *fabricated* as such the question of payment under the said invoices does not even arise, is yet another false and feeble plea, in the light of the *email* correspondence referred to above, where under the corporate debtor not only *apologised* the operational creditor for the delay in payment of the amount due under the above invoices but also in unconditionally made part payment by undertaking to pay the balance amount. It is pertinent to note under the above emails, the corporate debtor has stated that it is interested in getting back to the usual days of working together.

12. As regards the part payment of the operational debt made on 13/07/2021 by the corporate debtor , the contention of the corporate debtor that, the said payment was only towards 'advance' and after the

quality deficiencies were noticed in the product *supplied* , it had *sought* for the refund of the same is concerned, in the light of the undisputed emails which we referred *supra*, we hold that the said plea is nothing but an afterthought on the part of the corporate debtor to avoid payment which is legitimately due to the operational creditor, hence we reject the same. The operational creditor also filed the record of default issued by NeSL, which certificate clearly confirms *default* on the part of the corporate debtor in repayment of the operational debt of a sum exceeding rupees one crore to the operational creditor.

13. We are therefore are *fully satisfied* that, existence of 'operational debt' of a sum exceeding rupees one crore which is due and payable by the respondent/corporate debtor to the petitioner/operational creditor and its default by the corporate debtor , has been clearly established by the operational creditor.

The point is answered accordingly.

Point2.
Whether a pre-existing dispute which is *genuine*, as regards the *quality* of the product supplied *exists*? *If so*, whether the petition is maintainable?

The Submissions

14. According to the Ld. Counsel for the corporate debtor, a genuine pre-existing dispute as the quality of the product, *namely,* the 'source code' supplied by the operational creditor, really *exists* in this case, as such the present petition is liable to be dismissed on that ground alone. In support of this plea, Ld. Counsel relied on the 'audit report' purportedly, submitted by the internal audit team of the corporate debtor (copy of which is *not filed* before us) and also on the *emails* dated 14.09.2021 and 22.09.202. Since the Respondent received the demand notice *post* its emails dated 14.09.2021 and 22.09.202, under the reply dated 05.10.2021 sent to the demand notice issued under Section8 of I&B Code, the respondent, *inter-alia*, specifically contended that that, a '*pre-existing dispute'* between the parties regarding the '*quality of source code'* that was developed and provided by the operational creditor, truly exists.

15. According to the Ld. Counsel, the operational creditor has pleaded that there are *five invoices* pending which includes a *quotation* from the operational creditor to the corporate debtor. Ld. Counsel, therefore, contends that a quotation can never 'qualify' as invoice, as such claim of the operational creditor that amount under five invoices is due is baseless. As regards the four invoices, Ld. Counsel further contended that the corporate debtor *never received any invoices and in fact the operational creditor was not able to produce a single Invoice which was attested by the corporate debtor and that the operational creditor has fabricated all these invoices.*

16. Ld. Counsel in support of the above submission relied on the following 'extract' of the written submissions of the corporate debtor.

S.No	**Date of the invoice as claimed by the OC**	**Status of the invoice**
1.	17.05.2018	Copy of the invoice not attached. Hence the same cannot be commented upon

2.	04.02.2019	The CD never received the said invoice
3.	30.12.2019	The CD never received the said invoice
4.	13.07.2021	The CD never received the said invoice
5.	26.04.2021	The items were never dispatched nor received by the CD. Therefore, the CD is not liable to make any payment against this invoice.

17. Ld. Counsel also placed reliance on the rulings.

Mobilex Innovations Private Limited v. Kirusa Software Private Limited (CIVIL APPEAL NO. 9405 OF 2017) where in, Hon'ble Supreme Court of India, has observed as follows:

> "40. 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."

Ven Infra Projects V. Srichaitanya Chloridest Pvt Ltd. (Valanties Laboratories Pvt Ltd.) (In CP(IB) No. 54/9/HDB/2020), NCLT, Hyderabad, where in it was held as follows:

> "8. Apart from the issue with regard to the Demand Notice being in proper format, the Counsel for the Respondent raises another issue, which is with regard to the pre-existing dispute between the parties. He draws our attention to an email sent on 28.09.2019, wherein, defects were pointed out by the CD…
>
> sssto the issuance of the said email and as a counter blast and to avoid the said payment, this mail was sent. But, absolutely no evidence with regard to the same, is placed before this Tribunal. Hence, we cannot accept the contention of the Counsel for the Petitioner that the email is sent as a counter blast for the demand made by the Petitioner. Even in the email, the pre-existing dispute was very much mentioned. Since the dispute is raised prior to the demand notice, we believe that there is a pre-existing dispute.
>
> 11. Hence, in view of the above, this application is liable to be dismissed and is accordingly dismissed."

