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

CP (IB) 3977/MB/C-II/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

Mohite Infraprojects Private Limited
[CIN: U45202MH2009PTC197627]
201, Rajas Residency, Near Umbreshwar Sainath Madir, Panth Nagar Ghatkopar (East) – 400075.

… Operational Creditor/Applicant

Versus

Polo Queen Industrial and Fintech Limited
[CIN: L72200MH1984PLC094539]
304, A to Z Industrial Estate, Ganpat Rao Marg, Lower Parel, Mumbai – 400013.

…Corporate Debtor/Respondent

Order Delivered on 29.10.2021

Coram:

Hon'ble Member (Judicial)	:	Mr. Ashok Kumar Borah
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor	:	Mr. Gauraj Shah a/w Mr. Jeet Gandhi, Advocates.

For the Corporate Debtor : Mr. Jamsheed Master, Advocate i/b Ms. Asha Nair, Advocate.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This is a Company Petition filed under section 9 ("**the Petition**") of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Mohite Infraprojects Private Limited ("the Operational Creditor")**, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Polo Queen Industrial and Fintech Limited ("the Corporate Debtor")**.

2. The Corporate Debtor was incorporated 19.07.1984 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is **L72200MH1984PLC094539**. Its registered office is at 304, A to Z Industrial Estate, Ganpat Rao Marg, Lower Parel, Mumbai – 400013.

Brief Facts of the case:

3. On 5th February, 2016, the Corporate Debtor, through its Architects M/s. Parelkar-Ovalekar-Paria (Architects and Interior Designers) floated a Tender Notice and invited Tenders from interested contractors who were willing to take up the work as quoted in the Tender Notice. The Operational Creditor submitted its tender and the said tender was approved and selected by the Corporate Debtor.

4. On 20th December, 2017, the Articles of Agreement were executed between the Croporate Debtor and the Operational Creditor.

5. After completion of construction work, the Operational Creditor used to raise and issue its Bills/Invoices on the Corporate Debtor stating therein the information of the work completed and by giving specification. Thereafter, the Architect of the Corporate Debtor aftger due verification of the work completed, used to issue their letter to the Corporate Debtor to release the amounts due under the Bll/Invoices and total 9(Nine) invoices were issued and out which 8(eight) were cleared.

6. On 11th June 2019 Bill/Invoice for a sum of Rs.28,14,197/- (Rupees Twenty-Eight Lakhs Fourteen Thousand One Hundred Ninety-Seven Only) as raised by the Operational Creditor on the Corporate Debtor, inspite of having been approved by the Architect of the Corporate Debtor has not been cleared till date along with the 50% Retention Amount payable to the Petitioner/Operational Creditor.

7. On 18th October, 2019, finally, upon the Petitioner/Operational Creditor realising that the Corporate Debtor was unable/incapable of paying the admitted operational debt to the Petitioner/Operational Creditor, through their Advocates and Solicitors served upon the Corporate Debtor Demand Notice in Form 3 under section 8 form the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which was duly received by hand delivery

as well as by speed post by the Corporate Debtor and till date no line of reply is received from the Corporate Debtor.

8. The Applicant submits that the Total Amount of Debt is Rs. 34,10,640/- (Rupees Thirty-Four Lakhs Ten Thousand and Six Hundred and Fourty Only) this outstanding amount includes bill amount of Rs.28,14,197/- and 50% Retention Amount of Rs.5,39,368/- and Interest amount @ 8 % p.a i.e. Rs.2,68,285/-

Sr. No.	Invoice No.	Date of Invoice	Debt Fell Due on	Outstanding Amount (INR)
1.	MIPL/001/2019-20	11.06.2019	05.11.2019	28,14,197/-
2.		11.06.2019	11.06.2019	5,39,368/-
Net Outstanding Balance				33,53,565/- + Interest @8% p.a.=2,68,285/- Rs.34,10,640/-

9. The Operational Creditor further submits that they have raised in all 9 bills and all were admitted. 8 of the 9 bills were paid. The

procedure as per the agreement for payment of bills raised by Operational Creditor required Corporate Debtor Architect's Architect certifying the works. This procedure is admittedly also completed.

10. The Operational Creditor further submits that the Corporate Debtor has on the basis of certification of work by the Architect of the Corporate Debtor booked the 9th bill in its accounts and had paid applicable TDS thereon and has filled from 26As. In the form 26AS, Corporate Debtor has in accordance with the certification deducted tax at source on the sum of Rs.28,14,197/- and Rs.5,39,368/-. Hence, the amount is due and payable as has been admitted.

