# IN THE NATIONAL COMPANY LAW TRIBUNAL
# NEW DELHI BENCH-IV

**Company Petition No. (IB)- 907/(ND)/2020**
**&**
**I.A.2289/(ND)/2022**
**IN**
**C.P.(I.B.)/907/(ND)/2020**

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

**In the matter of:**

M/s. Melange Systems Private Limited

.... Operational Creditor

**Vs.**

M/s. Smartering Infratech Private Limited
(Formerly known as M/s. Palmohan Electronics Private Limited)

.... Corporate Debtor

**CORAM:**

**SH. DHARMINDER SINGH, HON'BLE MEMBER (J)**

**DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)**

**Order Delivered on: 29.09.2022**

**ORDER**

**PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)**

The instant petition was filed by M/s. Melange Systems Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') incorporated under the provisions of the erstwhile Companies Act, 1956 and having CIN: U72200KA2000PTC027922 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate



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Insolvency Resolution Process in respect of M/s. Smartering Infratech Private Limited, formerly known as M/s. Palmohan Electronics Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor').

2. The Respondent Company M/s. Smartering Infratech Private Limited having CIN: U32109DL2003PTC121038 incorporated under the provisions of the provisions of the Companies Act, 1956 having its registered office situated at 15A/5, W E A Karol Bagh, New Delhi – 110005. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. The brief facts of the case leading to the filing of this petition as averred by the applicant are as follows:

   a. The applicant submits that the applicant is a Micro Small and Medium Enterprise with an emphasis on Internet of Things ('IoT') offering low cost, low power wireless networking modules and complimentary solutions, remote monitoring of machines and devices etc. The applicant further submits that applicant has supplied RF modules to the corporate debtor and M/s. PME Infratech Private Limited one of its group companies since the year 2013.
   b. The applicant submits that the corporate debtor was awarded tender by Maharashtra State Electricity Distribution Company Limited pursuant to which the corporate debtor raised several purchase orders on the applicant for the supply of RF Modules since 2013.
   c. The applicant further submits that the corporate debtor vide email dated 31.10.2017, instructed the applicant to raise invoices and dispatch materials to PME Infratech instead of the corporate debtor and therefore, the liability of the corporate debtor and PME Infratech is joint and several in view of the instructions given by the corporate debtor.



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d. The applicant submits that the corporate debtor and applicant had entered into a business arrangement pursuant to which an Escrow Account Agreement was entered into with IDM=BI Bank as Escrow Agent on 19.12.2018, wherein it was specifically agreed that 30% of the amount received from MSEDL is to be transferred into the account of the operational creditor and rest to the account of the corporate debtor.

e. The applicant submits that inspite of the said arrangement no payment has been received by the applicant and the last payment made by the corporate debtor to the applicant is on 02.08.2019, which had been adjusted the pending invoices/bills up to the month of October, 2017.

f. The applicant further submits that neither the corporate debtor nor the PME Infratech have made any payments against the invoices raised by the applicant which include the applicable taxes since November 2017 and December 2018 respectively till date.

g. The applicant submits that there are 53 nos. of invoices of various dates due for payment from both the corporate debtor and PME Infratech payable to the applicant. The applicant adds that amongst the total 53 invoices, 19 invoices amounting Rs. 1,57,20,837/- are raised on the corporate debtor.

h. The applicant submits that the applicant has already paid Rs.23,98,094/- towards the Goods and Services Tax('GST') on all outstanding invoices pertaining to the corporate debtor. The applicant adds that the corporate debtor would have taken input credit, against the said payment made by the applicant to the GST authorities.

i. The applicant further submits that the corporate debtor is yet to provide 'C' Form to the applicant against the supplies issued by the applicant and the same has been admitted by the corporate debtor in its letter dated 30.07.2019. The applicant adds that the applicant is yet to receive the 'C' Forms from the corporate debtor for the total invoice value of Rs.11,27,88,946/- for the period between 2015 to 2018.

j. The applicant further submits that the applicant vide email dated 16.06.2020 had informed the corporate debtor that Commercial Tax Department, Government of Karnataka has now issued a notice seeking Rs.53,53,787/- as arrears for the assessment year 2015-2016.The applicant adds that the corporate debtor in response of the email dated 16.06.2020 intimated the applicant that corporate debtor require another three months to provide the 'C' Form against the supplies made by the applicant.