18. *Per Contra,* Ld. Counsel for the operational creditor, while refuting the plea of existence of a '*genuine pre-existing dispute'* as regards the quality of 'source code' that was supplied by it under the invoices referred supra, contended, *inter alia*, that the said plea is nothing but an *afterthought, false,* and *per se, self-contradictory.* In this regard learned counsel has invited our attention to the events that took place between 11.06.2021 till 28.09.2021, i.e. from the date of issuance of reply to the date of issuance of the demand notice which are mentioned in the written submissions filed, which is extracted herein below:

Sl. No.	**Date**	**Event**	**Annexure No.**
1.	11.06.2021	Audit report was received by the Corporate Debtor	Annexure 6 of the Counter at **Page No: 141 to 154**
2.	09.07.2021	Email from CD (Mr. Vishnu Vardhan) to the OC. It states: **"We have been going through**	Main CP: Annexure A7

		internal audit, I was told there are some pending invoices for Lumi, would like to discuss long term goals and relationship between Hogar and Lumi" <u>28 days from the date of Audit Report: (i) invoices are acknowledged; (ii) long term goals and relationship is anticipated between the parties.</u>	Page No: 54
3.	10.07.2021	Email from OC to CD, seeking clearance of pending payment	Main CP Annexure A6 **Page No: 49**
4.	12.07.2021.	Email from CD to OC stating that: (a) "You will be hearing from Hogar team related to software hand over paper work and **<u>payment details</u>** in a few days" (b) "We would like to discuss **<u>future plans</u>**	Main CP **Page No: 55**

		and road map of products and solutions, **how Lumi and Hogar can collaborate and develop more technical and business relationships**, we would like to **invite you guys to US to visit us**…" 1 month from the date of Audit Report: (i) promise to clear payments is made; (ii) future plans and development of technical and business relationship is envisaged.	
5.	13.07.2021	Email from OC to CD providing a final deadline to the CD to furnish the full payment by 12:00 AM on 15.07.2021 post which the services would be stopped by OC without any notice or notifications.	Main CP Annexure A6 **Page No: 7 & 48**
6.	13.07.2021	Part-payment of 30K USD is made by the CD. 1 month, 2 days from the date of the Audit Report, Part-payment of 30K USD is made.	Acknowledged by the CD in their notice on Page ____ at Para ___.

7.	13.07.2021	An email was received from CD by OC stating reasons for delayed payment such as the COVID-19 Pandemic and entry of new investors into the company. CD states that as they have new investors in the company "***we are working with them to pay all the pending invoices***" 1 month 1 day from the date of the Audit Report: an assurance that they are working on clearing invoices.	Main CP **Page No: 57 & 58**
8.	15.07.2021	**Email from CD to OC "*apologizing for payment delays…we wired 30K as committed and mentioned*".** **1 month 4 days from the date of Audit Report: (i) acknowledgment of delay in clearing payment (ii) 30K is admitted as a part payment as committed.**	Main CP **Page No: 59**
9.	30.08.2021	Email from CD to OC blaming various	Main CP

		market factors such as COVID-19 Pandemic for lack of funds in the CD. CD claims that it shall appreciate OC's support as a "partner" and requests OC to return the 30K USD payment. CD also states that "***we can address the issue of payments for software etc. immediately after the situation improves and capital is available***" **<u>Thus, even as on 30.08.2021 – more than 2 months from the date of internal audit, CD acknowledges the pending payments.</u>**	**Page Nos: 68 & 69**
10.	30.08.2021	Email from OC to CD clarifying that services have been rendered and pending payments must be cleared. OC resends **the invoices** for the same.	Main CP Annexure A6 **Page No: 45**

11.	14.09.2021	Email from CD to OC raising various concerns with the code for the **VERY FIRST TIME** and claiming that no amount is payable by the CD. **More than 3-4 months subsequent to the audit report that gave rise to the alleged dispute, an issue is raised.**	Main CP Annexure A9 **Page Nos: 66 & 67**
12.	22.09.2021	Notice of Breach of Agreement from CD's lawyers in Vietnam seeking 30K USD and damages of 2 million USD	**Page No. 28 of the Counter**
13.	28.09.2021	OC issues demand notice to the CD under Section 8 of IBC	Main CP: Annexure A1 **Page No: 23**
14.	05.10.2021	CD issues a reply to the demand notice raising the same baseless alleged dispute	Counter Page No. 11
15.	14.10.2021	The main CP was filed by the OC	

19. According to the Ld. Counsel, the aforesaid sequence of events clearly reveal that, despite the audit report that allegedly found quality deficiencies in the source code, which report also has been made the 'basis' for the so called plea of existence of a 'pre-existing dispute', is very much available with the corporate debtor by 11th June 2021, and post this report, for three *consecutive* months the Corporate Debtor sent multiple *emails* to the Operational Creditor wherein, the corporate debtor acknowledged the 'pending invoices' and promised to pay them stating various reasons for delay in payment such as Covid-19, financial crunch etc, *but did not mention any defect in the 'source code'* and requested the Operational Creditor to continue their relationship with the Corporate Debtor.

