IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.1388/KB/2020

In the matter of

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

In the matter of:

Mr. Kuldeep, the sole Proprietor of M/s Mahalaxmi Electronics, having its registered office at T- 372, Third Floor, Baljeet Nagar, New Delhi-110008,

... Operational Creditor

Versus

In the matter of:

M/s Future Netwings Solutions Pvt. Ltd., CIN: U51109WB1997PTC083387, having its registered office at 5th Floor, Synergy Building, Rajarhat, near Aquatic, Kolkata, West Bengal-700102.

...Corporate Debtor

Date of hearing :15/06/2022

Order Pronounced on : 13/07/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Prerak Khurana, Adv.] For Operational Creditor

1. Mr. Shaunak Mitra, Adv.] For Corporate Debtor
2. Mr. Patita Paban Bishwal, Adv.]

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **Mr. Kuldeep,** the sole Proprietor of M/s Mahalaxmi Electronics**,** (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect **M/s Future Netwings Solutions Pvt. Ltd.,** CIN : U51109WB1997PTC083387, having its registered office at 5th Floor, Synergy Building, Rajarhat, near Aquatic, Kolkata, West Bengal-700102, (hereinafter referred as the Corporate Debtor).

3. It is submitted in the petition that the Corporate Debtor and the Operational Creditor (collectively be referred to as "Parties") executed a Memorandum of Understanding dated 01.06.2018 for the purpose of collaborating and working towards generating business opportunity for Corporate Debtor, for sale of goods (Comscope passive component and Cisco Active Component and telephony) (goods) in the project named as "Re-development of ITPO Complex into Integrated Exhibition-Cum-Convention Centre (IECC) at Pragati Maidan, New Delhi on Design, Engineering, Procurement and Construction (EPC0 including operation and maintenance" (Project).A copy of the said Memorandum of Understanding dated 01.06.2018 is annexed as Annexure-1.

4. It is submitted that it was mutually agreed that the Operational Creditor shall ensure that the sale of Corporate Debtor's goods in the Project shall be made only through the Corporate Debtor or through their related Company or Comscope or Cisco directly to the end client being M/s Shapoorji

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Pallonji Qatar W.L.L. (JV) 9th Floor, Videocom Tower, Block-E-I, Jhandewalan Extension, New Delhi-110055.(or their related companies.)

5. It is submitted that by virtue of the Clause 2 of the MoU entered between the parties, it was an obligation upon the Corporate Debtor to keep the Operational Creditor informed about the leads for enquiry,which the Corporate Debtor shall receive for sale of goods in the project "Name of the work: Re-development of ITPO Complex into Integrated Exhibition-Cum-Convention Centre at Pragati Maidan, New Delhi, on Design, Engineering, Procurement and Construction (EPC) including operation and maintenance" from any other vendor or the client.

6. It is submitted that in terms of Clause 3 of the MoU, whenever the Corporate Debtor, directly or through one of its related company, or Comscope or Cisco, makes sale to the "Client", then the Corporate Debtor shall need to keep the difference as commission of 10% on the sales. Further, such commission of 10% shall be duly transferred to the account of the Operational Creditor as soon as the payment for the goods is realized by Corporate Debtor or the related company, or Comscope or Cisco.

7. It is submitted that Clause 3 of the MoU makes it clear that whenever the Corporate Debtor makes sale to any client, irrespective of whether it was Shapoorji Pallonji Qatar WLL or otherwise, the Corporate Debtor was to pay the Operational Creditor 10% of the sales. The MoU was therefore, not only restricted to sales to Shapoorji PallonjiQatar WLL.

8. It is further submitted that by virtue of sales effected, monies fell due to the Operational Creditor.Upon there being a reminder to make payments, the Corporate Debtor, through Mr. Jaideep Chakravarti (Director of the Corporate Debtor), vide email dated 20.02.20219 duly confirmed and acknowledged that a supply was made amounting to Rs.12,65,00,000/-and

GST Extra.it was stated that 5% of the commission would be paid as and when monies are received by the Corporate Debtor from its Client.

