

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

CP. (IB) No.40/GB/2019

Coram:

Hon'ble Shri H. V Subba Rao, Member (J) : Hearing through

Hon'ble Shri Prasanta Kumar Mohanty, Member (T) : Video Conferencing

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF THE NATIONAL COMPANY TRIBUNAL, GUWAHATI BENCH ON 22.03.2021

Name of the Company M/s. Dynamic Engineering Ltd.

Vs

M/s. Jericho Chemicals LLP

Section of the Companies Act: Under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016.

S.No.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	Mr. Sibanu Sarma	Advocate	Petitioner	Present
2.	Ms. Kriti Bareja	CS	Petitioner	in Video
3.	Mr. S. Bharali	Advocate	Respondent	Conference

ORDER

The Applicant is represented through respective Learned Counsel(s).

The case is fixed for pronouncement of order.

The order is pronounced in the open court, vide separate sheet.

Sd/-

**(Prasanta Kumar Mohanty)
Member (Technical)
&
Adjudicating Authority**

Dated this the 22nd Day of March, 2021

Sd/-

**(H.V Subba Rao)
Member (Judicial)
&
Adjudicating Authority**

ORDER

[Per se: Prasanta Kumar Mohanty, Member (T)]

1. The present petition has been preferred by the Operational Creditor, M/s. Dynamic Engineering Ltd. under Section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as a "Code") seeking for initiation of Corporate Insolvency Resolution Process ("CIRP" in short) against the Corporate Debtor Company, namely, M/S. Jericho Chemicals LLP.

2. The Petitioner/Operational Creditor is a registered company under the provisions of Companies Act, 1956, with a Company Identification Number (CIN)- **U74899DL1996PLC080423**. The Registered office of the Petitioner is situated at 106, Delhi Chamber, 3439, Delhi Gate, New Delhi-110002. The present petition is filed by Mr. Anil Kumar Sehgal, S/o Lt. Shri Sohan Lal Sehgal, the Managing Director and authorized signatory of M/S Dynamic Engineering Ltd, Amrapqali Royal 2-B, Vaibhav Khand, Indirapuram Ghaziabad -201014.

3. **The Respondent/Corporate Debtor, namely M/S. Jericho Chemicals LLP, was incorporated on 18th May 2012 with CIN-U24240AS2012PTC011082 but later converted to Limited Liability Partnership on 22nd March 2018. The registered office of the Corporate Debtor Company is situated at: IIT Road, Jaiguru, vill-Numalijulah, North Guwahati, Kamrup, Assam- 781031.**

4. It is submitted by the Petitioner that the Respondent/Corporate Debtor is indebted to the Petitioner for Rs.42,26,263.00 (Rupees Forty-Two Lakhs Twenty Six Thousands Two Hundred and Sixty Three only) which includes interest @18% per annum pending payment. The Corporate Debtor placed two purchase orders with the applicant for supply of materials and services etc. at the assigned plant of Corporate Debtor after agreeing upon the terms of the contract including the technical specifications and pricing. The Operational Creditor executed all the above mentioned orders and accordingly supplied the required materials and provided its services for installation, testing and commissioning etc. for the chemical plant of the Corporate Debtor at its allocated locations. Accordingly, invoices were raised against the

materials and equipments supplied and services rendered. However, the Corporate Debtor made default in making payment despite the clear agreement, deliberately withheld the payment due on false pretext. However, later on the Corporate Debtor admitted the mistake and also promised to honour its commitment and release the payment as is reflected in the mail dated 13th June 2017.

5. It is further submitted by the Petitioner that despite the said assurance, on not receiving the due payment, it kept making vigorous follow up but all in vain. On 22nd October 2018, a letter was again sent by the Operational Creditor giving details and requesting the Corporate Debtor to clear the outstanding balance of unpaid operational debt. **However, Corporate Debtor did not revert and thereafter the Operational creditor finally on 10.05.2019 issued Demand Notice in Form-3 under Section -8 of the Insolvency and Bankruptcy Code,2016, requesting the corporate debtor to clear the outstanding unpaid amount but the Corporate Debtor neither made the payment till date nor sent any reply to the said notice.** In this regard various invoices/bills were raised by the Operational Creditor in proportion of the work carried on by the Operational Creditor and the same were duly accepted by the Corporate Debtor. The Copy of the purchase orders and invoices are annexed as **Annexure-I**.