20. Therefore, according to the Ld. Counsel, had the alleged dispute really been a 'genuine pre-existing dispute' prudence on the part of the corporate debtor require the corporate debtor to immediately raise its 'concerns' regarding the ' quality defects' in the source code as of 11th June 2021, i.e., the date of the Audit Report, rather than wait for a period of three to four months and raise the same after making part

payment and assuring balance payment in due course. Ld. Counsel also contends that, the so called defects, if really exists the same would be cited as reasons for *non-payment* and not *Covid-19* or financial difficulties and no promises to clear pending invoices would have been made by the corporate debtor in its correspondence that preceded the email dated 14.09.2021. However, the conduct of the corporate debtor, being completely contrary it is clear that the corporate debtor evidently created a 'dispute' which never existed as a pure afterthought.

21. Ld. Counsel also submitted that, the Corporate Debtor had accepted the delivery of 'source code' supplied by the operational creditor without raising any dispute or objection and also *utilised* the same. If really there are any quality issues, the Corporation Debtor would have rejected the entire materials at the time of unloading of the same.

22. Ld. Counsel also placed reliance on the following rulings.

Raghuvir Buildcon Pvt. Ltd v. Ketan Construction Limited [2020 SCC OnLine NCLT 13130]: wherein the Hon'ble NCLT states at para 20, held that;

"at a glance itself, it can be said that a threshold or stage is to be crossed to convert a difference/disagreement into a dispute. In other words, normally commercial/legal differences per se are not dispute unless such differences are

ascertained into a claim on which both the parties have opposite/different views and want to settle the same through some legal process".

Aalborg CSP A/S v. Solar Atria Cleantech Pvt. Ltd. [2020 SCC OnLine NCLAT 533], wherein the Hon'ble NCLAT, relying on the judgment of the Hon'ble Supreme Court in *Mobilox Innovations* observed that;

"it is the duty of the Adjudicating Authority to see whether there is a plausible contention which requires further 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[…] If the dispute truly exists and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Deepak Modi v. Shalfeyo Industries Pvt. Ltd [2023 SCC OnLine NCLAT 169], wherein the Hon'ble NCLAT was adjudicating a matter wherein the Corporate Debtor/Appellant had raised the defence of 'pre-existing disputes' on the ground that the product supplied was defective, the Hon'ble NCLAT observed that;

"13. […] It is true that under the provisions of Code if Adjudicating Authority is satisfied with pre-existing dispute at the time of entertaining an application filed under Section 9 of the Code there is no reason to initiate the same or admit the application. However, law is settled on the point that there must be pure pre-existing dispute. Meaning thereby that genuine pre-existing dispute must exist in rejecting an application Section 9 of the code. In the present case it is reflected from inspection report of SGB Infra Ltd. dated 16.12.2019 which is at page 147 that the Corporate Debtor was asked by the SGB Infra Ltd. to remove the flooring. This fact is itself enough to draw an inference that the Corporate Debtor had accepted the delivery of granite slabs made by the Operational Creditor without raising any dispute or objection. Otherwise the Corporation Debtor would have rejected the entire materials at the time of unloading of the same".

Our Analysis

23. Having heard the Ld. Counsels of both sides, *besides* on perusal of the record placed before us, at the outset, we wish to state that, all that we, as the adjudicating authority is required to see at this stage

is, whether the contention of the quality complaint regarding the 'source code' raised by the corporate debtor *prior* to the receipt of the demand notice from the operational creditor, is a 'plausible' contention which requires further investigation and that the same is not a 'patently' 'feeble legal argument' or an 'assertion of fact unsupported by evidence'. In carrying out this 'task', it is also important for us to *separate* the grain from the *chaff,* in order to reject a 'spurious' 'defense' which is a mere 'bluster'. However, in doing so, we should bear in mind that we need not be *satisfied* that the above defense is likely to succeed, as at this stage it is not necessary for us to examine the merits of the dispute except to the extent indicated above. Thus, in the event if it found that, a dispute *truly* exists *in fact* and the same is not *spurious*, *hypothetical* or *illusory*, we have no alternative but to reject this petition.