9. It is submitted that on the basis of the admission of the Corporate Debtor, the applicable commission on such supply which was payable by the Operational Creditor was a sum of Rs.1,26,50,000 at the rate of 10% for the sales. As opposed to that the Corporate Debtor tentatively promised to pay a commission of 5% amounting to Rs.63,25,000/- and GST Extra as applicable in the month of May-June, 2019 by way of email dated 20.02.2019. (Annexue-2).

10. It is submitted that there was no question of payment of 5% of the sales as the agreed consideration was 10% of the sales and not 5% of the sales. This was in derogation of the terms of the MoU. The reduction of the commission neither finds mention in the terms of the MoU nor in any subsequent correspondence. Hence, the reduction of the commission amount is completely without any basis and in the teeth of Clause 2 and 3 of the MoU. That apart, the monies were not to be paid upon realization but when Sale is effected. This was also in breach of the terms of the MoU. The Corporate Debtor has sought to read terms into the MoU which were never agreed to.

11. It is submitted that pursuant to the email dated 20.02.20219, the Operational Creditor served a **Demand Notice dated 07.09.2019** for a sum of Rs.1,26,50,000/- to the Corporate Debtor. The Corporate Debtor replied to such **Demand Notice vide letter dated 25.09.2019** whereby the Corporate Debtor disputed the claim amount of Rs.1,26,50,000/- claimed by the Operational Creditor. A copy of Demand Notice u/s 8 of the Insolvency and Bankruptcy Code, 2016 sent by the Operational Creditor to the Corporate Debtor dated 07.09.2019 and copy of reply dated 25.09.2019 to the Demand Notice are annexed as (Annexure-A5 & A6).

12. It is submitted that the Operational Creditor filed a claim under section 9 under Insolvency and Bankruptcy Code against Corporate Debtor before this Adjudicating Authority, which was registered as Mahalaxmi Electronics vs. Future Netwings Pvt. Ltd. CP(IB) No. 73/KB/2020. Notice was duly issued in this matter on 08.01.2020.But the same was withdrawn with liberty to file fresh on 11.03.2020.

13. It is further submitted that Cisco made sales amounting to Rs.24,00,00,000/- towards Active Components of goods in the project named as "Re-development of ITPO Complex into integrated Exhibition-cum-Convention Centre at Pragati Maidan, New Delhi on Designs, Engineering, Procurement and Construction including operation and maintenance", for which the Corporate Debtor are liable to pay a sum of Rs.2,40,00,000/- being 10% of the commission payable to Operational Creditor. The same is not being claimed by Operational Creditor under this claim against Corporate Debtor,but the Operational Creditor reserves his right to recover the same from Corporate Debtor.

14. It is submitted that in this background, a fresh Demand Notice dated 12.10.2020 was issued as the Corporate Debtor has failed to make any payments despite several payment reminders. The fresh Demand Notice dated 12.10.2020, got duly delivered on 16.10.2020 and till date of the filing of the current operational debt, the Corporate Debtor has filed his reply dated 04.11.2020, and in a clandestine manner denied the claim made by the Operational Creditor. The Corporate Debtor has not transferred the outstanding claim in the account of the Operational Creditor. A copy of the fresh Demand Notice dated 12.10.2020 is annexed as Annexure-A9 and copy of the reply dated 04.11.2020 sent by the Corporate Debtor is annexed as Annexure-A10, to the petition.

15. It is submitted that debt still remains outstanding as no payment has

been received by the Operational Creditor till date.

16. It is submitted that as on 05.10.2020, a total sum of Rs.1,26,50,000/- remains outstanding along with interest at the rate of 9% per annum amounting to Rs.18,71, 506.85/- totaling to Rs.1,45,21,506.85.The debt fell due from 20.02.2019 and is still subsisting till date. The emails dated 20.02.2019 makes it evident that the said amount due towards Operational Creditor is legally due and has to be given by the Corporate Debtor.