k. The applicant submits that the applicant sent continuous reminders to the corporate debtor vide telephone, email, whatsapp messages and even personal meetings with the corporate debtor but all are in vain and despite having no dispute with regard to outstanding invoices, the corporate debtor failed to make payment of outstanding invoices.

l. The applicant further submits that the applicant had issued a Demand Notice to the corporate debtor on 28.12.2019 demanding payment of the outstanding amount due inclusive of interest amounting Rs.4,27,48,927/- to the corporate debtor. The applicant adds that the corporate debtor neither had made any payment nor had it replied to the said demand notice.

m. The applicant had provided the following documents on record to prove the claim:

    i. Copy of the Escrow Agreement with the applicant, corporate debtor and IDBI Bank.
    ii. Statement showing the details of outstanding invoices/bills of the Corporate Debtor and PME Infratech against the purchase orders.
    iii. Copy of the 19 invoices raised by the applicant to the corporate debtor.
    iv. Statement of GST paid by the operational creditor against the outstanding invoices raised towards the goods supplied to the corporate debtor.
    v. Statement showing the details of the outstanding Form 'C' receivable from corporate debtor.
    vi. Copy of the emails/ correspondence between the operational creditor and corporate debtor.
    vii. Copy of the Demand Notice dated 28.12.2019 sent to the corporate debtor.

4. The corporate debtor had filed its reply and the averments of the corporate debtor in the reply are stated in brief as below:-

    a. The corporate debtor submits that as per the books of accounts of the corporate debtor, the total amount of unpaid invoices towards the applicant stand only at Rs.78,16,362./- as on the date of the reply, which has also not become due to be paid and is to be adjusted against various penalties incurred on account of defective goods supplied by the applicant. The details of inconsistency in the principal amount claimed by the applicant is represented in tabular form overleaf:-

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| | | |
|---|---|---|
| | **Discrepancies in Melange Ledger Account** | |
| | | *(Amount in Rupees)* |
| | Discrepencies Details as below: | |
| 1 | Excess Amount being claimed on supply of modules for R&D and integration purpose 2014-15 onwards. | 969,389.00 |
| 2 | Discrepancy in Amount per Petition (Pg-80) & Statement of Account receivable (Pg-133) | 1,440,561.00 |
| 3 | Invoices claimed in the statement but no deliveries/supplies received:<br>No Material/invoice received against Inv. No. 233 dated 07-Oct-2014 at Page No. 134 = 928,175/-<br>No Material/invoice received against Inv. No. 039 dated 27-Apr-2015 at Page No. 135 = 12,18,645/- | 2,146,820.00 |
| 4 | Payment made by Palmohan but not credited by Melange dated 20-Sep-2018. | 658,440.00 |
| 5 | Late Delivery Penalty as per PO terms<br>(0.5% per week, subject to maximum of 5%) | 2,316,729.00 |
| 6 | Recoverable Expenses done on behalf of Melange for Implementation of Pilot project at PSPCL, Patiala-Punjab, as below<br>Meter Cost 125 Nos Single Phase Meters and Meter Enclosures @970x125=121,250/-<br>Meter Cost 25 Nos Three Phase Meters and Meter Enclosures @ 2100x25= 52,500/-<br>Meters Installation Cost & consumables @210x150 = 31,500/-<br>Freight Charges Delhi to Patiala @ Rs. 14,500/-<br>Air Tickets/Hotels/Lodging etc. of Melange Staff (Bangalore-Patiala) 3 trips = 70,488/- | 290,238.00 |
| 7 | Debit notes issued towards freight charges and faulty modules 2014-15 onwards. | 81,698.00 |
| | **Total of excess amount being claimed by Melange:** | 7,904,475.00 |

b. The corporate debtor submits that the applicant had supplied modules with substantial and recurring technical defects, leading to delays in delivery of the electricity meters with RF communication capability to MSEDCL, consequent to which penalties were imposed by MSEDCL on the corporate debtor. The corporate debtor adds that the penalties are to be deducted from the amount due to the applicant.