6. It is submitted by the Petitioner that the said invoices are still outstanding and have remained unpaid till date. That as on date there is an outstanding amount of Rs.42,26,263.00 (Rupees Forty-Two Lakhs Twenty-Six Thousand Two Hundred and Sixty-Three only) along with interest @ 18% p.a. which is due and defaulted and payable by the Corporate Debtor (CD). The date on which the default occurred varies on different dates as per the terms of respective contract(s) beginning from 30.04.2017. Precisely, the payment against following invoices raised in terms of Purchase Order No 80AAMK17012017 dated 17.01.2017 have not received:

Invoice no.	Balance outstanding	Date on which debt fell due
J-0276 dated 31.03.2017	Rs. 9,05,681.00	30.04.2017
N-011 dated 20.04.2017	Rs.3,81,670.00	25.05.2017
NC-001 dated 22.04.2017	Rs.6,90,300.00	22.05.2017
J-0068 dated 23.06.2017	Rs.11,25,425.00	23.07.2017
034 dated 19.08.2017	Rs.37,571.00	19.09.2017
Total outstanding	Rs.31,40,647.00	

7. It is submitted by the Petitioner that the Form No. 3 Demand Notice was issued by the Operational Creditor on 10.05.2019 under the provisions of Insolvency and Bankruptcy Code, 2016.

8. It is submitted by the Petitioner that on the request of the CD vide its mail dated 29.12.2016 and 12.01.2017 made offers, clearly defining the terms which inter-alia included conditions relating to the pricing and payment. The offers dated 29.12.2016 and 12.01.2017 are annexed as **Annexure XII** in the rejoinder. The purchase orders PO No. 60BP12122016 dated 12.12.2016 and PO No. 80AAMK 17012017 dated 17.01.2017 issued by the CD were more or less on the same line bearing the payment terms. The first PO No. 60BP12122016 was for automation and control panel only and not for installation and commissioning as falsely claimed by the CD. The materials and equipments in respect of this PO were successfully delivered to the CD and were duly accepted by it without raising any issue whatsoever. **The CD in the line of the agreement duly made the entire payment thereby closing the issue to the satisfaction of both the parties in so far as the first PO is**

concerned. Only after being satisfied with the performance of the Operational Creditor the CD there after on 17.01.2017, issued second PO bearing no. 80AAMK 17012017 for supply, installation and commissioning of the project at their site. However, the Operational Creditor found variants in terms of second PO with the offer made. Noticing this the Operational Creditor immediately vide its mail dated 17.01.2017 sought amendments both in delivery date and in term of the payment. The mail dated 17.01.2017 sent by Operational Creditor is annexed as **Annexure XIII** in the rejoinder. **The said amendment was duly agreed by the CD.** However, the CD failed to make the due payment in respect of that supplies which resulted in slight delay in completing the commission of the project. The project was accordingly partly commissioned in March 2017 and the rest till June 2017 in a phased manner. Till this period there was not even a whisper from the CD regarding any issue in the project commission. Even after the complete commission, the CD did not make the payment either on one pretext or the other.

9. It is further submitted by the Petitioner that the CD in its reply has claimed that there was delay in supply of material resulting into losses to it. The CD claims that the material was to be supplied by 20th Jan, 2017 in terms of the Second PO is false, concocted and misleading. Although the said PO did mention the date of supply as 20th Jan, 2017 but the same was duly objected by the Operational Creditor vide its mail dated 17.01.2017. The CD understanding its typographical error accepted the change and agreed for the supplies to be made by 5th March, 2017. The CD is now attempting to take advantage of its own inadvertence as it is clear that the second order was nothing more than a copy paste of the earlier order which had the same terms and conditions including the supply dates as 05.01.2016 & 20.01.2017.