11. Procedure for certification of bill and payment:

i) As per Clause 4 of the Articles of Agreement, the special conditions ***(page 75 to 88 of the petition)*** and appendix ***(pages 889 to 93 of the Petition)*** of the tender document was to be read and construed as forming part of the Articles of Agreement dated 20th December 2017.

ii) The relevant clause are 21, 32 and 34. Page 889 of appendix is also relevant- **Clause <u>21-Certificate of virtual Completion and defects liability period: -</u>**
The work shall no be considered as completed until the Architect has certified in writing that they have been virtually completed. The defect lability period shall commence from date of such Certificate.
Clause 32- Certificate and Payment: -

The Contractor shall be paid by the Employer from time to time instalments under Interim Certificates to be issued by the Architects to the Contractor on account of the work executed when in the opinion of the Architect, work to the value named in the Appendix as value of work for Interim Certificates (or less at the reasonable discretion of the Architect) has been executed in accordance with this contract, subject, however, to a retention of the percentage of such value named in the appendix hereto as retention percentage for Interim Certificates, until the total amount retained shall reach the named in the Appendix as limit for Retention Money, after which time to the instalments shall be upto the full value of the work subsequently so executed and fixed in the building. The Architect may in his discretion include the Interim Certificate, such amount as he may consider proper on account of materials delivered upon the site by the Contractor for use in the Works. And when the works have been virtually completed and the Architect shell have certified in writing that they have completed the Contractor shall be paid by the Employer in accordance with the Certificate to be issued by the Architect the sum of money maned in the Appendix Installment after virtual Completion and the Contractor shall be entitled to the payment of the Final Balance in Accordance with the Final Certificate to be issued in writing by the Architect at the expiration of the period referred to as the Defect Liability Period in the Appendix hereto from the date of Virtual Completion or as soon after the expiration of such period as the works shall be finally completed and all defects made good according to be true intent and meaning and hereto whichever shall last happen provided always that the issue of the Architect of any certificate during the process of the work or at or after the completion shall not relive the Contractor from his Liability under Clause 2 and 20 nor relive the Contractor of his liability in case of fraud, dishonesty or fraudulent concealment relating to the works or materials or to any manner

dealt with in the Certificate, and in case of all the defects and insufficiencies in the work or material which a reasonable examination would not have disclosed. No Certificate of the Architect shall of itself be conclusive evidence that any works or materials to which it relates are in accordance with the Contract, neither will the contractor have a claim for any amounts which the Architects might have certified in any interim bill and paid by the Employer and which subsequently be discovered as not payment and in this respect the Employer decision shall be final and binding.

The Architect shall have power to withhold any certificate if the work or any parts thereof are not being carried out to his satisfaction.

The Architect may be any certificate make any correction in any pervious certificate which shall have issued by him.

No Certificate of payment shall be issued by Architect if the Contractor fails to insure the work and keep them insured till the issue of Virtual Completion Certificate.

Payments upon the Architects Certificate shall be made within the period named in the Appendix as Period of honoring Certificates have been delivered to the Employer.

Clause 34- **<u>Matter of be finally Determined by Architect: -</u>**

The ***opinion, direction, certificate (except for payment) with respect to all or any of the matter Clause 2(a) and 2(b), 4, 7, 12, 19, 28 (a, b, c, d, f) hereof which matters are herein referred to as the excepted matters shall be conclusive and binding on the parties hereto and shall be without appeal. Any other decision, opinion, direction,***

certificate or valuation of the 4 Architect or any refusal by the Architect to give of the same shall be subject to the right to the Arbitration and review under clause 35 hereof in the same way in all respects (including the provision as to opening the reference) as it were the decision of the Architect.

iii) After completion fo construction work, the Operational Creditor used to raise an issue its bill/invoices on the petitioner. ***As per clause 32*** of the special conditions, the ***appointed architect*** of the Corporate Debtor was ***from time to time certified*** and approved the work carried out by the Petitioner and ***give his final certificate certifying the work and would call upon the Corporate Debtor to release the amounts mentioned in the bills-invoices.***

iv) ***As per the above process, till date 8 bills*** (Bill Nos. R. A. 1 to R.A. 8, for a ***total amount of Rs. 2,97,64,965/-***) have been paid by ***the Corporate Debtor on the Certification of the Architect.***

12. There is no defense raised whatsoever of any pre-existing dispute. Nevertheless, even if, there is any defense raised raised the admittedly more than a sum of Rs. 1,00,000/- is due and payable. **(Judgment-Pedersen Consultants India Pvt. Ltd. V/s Nitesh Estate Limited. and paras MANU/NL/0328/2019 relevant paras-7,8,9,10,11 and Mobiloz Innovations Pvt. Ltd. V/s Kirusa Software Pvt. Ltd. AIR 2017 SC 4532 relevant para 40)**.

