

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
MUMBAI BENCH, COURT - II**

**C.P. (IB)- 1402 (MB)/ 2019**

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

*In the matter of*

**Alumilite Architectural Ltd.**

Having its registered office at: Dhiraj Chambers, 5<sup>th</sup> Floor, Hazarimal Somani Marg, Mumbai – 400001.

**.....Operational Creditor**

Vs

**Shrikant Studios Private Limited.**

Having its Registered Office at: Shrikant Chambers - III, Ground Floor, Sion Trombay Road, Chembur, Mumbai - 400071.

**.....Corporate Debtor**

**Order delivered on:- 03.02.2023**

***Coram:***

**Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)**

**Hon'ble Member (Technical) : Mr. Shyam Babu Gautam**

***Appearances:***

For the Operational Creditor : Mr. Jehangir Jejeebhoy, Advocate

For the Corporate Debtor : Ms. Aparna Devkar, Advocate

**ORDER**

***Per :- Shyam Babu Gautam, Member Technical***

1. The present Company Petition is filed by *Alumilite Architecturals Ltd.* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Shrikant Studio Private Limited* (hereinafter called “Corporate Debtor”) alleging that the Corporate Debtor committed default in making payment to the Operational Creditor. This Petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present Petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of Principal sum of **Rs.40,69,562/-** (Rupees Forty Lakhs Sixty-Nine Thousand Five Hundred and Sixty-Two Only) together with interest of **Rs. 32,50,373/-** (Rupees Thirty-Two Lakhs Fifty Thousand Three Hundred and Seventy-Three Only) aggregating to a sum of **Rs.73,19,935/-** (Rupees Seventy-Three Lakhs Nineteen Thousand Nine Hundred and Thirty-Five Only). The date from which the debt fell due is 31.03.2016.
3. The Corporate Debtor engaged the Operational Creditor to carry out manufacturing of aluminum sections, doors, windows, frames and structural glazing etc. by issuing a work order bearing No. SSPL/SIN/SC/GW/04/157/2013 for Rs. 3,05,49,327 excluding the taxes.
4. The Operational Creditor received part payments of Rs. 2,70,25,195/- (Rupees Two Crore Seventy Lakhs Twenty-Five

Thousand One Hundred and Ninety-Five Only). The Operational Creditor had carried out additional work of Rs. 7,03,774/- (Rupees Seven Lakhs Three Thousand Seven Hundred and Seventy-Four Only) which was not certified by the Corporate Debtor.

5. The Operational Creditor filed a commercial suit before the Hon'ble Bombay High Court for the total amount of certified and uncertified work. Further a conditional Order was passed by the Hon'ble Bombay High Court granting the Corporate Debtor last chance to file their reply before a specific date on account of running bills from the Corporate Debtor for the work as certified by the Corporate Debtor.
6. The Operational Creditor sent a **Demand Notice dated 22.10.2018** calling upon the Corporate Debtor to pay an amount of Rs. 40,69,562/- including the interest on the principal amount. The Corporate Debtor filed reply to the Demand Notice dated 26.11.2018.
7. The Corporate Debtor also filed counter claim three weeks after receipt of the Demand Notice. The Operational Creditor states that the Corporate Debtor has consistently and repeatedly acknowledged its debt and liability owed to the Operational Creditor.
8. The Operational Creditor have annexed copies of statement of Bank Accounts wherein the deposits or credits are received. The

Operational Creditor has annexed invoices dated 25.08.2013 to 31.03.2016.

9. The Corporate Debtor filed a Reply to the Petition dated 01.10.2021 stating that there exists a pre-existing dispute even before the alleged statutory demand notice sent by the Operational Creditor.
10. Corporate Debtor issued a work Order dated 25.04.2013 in favour of the Operational Creditor for supply and fixing of Aluminum Glazed Windows, Curtains, walls, structural glazing etc. As time was the essence of the contract the work was to be completed within 4 months i.e. on 28.08.2013. further as per clause 14 of the Works Contract, the Corporate Debtor was entitled to claim liquidated damages in the event of default or delay by the Operational Creditor.
11. The Corporate Debtor paid an advance of Rs. 15,27,466/- on 08.05.2013 and Rs. 15,27,466 on July, 2013 as advance towards shop drawings. The Operational Creditor failed to execute the work within the prescribed limit and hence extension was granted by the Corporate Debtor up to 31.03.2014 without imposing liquidated damages. The default by the Operational Creditor was recorded in letters dated 12.04.2014 and 21.04.2014 while responding to the Operational Creditor's demand for payment of Rs. 7,00,000/-.
12. As the Operational Creditor failed to execute the work within time, the Corporate Debtor was forced to terminate the work Order vide letter dated 26.08.2015. The said letter mentioned the

irregularities committed by the Operational Creditor in undertaking the work. Further, vide an email dated 02.09.2015, the Operational Creditor did not accept the termination of the contract and mentioned that vide email dated 25.08.2015 the Operational Creditor had sought time to allow the completion of the work on 15.10.2015 and also requested to grant 2 3 more days to arrange for more contractors so the incomplete work could be completed.