c. The corporate debtor submits that the applicant had filed the present Petition before the Hon'ble NCLT on July 30, 2020 after sending demand notice u/s. 8 of the Code,2016 on December 28, 2019, whereas, the applicant has also filed an application on December 04, 2019 for recovery of INR 2,18,04,151/- along with interest before the Micro and Small Enterprises Facilitation Council, Bengaluru (constituted under Section 21 of the MSMED Act). The corporate debtor adds that this constitutes a pre-existing dispute between the parties with regard to this amount.

d. The corporate debtor submits that there was a mutual understanding between the applicant and the corporate debtor that the applicant's invoices were to be paid only after payments were received from Maharashtra State Electricity Distribution

Company Limited. The corporate debtor further submits that since MSEDCL is in financial stress, release of the payments to the corporate debtor had been delayed and therefore the applicant is not entitled to payment of its outstanding invoices.

e. The corporate debtor further submits that the term 'debt' under the Code, 2016 does not include interest on the operational debt unless the parties specifically agreed for a rate of interest to be payable on any delayed payment and therefore the claim on account if interest on unpaid invoices is not sustainable since, the parties had never agreed on levy of any interest. To support its contention, the corporate debtor relied **on the citations Vitson Steel Corp Pvt. Ltd. v. Capacit'e Infraprojects Ltd. 1579/MB/C-IV/2019, order dated April 28, 2020, (Krishna Enterprises v. Gammon India Ltd., 2018 SCC OnLine NCLAT 360, (27.07.2018), M/s Wanbury Ltd vs M/s Panacea Biotech ltd., (18.04.2017) NCLT Chandigarh**

f. The corporate debtor submits that the applicant claim for liability on account of non-delivery of C-Forms is not maintainable as the applicant liability has not crystalized and is still a contingent liability. The corporate debtor further submits that the for the amount for which the notice has been issued by the Karnataka Sales Tax authorities, it cannot be ascertained that the tax liability has been raised on account of sales to the corporate debtor and not to any other customer of the applicant. The corporate debtor adds that the there was no agreement between the parties that the corporate debtor will be liable to pay differential tax in case of delay in delivery of C-Forms.

g. The corporate debtor further submits that even otherwise, the aforesaid outstanding amount of Rs.78,16,362/- under unpaid invoices (not due to be paid and to be adjusted for penalties), does not meet the threshold of INR 1 crore for admitting a petition for insolvency in terms of Section 4 of the Code, 2016 read with Notification S.O. 1205 (E), dated March 23, 2020.

5. The applicant filed the rejoinder to the reply submitted by the respondent corporate debtor. The submissions of the applicant in the rejoinder are stated herein in brief:-

a. The applicant submits that as on 01.04.2017, there was unpaid debt amount of Rs.2,68,47,308/- from the corporate debtor and total invoices amount raised from April, 2017 to March, 2018 was Rs.4,85,88,438/- and out of the total outstanding of Rs.





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7,54,35,746/- total receipt of Rs.5,14,71,602/- was accounted and adjusted from the pending invoices. The applicant further submits that thereafter only one payment of Rs.29,52,740/- has been received by the applicant on 02.08.2019.

b. The applicant submits that the corporate debtor was aware that the applicant was registered under MSME Act as a Micro Enterprises and therefore the corporate debtor was bound to follow the mandate as laid down in sub section (i) to (v) of Section 22 of the MSME Act.

c. The applicant submits that there was no mutual understanding between the applicant and the corporate debtor that payments will be made to the applicant only after the payments were received from MSEDCL. The applicant adds that there was no back to back payments arrangement between the parties

d. The applicant submits that the RF modules supplied by the applicant have always undergone proper quality checks and there was never any complaint from the corporate debtor with respect to the quality of the products supplied. The applicant further submits that the corporate debtor had only correspond with the applicant requesting clarifications or assistance with respect to the issues such as wrong PAN ID, Base Computer Systems (BCS)leap year problem, job creation issues in BCS, data and range problem which were thoroughly followed up and resolved immediately by the applicant. The applicant adds that the Base Computer System (BCS) software supplied by the applicant is free of cost as complimentary service, therefore the applicant cannot be held liable for any difficulties faced by the corporate debtor as the applicant was not obliged to provide support in respect of BCS software.

6. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply, rejoinder and written submissions filed by the parties. The relevant documents annexed with the respective submissions have been examined in detail.

7. The corporate debtor had filed an application i.e., I.A./2289/ND/2022 for placing on record the additional documents. The said additional documents are taken on record and were meticulously perused by this

Adjudicating Authority. Accordingly, the interlocutory application **i.e., I.A./2289/ND/2022 stands allowed.**

8. As regard to the corporate debtor's contention that the claim amount does not meet the threshold limit of Rs.1 Crore as provided under Section 4 of the Code, 2016 read with notification No. S.O 1205 (E) dated 24.3.2020 to initiate the CIRP against the corporate debtor, we observe that the applicant in Part IV of Form-5 of the petition had claimed an outstanding operational debt amounting Rs.4,27,48,927/- including interest. The bifurcation of the outstanding operational debt claimed by the applicant is as below:-

| S.No. | Particulars | Amount |
|---|---|---|
| 1. | Principal Outstanding Amount | 1,57,20,837/- |
| 2. | Interest charged from the due date 14/12/2017 up to 28/12/2019 [The interest as notified by the RBI for the relevant period are at the rate of 19.50%, 18.75% &18% respectively] | 31,51,331/- |
| 3. | C Forms Receivables | 1,38,23,748/- |
| 4. | Interest charged from 01.04.2015 up to 20.06.2017 @ 18% p.a. | 1,00,53,011 |
| | **Total** | **4,27,48,927/-** |

9. From the perusal of Part IV of Form 5 of the petition, we are of the view that there are mainly two issues to be determined by this Adjudicating Authority, to ascertain whether the quantum of debt qualified the test of pecuniary threshold limit as envisaged under Section 4 of the Code,, 2016 which are as follow:-

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**Issues:-**

1. Whether claim of recovery of difference between concessional payment under C-Forms and payment of Sales Tax due to reason that Form C was not supplied and interest thereon falls under the definition of 'operational debt' as defined under Section 5(21) of the Code, 2016?

2. Whether the interest on delayed payment forms part of the operational debt as defined under Section 5(21) of the Code, 2016?

10. As regard to the Issue 1, we are of the inferred view that the proceedings under the Insolvency and Bankruptcy Code, 2016 are not recovery proceedings and the claim of the applicant against the corporate debtor regarding the pending Form C and interest thereon will not clearly fall under the definition of operational debt. However, it is open for the applicant to go for other remedies but remedy under Code, 2016 will not be allowed. We are further strengthened by the Hon'ble NCLAT Judgement dated 03.03.2022 in **Transit Geo System Integrators Pvt. Ltd. Vs. Stahl Tecniks Pvt. Ltd. – NCLAT New Delhi [ Comp. App. (AT) (Ins.) No. 106 of 2022**] wherein Hon'ble NCLAT observed that if the Appellant has any claim against the Corporate Debtor regarding sales tax dues, it is open for them to take such proceeding as may be permissible but present was not a case where Section 9 proceedings ought to have been initiated.

11. As regard to the Issue 2, we observe that the applicant being a Micro enterprises is claiming interest on the delayed payment under the provisions of Section 15 of the MSMED Act, 2006. However, the applicant had not mentioned its status being a Micro unit, neither in the invoices raised by the applicant and nor in the purchase orders. Further, the applicant had not brought on record any correspondence or Form MSME-1 filed by the corporate debtor which may evidence that the corporate debtor was aware of the status of the applicant being Micro unit. It is pertinent to note that, it is a settled proposition of law that if interest on

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delayed payment is a part of the agreement between the parties, it is considered to be a part of the Operational Debt.