<u>Reply Submitted by the Respondent Corporate Debtor</u>

13. It is submitted that the present Petition filed under Section 9 of the Insolvency & Bankruptcy Code to be dismissed on the following grounds:

    i. A pre-existing dispute arose between the Petitioner – Operational Creditor and the Corporate Debtor in or about June 2019 much prior to the issuance of the statutory notice. Since the disputes have arisen prior to the issuance of the notice of filing of the Petition, the present Petition is not maintainable and is required to be dismissed in limine.

    ii. It is submitted that the mannerism of carrying out the work and the quality of work undertaken by the Operational Creditor as well as the defaults committed by the Operational Creditor are a matter requiring evidence to be led before a Civil Court of competent jurisdiction, therefore, the issues under consideration in the present Petition cannot be decided in a summary fashion as it would cause grave prejudice and unjust harm to the Corporate Debtor who will be deprived from putting forth his case.

    iii. The present Petition emanates out of a work contract for construction of a residential building towards a total consideration of Rs.2,15,74,742/- against which the Operational Creditor has already been paid Rs.2,85,51,818/-

which is about Rs.70,00,000/- in excess of the total construction value. The Corporate Debtor has the funds available to even pay the value of Rs.34,00,000/- as has been claimed in the present Petition. The Petitioner has chosen to not complete the work as agreed under the contract and is clandestinely using the Insolvency & Bankruptcy Code as a tool to extort money from the Corporate Debtor. It is trite law that the Insolvency & Bankruptcy Code should not be used as an instrument to recover proceeds but as a genuine legislation to assist entities which have financially defaulted by helping them restructure their debts.

The Petitioner is using the IBC Code to try and leverage upon the fear of placing this Company under CIRP with an intention to recover monies which it itself knows that it will not be able to recover till the defects in the construction are suitably cured. The Petitioner is misusing the Code to arm twist this Respondent to recover disputed claims.

iv. The correspondence and the submissions as well as the additional compilation tendered by the Petitioner makes it amply clear that the Respondent had genuinely and bonafidely raised disputes as regards the quality of work which dispute remained pending even on the date of filing Petition, therefore, the Petition ought to be dismissed.

14. it is submitted that the Petitioner has not approached this Hon'ble Tribunal with clean hands and is guilty of suppression as at the time of filing of the Petition, the Petitioner did not mention the fact that the Corporate Debtor had replied to the Section 8 notice by its letter dated 4th November, 2019 specifically drawing inference to the letters and previous correspondences which were much prior in time as compared to the notice issued under Section 8 of the Insolvency & Bankruptcy Code. The Respondent has in its reply dated 24th February, 2021 at Exhibits "A", "B", "C" and "D" placed numerous correspondences which pertain to the period June 2019 upto the filing of the Petition clearly showing the numerous instances when the Respondent raised a legitimate dispute against the Petitioner. Paragraph 5 of the Reply dated 24th February, 2021 also mentions the reference of the email dated 16th August, 2019 addressed by the Petitioner acknowledging the defect in the work carried out by the Petitioner. This admission in itself is an admission of dispute, therefore, upon this admission itself, the present Petition ought to be dismissed in limine with exemplary costs.

15. The Counsel appearing for the Petitioner during his arguments sought to suggest that payment was required to be made in accordance with the Architect's certificate issued in March 2019, however, the said stand is wholly incorrect and inconceivable since the defects came to light only during the monsoon of 2019 which was subsequent to the issuance of the Architect's Certificate and the Petitioners themselves by their letter dated 13th September, 2019

(Exhibit "F" at page 254 to the Reply dated 24th February, 2021) stated as under:

> *"Regarding the rectification work we have never denied our responsibility. We will execute the same as and when the weather conditions normalize. Also inform your site engineer / architect to certify our rectification work as it progresses. The said letter dated 13th September, 2019 bearing reference No. MIPL/PM/2019-20/015 is also copied to the structural architect mutually appointed by the parties being Parelkar Ovalekar Parpia."*

Further, it is pertinent to note that the Petitioners themselves had told the Respondents that they will obtain a fresh certificate from the Architect, however, no such certificate has been received till date and therefore, the submission made by Counsel relying upon an earlier certificate is wholly inconceivable.

16. The Construction Completion Certificate on the basis of which the Petitioners rely itself mentions a defect liability period which starts from 1st May, 2019 and continued till 30th April, 2020 and uses the words "virtually completed" which in itself shows that there was a further completion liability and defect clause pending. (See Exhibit "B" at page 32 of the Petition.)