13. Accordingly, a fresh work Order was issued on 05.12.2015 for a period of 10 days and the same also provided for Arbitration as a dispute resolution mechanism. The said letter also mentioned clause of liquidated damages in the event when the Operational Creditor failed to complete the work. The Corporate Debtor also addressed a letter dated 23.02.2016 placing on record that in the event the Operational Creditor failed to complete the work within 2 weeks, the Operational Creditor will not demand any payment on account of work, till completion of the work. The contents of the said letter was accepted by the Operational Creditor and was never disputed.

14. Further, on 31.03.2016, the R.A. bill was certified which also recorded that advance of Rs. 11,00,000/- was paid and after adjustment total amount payable to the Operational Creditor was Rs. 21,95,790/-. Further, vide reply dated 30.06.2016, the claim of the Operational Creditor was disputed by the Corporate Debtor and clarified that due to delay in execution of the work by the Operational Debtor, the Corporate Debtor suffered losses and was entitled to liquidated damages of Rs. 76,21,445/- along

with interest @ 18%. In the said letter it was also clarified that an advance of Rs. 11 Lakh was already paid. As the Operational Creditor has failed to complete the work, question of final payment does not arise. In the certified bill dated 31.03.2016, the amount payable was Rs. 32,95,790/- but since an advance of Rs. 11 Lakh was paid and also the Corporate Debtor was entitled to liquidated damages, it is the Operational Creditor who owes Rs. 54,25,655/-.

15. There exist an pre-existing dispute between the parties with respect to the amount as well as services as per section 6 (a) and (b) of the Code.
16. Further, the Operational Creditor has filed Commercial suit No. 232/2016 at the Hon'ble High Court Bombay, for claim of Rs. 1,38,58,199/- including interest claim @24% i.e. 38,96,203/- arising out of the Work Order dated 25.04.2013. during the pendency of the suit, the Operational Creditor addressed Demand Notice dated 22.10.2018, received on 28.11.2018 without annexing the invoices demanding payment of Rs. 40,69,562/- with interest @ 18% p.a. amounting to Rs. 32,50,373/- as on 30.09.2018 and future interest @ 18% p.a. from 1.10.2018 till payment under the same work order i.e. 25.04.2013. Further, on 22.11.2018 Corporate Debtor filed Written Statement to the suit in High Court and also a counter claim against the Operational Creditor for claim of Rs. 54,87,333/- with interest @ 18% compounded monthly from 1.07.2016 till date of realization. On 26.11.2018, the Corporate Debtor replied to the demand notice and raised the objections

that the Operational Creditor has wrongly addressed the demand notice as there already a pre-disputing dispute existing vide Commercial suit No. 232/2016. The Corporate Debtor also pointed out that the demand notice sent was defective as the same was without invoices.

17. The Hon'ble High Court of Bombay dismissed the Commercial Suit for default on 04.01.2019. Further, the Operational Creditor filed Notice of Motion to restore the suit. The Operational Creditor filed proceedings in this Tribunal without disclosing the fact that restoration Application was filed by the Operational Creditor and the same was allowed on 15.02.2021 and the suit was restored.
18. The Operational Creditor on one hand attempted to restore the dispute in the High Court arising out of the same work Orders and R.A. bill dated 31.03.2016 and also filed the present Petition for payment against the same work order after delay of four months. The Operational Creditor thus has filed the Petition under the code only to put the Corporate Debtor through stress and the Petition is ought to be dismissed as the same has been initiated as recovery proceedings.
19. The Corporate Debtor states that the Operational Creditor initiated Insolvency proceedings during the pendency of the Commercial Suit No. 232 of 2017 with the same cause of action causing forum shopping and treating Insolvency proceedings as recovery proceedings.