12. At this juncture , it is relevant to refer the citation in **Pawan Enterprises v. Gammon India,[Hon'ble NCLAT in in para. 4 of its Judgement dated 27th July 2018 in Company Appeal No.148 of 2018]** has held that "*If in terms of any agreement interest is payable to the Operational or Financial Creditor then the debt will include interest*"; in case **Prashat Agarwal v. Vikash Parasrampuria,[Company Appeal (AT) (Ins) No. 690 of 2022, judgement dated 15.07.2022],** Hon'ble NCLAT observed that "*it is clear from the facts that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself.*"

13. Thus, only mere a statement of the applicant that the corporate debtor was aware of the status of applicant being micro unit and therefore, the applicant is entitled to interest on delayed payment as per provisions of MSMED Act, 2016 will not suffice the requirement unless duly supported and corroborated by the records to prove that the corporate debtor was aware of the Applicant's status being MSME unit and interest on delayed payment was duly accounted by the corporate debtor and by the applicant in its financial accounts in compliance of the accounting standards and Schedule III of the Companies Act, 2013..

14. As regard to the outstanding principal amount of Rs.1,57,20,837/-, on one hand it is the contention of the applicant that 19 invoices issued in the name of the corporate debtor by the applicant are pending, however, on the other hand, it is the contention of the corporate debtor that the principal amount claimed by the applicant is inconsistent and only Rs.78,16,362/- were outstanding and the same has not become due and payable and to be adjusted against various penalties incurred by the corporate debtor on account of defective goods.



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15. On a perusal of the contentions of the corporate debtor, we are of the considered view that the outstanding principal amount adjusted by the corporate debtor on account of delay, deficient products, technical defects in Modules and non-supply by the applicant is arbitrary in nature and is only an afterthought of the corporate debtor, to give the color of pre-existing dispute. The corporate debtor failed to bring on record any correspondence which evidence that the outstanding dues were adjusted against the penalties and losses caused to the corporate debtor or to delivery against some of the invoices claimed by the applicant to be outstanding. Moreover, as regard to the payment of Rs.6,58,440/- made by the corporate debtor to the applicant, the NSIC statement relied by the corporate debtor only shows 'Supplier Payment Made' and does not disclose the name of the supplier to whom payment is made.

16. Accordingly, in view of the aforesaid discussion and observations, the interest on delayed payment amounting Rs.1,51,331/- and Form C and interest thereon amounting Rs.1,38,23,748 and Rs.1,00,53,011 respectively as claimed by the applicant in Part-IV of Form-5 cannot be considered to come within the preview of the operational debt as defined in Section 5(21) of the Code, 2016. Furthermore, this Adjudicating Authority is not inclined to indulge in exercise of determining the exact quantum of debt as the determination of exact quantum of debt does not fall for consideration before the Adjudicating Authority at the stage of 'admission' of the Application under Section 9 of the Code. The only requirement is that the minimum outstanding debt should be more than the pecuniary threshold limit provided under Section 4 of the Code, 2016. Consequently, in view of the reasons stated supra, we are of the earnest view that the outstanding principal amount as claimed by the applicant is above the pecuniary threshold limit of Rs.1 crore as envisaged under Section 4 of the Code 2016 read with notification No. S.O 1205 (E) dated 24.3.2020 as the instant petition is filed on 31.07.2020.

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17. As regard to corporate debtor's contention of the existence of the dispute between the parties, we find it necessary to appreciate and discuss the nature of dispute, to discuss the provision of law including the expression 'dispute' as defined and inclusive definition as could be inferred from Section 5(6) of the Code, 2016 which is as under:-

***"Section 5(6) of the Code, 2016:-***

*5(6) "dispute" includes a suit or arbitration proceedings relating to–*
*(a) the existence of the amount of debt;*
*(b) the quality of goods or service; or*
*(c) the breach of a representation or warranty;"*

18. Therefore, on a perusal of the term "dispute", it can be drawn that the dispute should not be a patently weak legal argument or an assertion of fact but must be well supported by evidence on record. The jurisprudence regarding the pre-existing dispute is settled in cantena of judgments that mere mentioning in the notice or reply that the dispute is in existence between the parties, in relation of the impugned debt is not sufficient. The dispute should be pre-existing i.e., prior to the receipt of the demand notice, which fact the corporate debtor fails to establish in the present case.