17. It is submitted that Clause 11 read with Clause 21 of the General Instructions to the Tender Contract make it amply clear that there was no interest liability during the defect liability period, however,

the Petitioners have incorrectly imposed interest at the rate of 8% only with an intention to increase the receivable amounts.

18. It is further submitted that Exhibit "D" at page 34 of the Petition makes it amply clear that the TDS payable to the Petitioners have been recorded and the Petitioners are willing to pay the said amount upon satisfactory work being carried out as per the terms of the tender and there is no intention to not pay monies to the Petitioner, however, these monies shall be paid only when the disputes between the parties are amicably resolved.

19. The Respondent submits that the contents of the Affidavits dated 24th February, 2021 and 26th August, 2021 and the objections raised therein as to the maintainability of the Petition and the facts leading to the present Petition be treated as reproduced herein and submitted before this Hon'ble Authority. The Respondent also relies upon Clauses 4, 7, 19, 20, 21 of the Construction Agreement which are reproduced in the Reply of the Corporate Debtor.

20. The Petitioners rely upon the following judgments which are annexed hereto:

Sr. No.	Judgment	Reported In	Paragraph Nos.
1.	Macquarie BankLtd. vs.	(2018) 2 SCC 674	

	Shilpi Cables Technologies Ltd.		
2.	Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.	(2018) 1 SCC 353	31-51
3.	Innoventive Industries Ltd. Vs. ICICI Bank & Anr.	SCC 407	29
4.	Pedersen Consultants India Pvt. Ltd. vs. Nitesh Estates Ltd.	MANU/NL/0328/2019 [Order dated 24th July 2019 inCompany Appeal (AT) (Insolvency)No. 720 of	6-10

		2018 passedby NCLAT, New Delhi]	

21. In *Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 : (2018) 1 SCC (Civ) 311 : 2017* SCC On Line SC 1154 at page 403 The Apex Court after discussing the issue at hand in Paragraphs 31 to 50 held as under :

"51. *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 inthe 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 doesnot 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.* ***<u>So long as a dispute truly exists in fact and is not</u>***

***spurious, hypothetical or illusory, the adjudicating authority has to reject the application**."*

(Emphasis supplied)

22. In *Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356 : 2017* SCC On Line SC 1025 at page 438 The Apex Court held as under :

*"**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 Section8(2), the corporate debtor can, within a period of 10 days ofreceipt 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.***

(Emphasis supplied)

23. During the course of arguments, the Counsel for the Petitioners tried to rely upon a Compilation of Documents which was neither handed over to the Respondents nor does it form part of the record and the Counsel appearing for the Respondents objected to the said Compilation being taken on record. The said Compilation was not

taken on record, however, in spite of the Compilation not being taken on record, the same was circulated after the matter was closed for orders. The Respondents submit that the handwritten note contained therein is denied in toto and a matter of leading evidence, the Petitioner is put to strict proof of the veracity of the said note. Inspection of the original note has also not been given to the Respondent nor is the document tendered on affidavit and therefore, cannot be relied upon.

24. During the course of the hearing, the Petitioners have relied upon the judgment of *Pedersen Consultants India Pvt. Ltd. vs. Nitesh Estates Ltd. reported in MANU/NL/0328/2019*. The said judgment more particularly paragraphs 6 to 10 lay down the correct proposition of law as regards pre-existing dispute is concerned. The Petitioner has sought to rely on paragraphs 11 and 12, however, the said paragraphs have no binding on the present case as they pertain to the facts and circumstances of that particular case where disputes were not pre-existent.

Finding

25. We have heard the submissions of Applicant as well as the Respondent and perused the records.

26. The contentions raised by the Petitioner during the course of arguments seeming to suggest that the defects were subsequently cured by the Petitioner is in itself an admission of dispute and the

Petition is required to be dismissed on that ground alone. Therefore, in the lights of *Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (2018)* this bench is convinced that this Petition is liable to be rejected.

it is beyond reasonable doubt that a pre-existing dispute remained outstanding on the date of issuance of the statutory notice as well as on the date of filing of the Petition.

27. The petition bearing **CP (IB) 3977/MB/C-II/2019** filed by **Mohite Infraprojects Private Limited,** the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Polo Queen Industrial and Fintech Limited [CIN: L72200MH1984PLC094539],** the Corporate Debtor, is **rejected**.

Dated the 29th day of October, 2021

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**ASHOK KUMAR BORAH**
Member (Technical)	**Member (Judicial)**

29.10.2021
SAM