24. We therefore, proceed with our analysis on the basis of the above stated widely accepted and authoritative *legal frame*, coupled with the *factual matrix* of this case.

25. Indisputably, the *pre and post* sequence of events of the audit report dated 11.06.2021 until 14.09.2021, clearly state that the corporate

debtor in its *email* communications made until 14.09.2021 with the operational creditor, never raised any dispute as to the quality of the 'source code' that was supplied. The corporate debtor in fact, had made *part payment* of a sum of rupees 30000 US Dollars, *apologised* for the delay citing reasons for delayed payment such as the COVID-19 Pandemic and entry of new investors into the company and also stated that, as there are new *investors* they *are working with them to pay all the pending invoice*s. Therefore, if really the 'audit report' of 11th June 2021 had really pointed out issues relating to the 'quality' of the source code, where was the need to make part payment, apologise for the delay, assure balance payment in due course and more importantly to wait for three to four months, *i e.* until its email dated 14.09.2021 to bring to light the so called audit report and its finding on the quality of the source code?. This question conspicuously remained unanswered by the corporate debtor. Moreover, it is not the case of the corporate debtor that it had returned the product, at any stage. Hon'ble NCLAT, in *re*, Deepak Modi**,** **supra**, wherein also the Corporate Debtor/Appellant had raised the

defence of 'pre-existing disputes' on the ground that the product supplied was defective, held as below;

> "13. […] It is true that under the provisions of Code if Adjudicating Authority is satisfied with pre-existing dispute at the time of entertaining an application filed under Section 9 of the Code there is no reason to initiate the same or admit the application. However, law is settled on the point that there must be pure pre-existing dispute. Meaning thereby that genuine pre-existing dispute must exist in rejecting an application Section 9 of the code. In the present case it is reflected from inspection report of SGB Infra Ltd. dated 16.12.2019 which is at page 147 that the Corporate Debtor was asked by the SGB Infra Ltd. to remove the flooring. This fact is itself enough to draw an inference that the Corporate Debtor had accepted the delivery of granite slabs made by the Operational Creditor without raising any dispute or objection. Otherwise the Corporation Debtor would have rejected the entire materials at the time of unloading of the same".

In the case on hand also the corporate debtor accepted the 'product' without any kind of **'demur'** and also ***utilised*** the same, and also part payment. Therefore, the above ruling on facts is applicable to the case on hand with all its force.

26. Therefore, in the light of our discussion as above we are in complete agreement with the submission of the Ld. Counsel for the operational creditor that, the plea of existence of a 'pre-existing' dispute as to the 'quality' of the source code, supply of which stands established clearly

and categorically, is nothing but 'spurious' a 'feeble argument' unsupported by facts, *besides* an 'after thought'. Hence, we here by reject the plea of existence of a *pre-existing* dispute as to the quality of the source code supplied by the operational creditor to the corporate debtor.

The point is answered accordingly.

27. Therefore, in the light of our findings on the points above, we are completely satisfied that, the petitioner has established the existence of operational debt of a sum exceeding rupees one crore which is due and payable by the corporate debtor herein to the Petitioner/operational creditor, besides its *default*. We also found that the Petition is in order.

28. Hence, the Adjudicating Authority admits this Petition under Section 9 of I&B Code, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions: -

(A) Corporate Debtor, M/s Hogar Controls India Private Limited is admitted in Corporate Insolvency Resolution Process under section 9 of the Insolvency & Bankruptcy Code, 2016,

(B) The Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(C) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the

Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

(E) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(F) That the order of **moratorium** shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

(G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as

prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

(H) That this Bench hereby appoints Mr. MANJEET BUCHA**,** having Registration No. IBBI/IPA-002/IP-N00808/2019 - 2020/12551 as Interim Resolution Professional, whose contact details are:

Address: 5-9-91 93, D.No-204,02nd Floor,Shakti Sai Complex ,Beside Udai Omni Clinic,Chapel Road ,Abids ,Other,Telangana ,500001.

Ph No.9346955001.

as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

(I) Proposed IRP shall file Form-2 issued by the IBBI within three days from the date of receipt of this order. This information is also available in IBBI Website. Authorisation for Assignment is valid to 24.10.2024. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

(J) The Registry is directed to furnish certified copy of this order to the parties as per Rule 50 of the NCLT Rules, 2016.

(K) The petitioner is directed to communicate this order to the proposed Interim Resolution Professional.

(L) The petitioner is directed to pay a sum of Rs.1,00,000/- to the interim resolution professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI regulation, 2016.

(L) Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.

(M) Accordingly, this Petition is allowed. However, there is no order as to costs. In the result this company petition is admitted. No order as to Costs.

SD
Charan Singh
Member Technical

SD
Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

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