19. As far as the corporate debtor's contention regarding the e mail trail dated July 15, 2019, June 21, 2019 and Aug 1,2019, which were exchanged between the corporate debtor and applicant is concerned, we observe that the same were related to the technical clarifications and assistance required by the corporate debtor and we find that no specific correspondence was exchanged between the parties regarding the technical defects in the modules supplied by the applicant and the correspondence relied are only related to the clarifications or assistance with respect to the issues such as wrong PAN ID, data and range problem, which would have been resolved by the applicant as the corporate debtor continue to take the supply from the applicant and hence the corporate debtor is now estoppped from raising the plea of existence of dispute.



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20. As regard to the corporate debtor's contention that the applicant had filed case before the Micro and Small Enterprises Facilitation Council, Bengaluru on December 04, 2019 for recovery of INR 2,18,04,151/- along with interest and that will constitute as pre-existing dispute, we observe that the Hon'ble MSEFC, Bengaluru vide its order dated 13.07.2021 in Case No. 213/2019 filed by applicant against respondent had disposed the case with the following observation:-

> *"During the MSEFC hearing held on 01.07.2021, petitioner was present. Notice issue by this authority was returned said addressee nort there. Council decided to disposed the case as closed at this stage itself. Therefore the case filed before MSEFC is closed."*

21. Thus, adverting to the facts of the present case and the above observations, we observe that there is no pre-existence of dispute between the parties before the issuance of demand notice and further the MSEFC, Bengaluru had neither referred the matter to the arbitration nor any observation with regard to the existence of dispute between the parties is recorded by MSEFC, therefore, mere filing of reference before MSEFC won't constitute as pre-existing dispute.

22. At this juncture, it is relevant to refer the Hon'ble Supreme Court's judgement in **M/s. Innoventive Industries Limited v. ICICI Bank & Anr. [Civil Appeal No.s 8337-8338 of 2017]** wherein in para 29 it was held that:-

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

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23. Therefore, considering the above said factors and bearing in mind the principles laid down in the cases mentioned above the contention of the corporate debtor that there was a pre-existing dispute between the parties regarding deficient products, technical defects in modules, non-supply of goods by the applicant or filing of reference before MSEFC is found devoid of any merit. Consequently, the corporate debtor not at all succeeded in proving the existence of dispute between the parties regarding the quality of goods supplied by the applicant or the existence of the amount of debt whereas the corporate debtor committed default by not making payment of outstanding dues along with interest if any, to the operational creditor even after receiving demand notice under section 8 of the Code, 2016.

24. We are of the considered opinion that the corporate debtor had failed to raise any plausible contention and the pre-existing dispute attempted to be raised by the corporate debtor is a feeble one, unsupported by any evidence, is a moonshine and nothing else. In this regard, the reliance cis placed on the citation **Mobilox Innovations Pvt Ltd V. Kirusa Software Pvt Ltd, C.A. No.9405/2017 decided on 21/09/2017** at paragraph 25 it is observed as under:

*"Adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
*(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)*
*(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
*(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.



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25. In view of the foregoing averments and the discussions made, we are of the considered view that operational debt above the threshold limit of Rs. 1 Crore was due and there was default on the part of the corporate debtor in pursuance of invoices raised on behalf of the applicant. Further, keeping in view all the aforenoted reasons, this Adjudicating Authority is satisfied that there is an existence of 'debt' above the pecuniary threshold limit and 'default' as defined under the Code, 2016.

26. Thus the present petition **(IB)-)907/(ND)/2020** filed by the applicant under Section 9 of the Code, 2016 ***stands* admitted** in terms of Section 9(5) of the Code and **CIRP is *hereby ordered to be initiated against the Corporate Debtor i.e., M/s. Smartering Infratech Private Limited.***

27. The applicant has not proposed the name of an IRP, therefore, this bench appoints Mr. Prassan Navin Kumar Sinha, as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-002/IP-N01197/2021-2022/13971 and email id – csprassan@gmail.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016, AFA and disclosures be made as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 within a period of 3 days from the pronouncement of the order.

28. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Prassan Navin Kumar Sinha to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful



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shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor

29. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

"(a)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;
(b)Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
(c)Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
(d)The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor."
(e)The IB Code 2016 also prohibits *Suspension or termination of any 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, 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."*

30. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.



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31. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing a appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

32. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

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**(DR.BINOD KUMAR SINHA)**
**MEMBER (T)**

SD/-

**(DHARMINDER SINGH)**
**MEMBER (J)**