10. It is submitted by the Petitioner that the CD deliberately, as an afterthought, hiding the fact that immediately on receipt of the PO, the Operational Creditor had objected to the said terms through its mail of the same date i. e. 17.01.2017 and clarified the terms of payment being; 10% against PO, 80% against Performa invoice prior to the dispatch and 10% after commissioning. The Corporate Debtor accepted the error on the same date, following which the supplies were made to it by the

Operational Creditor. Even subsequently the letter dated 13.06.2017 is attached as **Annexure-XIV**.

11. It is submitted by the Petitioner that all the major supplies required to complete the project were made in the month of March itself and the invoices, as agreed, were duly raised on to the Corporate Debtor aggregating to Rs.2,48,21,773.00 plus, duties, taxes and freight. Some additional supplies were made on 20th April 2017. Thereby the Operational Creditor raised the total invoices, both for supplies and services, aggregating to Rs.3,46,22,557.00 (including freight and taxes). There is a clear admission of its liability as can be clearly evidenced from the ledger of the Operational Creditor in the books of CD annexed with the reply (**Annexure-E**) filed by the Corporate Debtor. **It is also pertinent to mention here that even after closure of its books, duly audited, the Corporate Debtor's audited financial statement for the Financial year ended 31.03.2018 clearly shows the amount payable to Operational Creditor being Rs. 22,92,472.00 i.e after adjusting the amount of Debit Notes aggregating to Rs. 5,86,007.00, arbitrarily raised and suo-moto adjusted. Copy of the Financial Statement for the financial year ended 31.03.2018 is marked as Annexure-D, attached by the Corporate Debtor in its reply.**

12. It is submitted by the Petitioner that as per the agreed terms, the Corporate Debtor should have made 90% payment of the basic invoice value against the supplies and entire amount of taxes and freight thereon which was Rs.2,65,06744.00. However, as against this, the Corporate Debtor made payment of only Rs.2,45,97,802.00 till 31.03.2017.

13. **It is further submitted by the Petitioner that on 14th August and on 28th December 2017, the Corporate Debtor made a payment of Rs.63,94,395.00 and Rs.5,00,000.00 respectively to the Operational Creditor. Thus it is amply clear that there was no dispute as to Corporate Debtor's liability on account of commissioning or otherwise till December 2017 (even after 6 month of completion of the Project). Pertinently, the ledger attached by Corporate Debtor clearly reflects a credit of Rs.22,92,472.80 in favour of the Operational Creditor as on 28.12.2017.**

14. The Petitioner further has submitted that whenever approached for the payment, either through mails or personal meeting, the Corporate Debtor in return deliberately, in order to evade from its liability, brought in new unrelated technical issues.

15. The Petitioner also submitted that the CD and Operational Creditor held a meeting on 16th March 2018 at Guwahati so as to mutually clear all the issues raised from time to time on demand of payment by the Operational Creditor. The CD Claiming that Operational Creditor did not support the CD in completion of project successfully is wrong and denied. The Minutes of meetings attached by the CD in reply affidavit clearly show that the entire work was done and no technical issues were pending resolution.

16. In **part V** of the Application , the Petitioner submits that a copy of the statement of the Operational Creditor's Bank accounts maintained with Yes Bank Ltd at Sector 63, Noida Branch bearing Account No. 001484100001753, where deposits are made or credits received normally by the Operational Creditors, for the period from 01.01.2017 till 09.10.2019 is annexed herewith and marked as "**Annexure-VIII**" to evidence that no payment has been received from the Corporate Debtor towards the amount claimed to be in default herein.