17. The Operational Creditor has enclosed with the petition several documents in support of his case, which are as under:-

i. Copy of the Memorandum of Understanding dated 01.06.2018;
ii. Copy of Email dated 20.02.2019 sent by Corporate Debtor to the Operational Creditor (Annexure A2).
iii. Copy of Company Master Data of the Corporate Debtor (Annexure-A3)
iv. Copy of payment of Application Free INR 200/- MCA, New Delhi, (Annexure A4);
v. First Demand Notice under section 8 of the Code sent by the Operational Creditor to the Corporate Debtor dated 07/09/2019.(Annexure A5).
vi. Copy of reply dated 25.09.2019 to the Demand Notice (Annexure-A6).
vii. Copy of order dated 11.03.2020 and 08.01.2020 passed by this Adjudicating Authority (Annexure A7 colly.)
viii. Copy of claim petition filed before this Adjudicating Authority (Annexure-A8).
ix. Demand Notice dated 12.10.2020 sent by Operational Creditor to the Corporate Debtor (Annexure A9).
x. Copy of reply dated 04.11.2020 sent by Corporate Debtor is

annexed as Annexure –A10.

18. It is submitted that in terms of the MoU , Roles and Responsibilities assigned to the parties as under:-

Roles and Responsibilities

Agency A agrees to:

1. *It is Agreed that M/s Agency A shall ensure that Agency B's Goods (Comscope Passive component and Cisco Active component and telephony, of which it is a distributor and authorized system integrator) and services are approved and the same are sold to M/s Shapoorji Pallonji and Co. (P) Ltd. M/s Shapoorji Pallonji Qatar WLL (JV) 9th Floor, Videocon Tower, Block-E-I, Jhandewalan Extension, New Delhi-110055(or their related companies) in the project of "Name of the Work: Re-development of ITPO Complex into Integrated Exhibition-Cum-Convention Centre(IECC) at Pragati Maidan, New Delhi on Design, Engineering ,Procurement and Construction (EPC) basis including operation & Maintenance".*

***Agency B agrees to**:*

1. *It is agreed that M/s Agency A shall ensure that the sale of Agency B's Goods(Comscope passive component and Cisco Active component and telephony) in the project of Name of the Work: Re-development of ITPO Complex into Integrated Exhibition-Cum-Convention Centre(IECC) at Pragati Maidan, New Delhi on Design, Engineering ,Procurement and Construction (EPC) basis including operation & Maintenance" shall be made only through M/s Agency B Qr through their related Company or Comscope or Cisco Directly to the end client being M/s Shapoorji Pallonji Qatar WLL (JV) 9th Floor, Videocon Tower, Block-E-I, Jhandewalan Extension, New Delhi-110055(or their related companies).*
2. *M/s Agency B shall keep M/s Agency A in loop at all times on any leads for enquiry they shall receive for sale of Agency B's Good (Comscope passive component and Cisco Active component and telephony) in the project of " Name of the Work: Re-development of ITPO Complex into Integrated Exhibition-Cum-Convention Centre(IECC) at Pragati Maidan, New Delhi on Design, Engineering ,Procurement and Construction (EPC) basis including operation & Maintenance"from any other vendor or client.*
3. *When M/s Agency B, directly, or through their related Company or Comscope or Cisco, shall make sale to the client, Agency B shall keep the difference as commission of 10% on the sales. The commission shall be transferred to the account detail, defined by Agency A, as soon as the payment for the goods is realized by Agency B or their related company or Comscope or Cisco Directly from the Client.*

19. The Operational Creditor has referred to email dated 20th February, 2019,which is reproduced as under:-

> *" Subject: Fw: ITPO Agreement*
> *From: Jaldeep Chakrabarti jaideep.c@futurenetwings.com on 20 Feb 2019*
> *To: electronics. mahalaxmi@rediffmail.com.*
> *Cc "anil.t" anil.t@furturnetwings:com*
> *1 attachment (s) –ITPO Agreement _with _MAHALAXMI.pdf(1.73MB)*
> *FNS Signature*
> *Hello*
> *This has reference to the attached agreement regarding the Pragati Maidan redevelopment project*
> *As you know, the project was not awarded to us by Shapoorji Pallonji and hence we are not in a position to pass on the 10% of the order value of Commscope and Cisco*
> *However after a lot of effort, we were able to get the Commscope part from the awarded party at low margins.*
> *As discussed and agreed, we will pass on 5% of the Commscope supply order value to you i.e. 5% of INR 12.65 crore= Rs.63.25 lacs. This will be paid immediately on 100% realization of the payment. It is difficult to predict the timeline for the final payment at the present moment. You may tentatively expect the same around May-June 2019. We shall keep you informed in case of delay due to project delay etc.*
> *As you also know, the Cisco order has not come to us or to any of our related party or to Cisco directly. As a result we are unable to pass on the 10% which we had factored in our quote for you.*
> *Please sent us an acknowledgement of this mail so that we can factor the same in our cash flows and related planning.*
> *Thanks and regards*
> *Jaideep".*

20. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit.