20. The Operational Creditor has also stated that the Demand Notice sent by the Operational Creditor was defective as there were no invoices annexed.
21. The Corporate Debtor submits that the claim is time barred as the invoices under which the amounts are claimed date from 2012. The dispute regarding the amounts and services are pending since 2014. Also, the invoices annexed to the Petition are not certified and hence cannot be relied.
22. Corporate Debtor disputed the claim of the Operational Creditor with respect to the amount as well as services. The pre-existing dispute between the parties has been existing since 2014 and hence the petition is liable to be dismissed.
23. The Operational Creditor filed its rejoinder and denied the allegations as raised by the Corporate Debtor. the Operational Creditor had finished the work undertaken and had also received work certificate from the Corporate Debtor duly certifying the completion of the work. The Operational Creditor had raised tax invoices between 25.08.2013 and 31.03.2016 after obtaining work certification for a sum of Rs. 3,10,94,757/- from the Corporate Debtor. However, till 31.03.2016 the Operational Creditor had received only Rs. 2,70,25,195/- from the Corporate Debtor and Rs. 40,69,562/- remains unpaid by the Corporate Debtor.
24. The Operational Creditor denies of there being an pre-existing dispute between the parties even before the demand notice. The question of pre-existing dispute prior to the issuance of the

demand notice does not arise. The invoices raised by the Operational Creditor with respect to the work order have been certified by the Corporate Debtor. on 19.12.2016 the Operational Creditor filed suit against the Corporate Debtor for recovery of the outstanding dues before Hon'ble High Court at Bombay which was admittedly served upon the Corporate Debtor on 01.11.2018. Subsequently, the Corporate Debtor chose to file its Written Submissions and Counter Claim in the suit on 22.11.2018 and copy of the same was served to the Operational Creditor on 26.11.2018. Further, the Corporate Debtor on 26.11.2018 submitted its reply to the demand notice dated 22.10.2018. Thus the Operational Creditor had not only filed the suit but also issued Demand Notice dated 22.10.2018 to the Corporate Debtor prior to the filing of the Written Statement and Counter claim in the suit filed by the Corporate Debtor. hence, the question of pre-existing dispute does not arise. Also the Corporate Debtor did not initiate any proceedings in support of their allegation of unsatisfactory work or incomplete performance prior to the issuance of the demand notice and hence the contention of the pre-existing dispute is an afterthought and devoid of any merits.

25. The Operational Creditor repeatedly requested the Corporate Debtor to clear the outstanding dues. Additionally the Corporate Debtor issued fresh contract in favour of the Operational Creditor for additional work in December, 2015 and also mutually extended the time for completion of work. Hence, the contention of the Corporate Debtor that the Operational Creditor did not executed the work in prescribed

time post 30.04.2014 subject to imposition of liquidated damages is devoid of any merit. The delay in completion of the work was on account of incessant delay in clearing of the outstanding dues by the Corporate Debtor.

### **FINDINGS**

26. We have heard the submissions of the Counsel appearing for the Operational Creditor and Counsel appearing for the Corporate Debtor. On perusal of the Petition and documents annexed, it is evident that the issue for consideration before us is whether there exists a pre-existing dispute between the parties.

27. To examine this issue, we have perused the correspondences exchanged between the parties. We have also perused the clauses of the Work Order dated 25.04.2013. the work order specifically mentions the terms and conditions of the duration of completion of the work, in case of non-completion of the work within the prescribed time, liquidated damages to be claimed by the Corporate Debtor. Further, our attention has been drawn to the letter dated 12.04.2014 wherein it is seen that dispute had been raised by the Corporate Debtor regarding the failure on the part of the Operational Creditor to complete the work within the stipulated time period. The said letter also mentioned about the liquidated damages the Corporate Debtor are liable to claim from the Operational Creditor in accordance with clause 14 of the work order.

28. Further we have also perused the reply of the demand notice by the Corporate Debtor wherein it states that the Corporate

Debtor has filed written statement in the commercial suit 232 of 2017 in the Hon'ble High Court of Bombay denying the claim as raised by the Operational Creditor. Hence it is seen that the Operational Creditor has already filed proceedings in the civil court for the same cause of action. This clearly shows that there exists a dispute between the parties.

29. Reference is hereby made to the Order passed by Hon'ble Supreme Court in "*Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*"

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 defense which is mere bluster. However, in doing so,

the Court does not need to be satisfied that the defense 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.

45. “ Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.

30. Hence, in view of the above we are of the opinion that there exists a pre-existing dispute between the parties and the above **Company Petition 1402 of 2019** is hereby dismissed as disposed.

Sd/-

**SHYAM BABU GAUTAM**  
**(MEMBER TECHNICAL)**

Sd/-

**JUSTICE P. N. DESHMUKH**  
**(MEMBER JUDICIAL)**