- i) Copy of Purchase Orders and respective Invoices- "**Annexure-I**"
- ii) The working for computation of interest on amount of debt in default (including Interest) in tabular form –"**Annexure-II**".
- iii) The statement of ledger Account of Corporate Debtor in books of Operational Creditor- "**Annexure –III**".
- iv)** Copies of Email/ Communications exchanged between Corporate Debtor and Operational Creditor for demand of outstanding payment by Operational Creditor as "**Annexure-IV**"
- v)** Copy of letter dated 22.10.2018 sent to Corporate Debtor demanding payment as Annexure-V.
- vi)** Copy of Demand Notice in Form3 dated 25.10.2018 served on the Corporate Debtor under rule 5 of the Insolvency and Bankruptcy

(Application to Adjudicating Authority) Rules, 2016, by Operational creditor- "**Annexure VI**"

- vii) **Proof of delivery of Demand Notice on 29.10.2018- "Annexure – VII".**
- viii) Copy of the statement of the Bank account held in yes Bank Ltd at Sector 63, Noida Branch bearing Account No 001484100001753 and 0014848600000352, where deposits are made or credits received normally by Operational Creditor in respect of the debt of Corporate Debtor- "**Annexure- VIII**"
- xi) Copy of the Board resolution dated 25.06.2019 authorizing Mr Anil Kumar Sehgal & M./S Rakesh Mohan Sharma & Associates as "**Annexure –IX**"
- x) Copy of Master Data of Corporate Debtor on MCA Portal –"**Annexure- XI**"

17. In light of the abovementioned facts and circumstance, the Applicant's prayer before this Adjudicating Authority is to cause public announcement of the initiation of the Corporate Insolvency Resolution Process and call for the Submission of claims in accordance with Clause (b) of Sub-section (1) of Section 13 read with section 14 of the Insolvency and Bankruptcy Code, 2016 to be admitted and be pleased to pass any further order in the interest of Justice.

18. On the other hand, the Respondent has filed its reply dated 17.02.2020 and submits that the company petition is not maintainable in its present form or otherwise and as such the instant petition is liable to be dismissed.

19. The Respondent submits that the Operational creditor has failed to disclose any cause of action in the petition. The petition is wholly misconceived and without any basis. The petition is Prima-facie not maintainable and liable to be dismissed.

20. The Respondent submits that the petition is a gross abuse of the process of law and misconceived. It has been filed to harass the Corporate Debtor/ Respondent. The proceedings instituted by the Operational Creditor has been filed with ulterior purpose and malafide motive. The operational creditor has failed to make out any case whatsoever under provisions of Section 9 of the Insolvency and Bankruptcy Code.,

2016. That the application has been made belatedly, an afterthought and is misconceived.

21. The Respondent submits that in the instant case the alleged amount claimed to be default is disputed and hence the claim is not tenable as per process and otherwise it is not reflected in our book so as to allege that there is default on our part. As such no liability exists on the part of the Respondent as defined under Section 3(12) of the Insolvency and Bankruptcy Code 2016 and alleged claim is misconceived both in law and fact.

22. The Respondent submits that the Jericho Chemical Private Limited ceases to be a Private Limited Company from 23rd March 2018 and was converted to Limited Liability Partnership (LLP) vide registration Number-AAM 2846 by the Registrar of the Companies, Shillong.

23. The Respondent submits that the two number of purchase orders being PO number 60BP12122016 dated 12.12.2016 for basic amount of Rs.48,03,606.00 and PO number 80AAMK170120167 dated 17.01.2017 for an amount of Rs.2,58,76,991.00 were issued by the Respondent. Both the aforesaid POs were for the completion of Turnkey project awarded to the Applicant. The nature of the work to be carried out by the Applicant was for electrification and instrumentation of the entire manufacturing unit of the Respondent's manufacturing detergent powder, detergent cake and laundry bar. There were two purchase orders for one single work. It was a Turnkey project and the applicant was to handover the site in the fourth week of January 2017. The Equipments were to reach by 20th January,2017. However, the applicant failed to supply the equipments on time there was substantial delay and till date the Applicant failed to complete the project. On 5th December, 2016, the Applicant had sent an email to the Respondent specifying Project Completion Schedule. As per the project schedule, the Applicant was to handover the project in the 4th week of January, 2017. The Respondents were to commence their commercial production by 27th March, 2017 for availing fiscal benefit under North East Industrial Policy 2007 which was expiring on 31st March, 2017. However, due to the default on the part of the Applicant, there was undue and substantial delay in completion of the project and for which the Respondents suffered huge financial loss. The plant was to

be fully automated and integrated since work was not completed on time, the Respondent had to run the plant manually from 27th March 2017 onwards there by suffering huge losses by way of additional manpower deployment, over consumption of materials and production of substandard finished goods, thereby further suffering production losses. Copy of PO Number 60BP12122-016 dated 12.12.2016 and PO number 80AAMK17012017 dated 17.01.2017 are annexed herewith and marked as **Annexure-A and B** respectively.