21. **In reply to the petition,** the Corporate Debtor filed affidavit of Mr. Jaideep Chakrabarti, one of the Directors of the Corporate Debtor. It is submitted that application has been filed in abuse of process of law and is not maintainable in law or on facts and has been filed with sole objective of making wrongful gain at the expense of the Corporate Debtor. It is submitted that the Operational Creditor has deliberately suppressed and concealed several material facts in the application and has not approached this Adjudicating Authority with clean hands. It is submitted that the Operational Creditor has not enclosed any invoice either in the Demand Notice or in the

application. It is submitted that nothing is due or payable by the Corporate Debtor to the Operational Creditor. It is submitted that no cause of action has arisen against the Corporate Debtor and the Operational Creditor does not fall under the definition of an operational creditor under the IBC and no debt is due.

22. It is submitted that the Corporate Debtor is engaged in the business of providing networking solutions and supply of manpower to enterprises in private and public sector. In June 2018, the company entered into an MOU with the Applicant, for an upcoming project at Pragati Maidan, New Delhi, for an Integrated Exhibition cum Convention Centre (IECC) on Design Engineering, procurement and construction basis (EPC). Under the MOU, the Applicant was responsible to ensure sale of both PASSIVE ITEMS (like cables) and ACTIVE ITEMS (like switches, routers) to the end client namely Shapoorji Pallonji & Co. Ltd, for use in the said project. For this contemplated service by the Applicant, the company agreed to pay them a commission of 10% on net sale value. The commission was agreed to be payable only upon the payment for the said items (active and passive) as stated, being realised by the company directly from the client, and needless to mention on services being duly provided by the Applicant.

23. It is submitted that due to factors beyond the company's control, the company ultimately was not able to secure the contract from shapoorji Pallonji & co. Ltd. Later, the company was able to get some orders in the project.from a different party namely Niveshan Technogies Private Limited (who is unrelated to the end client shapoorji Pallonji), in respect of PASSIVE items only and the project is still under execution. The order was received at a very low margin from Niveshan Technogies Private Limited in favour of whom the contract was awarded by the end client. The total value of the order was Rs. 12.6 crores and the company got this order on its own initiative and the applicant had no role to play in the company getting this order. copy of the relevant purchase order evidencing the same is annexed as ANNEXURE.A.

24. It is submitted that the company on 20th February, 2O19 informed the applicant about this development i.e. that an order for Passive Components was received from another party at a very low margin. As such the company, only to maintain good business relations and in good faith, and without admitting any liability of any nature towards the Applicant, offered a sum of Rs. 63.25 Lakhs by email dated 2O.O2.2O19. Since this was not a part of the MOU between the parties and because the contract with Shapoorji Pallonji was not awarded to the company, the offer was without prejudice and in good faith. In fact, it was categorically stated in the email that since the project was not awarded by Shapoorji Pallonji, there was no question of paying commission under the MOU. Anyhow an amount of Rs. 10 Lakhs was also paid by the company in this respect on 9th May, 2019, even though 100% of the total project cost has not yet been realised by the company and the same was not under the Mou and was not admission of any liability and was strictly without prejudice. Such offer of the company has nothing to do with the Mou or any agreement between the parties. In this regard, Corporate Debtor said that the Applicant's claims are contrary to and de-hors the MOU.

25. It is denied by the Corporate Debtor that the company is liable to pay Rs. 1,26,50,000/- or any amount whatsoever to the applicant herein. The company has never promised to tentatively pay 10% of Rs. I,26,50,000|- in the month of May- June 2O19 or thereafter reduced the commission rate to 5% as alleged or at all. These are totally false allegations being made by the Applicant. It is denied that the company has confirmed or acknowledged the sales order for Comscope for the purpose of evaluating the commission payable to the alleged operational creditor. The company has never admitted any amount to be due and payable to the operational creditor. The corporate debtor after receiving the demand notice dated 07/09/2019 had duly replied by letter dated 25/09/2019 disputing the entire claim of the operational creditor. It is further denied that the default started occurring from 20/02/2019 or continuous till when sale order for Comscope were procured

and confirmed by the corporate debtor. There is and was no default on any account as alleged or at all. It is denied that any alleged default can subsist or continue. A copy of the reply letter dated 05/09/2019 is enclosed as ANNEXURE-B.

26. It is admitted by the Applicant that under C1ause 3 of the MOU, it is only if the company made sales to the "Client that the company would have to pay 10% of sales to the Applicant. It is denied that the MOU was not restricted to sales to Shapoorji. It is denied that sales made to any person other than Shapoorji can come within Clause 3 of the MoU. Such allegations of the Applicant are a deliberate misconstruction of the MOU. Clause 2 is a separate clause which does not import or impose any liability on the company. Anyhow, without rendering service, the Applicant cannot make any claims. It is denied that the email dated 20/02/2019 amounts to acknowledgement or confirmation or admission of any liability, as alleged or at all. It is denied that the company has acted in breach or in derogation of the Mou. It is denied that money was payable before realisation. The email dated 20/02/2019 cannot be relied upon to support the alleged claims of the Applicant and the purported reliance placed thereon is totally misplaced and the Applicant is deliberately misreading the same selectively and out of context. Significantly, in the application, the alleged claim is purported to be based solely on the MoU. However, the Applicant has failed to demonstrate any cause of action under the MoU and in fact, the claim is in derogation of the MoU, clause 3 whereof is restricted exclusively and only to sales made to Shapoorji, the client.

27. During the course of arguments, Ld. Counsel for the Operational Creditor has submitted that the Operational Creditor and the Corporate Debtor had executed an MoU on 1st June, 2018, whereby the parties would work towards generating business opportunity for sale of Corporate Debtor's goods in the project named as " Re-development of ITP Complex into Integrated Exhibition-cum Convention Centre (IECC) at Pragati Maidan, New Delhi on Design, Engineering, Procurement and Construction (EPC) including operation and maintenance" to M/s Shapoorji Pallonji Qatar W.L.L. (JV) or

their related companies. The said MoU stipulated that Corporate Debtor shall make sales only through Operational Creditor. It is submitted that the Clause 2 of the MoU states that Corporate Debtor shall keep Operational Creditor in loop at all times on any leads for enquiry the Corporate Debtor receives for Goods in the Project from any other vendor or client. Also Clause 3 of the MoU makes it clear that whenever the Corporate Debtor makes sale directly or through its related company, or Comscope or Cisco to the Client (that includes related companies) the Corporate Debtor shall pay 10% of such sales as commission to Operational Creditor.

28. It is submitted that on 20.02.2019 one Mr. Jaideep Chakrabarti, the Director of the Corporate Debtor issued an email acknowledging to the payment of debt to operational creditor. Vide said email Corporate Debtor confirmed and acknowledged that a supply of Comscope part of Goods were made amounting to Rs. 12,65,00,000/- Thus, as per the MoU, 10% of Rs.12,65,00,000/- i.e. Rs. 1,26,50,000/- became due to Operational Creditor.

29. It is submitted that a Demand Notice in terms of Section 8 of the Insolvency and Bankruptcy Code, 2016 dated 07/09/2019 was issued by Operational Creditor to Corporate Debtor to which Corporate Debtor sent a reply dated 25/09/2019.Thereafter, Operational Creditor through its sole proprietorship firm filed a claim before this Adjudicating Authority vide CP(IB) No. 73/KB/2019 and on 11/03/2020 the said petition was withdrawn with a liberty to file a fresh application.

30. It is submitted by the Ld. Counsel for the Operational Creditor that on 12/10/2020, fresh demand notice was issued on behalf of the Operational Creditor for default of non-payment since07/09/2019 when First Demand Notice was issued which fell due on 20/02/2019. The Operational Creditor issued its reply to Second Demand Notice, wherein they in a clandestine manner have denied the claim.

31. Having gone through the petition, reply affidavit along with their respective documents enclosed therewith, and after hearing Ld. Counsel for

the parties at length, we are of the view, that the Operational Creditor has not been able to make out any case for admission of this petition.We, therefore, dismiss this petition.

32. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on this , the 13th day of July, 2022

PJ