24. **The Respondent submits that on 01.04.2018 the book of account of Respondent showed a credit balance of Rs.22,92,472.00 as against Rs.31,40,647.00 claimed by the applicant. On 07.08.2018 the entire amount was written off due to failure of applicant to hand over the project as per terms and condition of purchase order.** On 07.08.2018 the Respondent raised a Debit Note amounting to Rs.22,92,471.00 as against delay and loss suffered. The said Debit Note was handed over to Ravi Paul official representative of the applicant and the same is reflected in the balance sheet of Respondent for the year 2018-2019. On 11th June 2018 a mail was sent by Respondent to Mr. Anil Kr. Sehgal, Managing Director of the Applicant Company informing that site has not been handed over as per agreed terms and a management decision has been taken to relieve them of the contract with immediate effect and all dues are to adjusted against incomplete work and losses incurred due incompetence in supplies.

25. The Respondent submits that the applicant has committed several breach of the commercial terms of the Commercial Purchase Orders. In this context it will be relevant to state herein that commercial term points No 8,11,12,12 and 14 in respect of the PO No 60BP12122016 were defaulted by the Applicant. Moreover, the commercial term point No 7 of PO 80AAMK17012017 which related to delivery date was defaulted by the Applicant. Moreover, commercial term points No.10,11,12 &13 of PO 80AAMK17012017 were also defaulted with by the Applicant. All these defaults will be apparent from the emails exchanged between the parties and annexed to the reply.

26. The Respondent submits that the term point No 9 of PO 60BP12122016 and Terms point 8 of Purchase order No 80AAMK17012017 stipulates that in event of the

failure to complete the delivery within the Schedule date, interest @5% per week shall be levied on the supplier. The said term of liquidated damages has been accepted by the applicant.

27. The Respondent submits that by the email dated 26.05.2018 Mr. Anil Kumar Sehgal Managing Director of the Applicant Company, signatory to the notice, has accepted that the project was inclusive of all suppliers, erection and commissioning of the project and they had failed to deliver the site. Further, on 25.10.2018 Mr. Sehgal of the Applicant Company was e-mailed about delay in completion of the project as well as handing over it was also informed to him about the production losses suffered due to delay. In response to the aforesaid email, vide an email dated 27.07.2018 Mr. Sehgal wrote that he was deputing and experienced engineers presided there by accepting that the job was incomplete.

Copies of the various e-mails and minutes of meetings are annexed herewith and marked as **Annexure-C** series.

28. The Respondent submits that the Respondent has not received any notice from the Applicant under the provisions of 8(1) of the Insolvency and Bankruptcy code, 2016. From the notice annexed in the Company Petition (Annexure VI) as such there was no question of replying to the same. It is apparent that in this notice (Annexure-VI) there is no mention of purchase order No. 60BP12122016 dated 12.12.2016 as such cannot be considered as Notice u/s-8 Insolvency and Bankruptcy Code and Rule 5 of the Insolvency Bankruptcy (Application to Adjudicating Authority Rules 2016).

29. The Respondent submits that the applicant has not annexed with the Company Petition the copy of purchase order No: 60BP12122016 dated 12.12.2016 and the same amounts to suppression of materials of facts. For their own convenience applicant has bifurcated PO No – 60BP12122016 dated 12.12.2016 and PO number 80AAMK17012017 dated 17.01.2017 where as both purchase orders are integrated for the turnkey project, and Respondent has defaulted in respect of both the purchase orders. **As per the terms of payment of the purchase order 30% payment is be made after installation and commissioning or as agreed.** The applicant even after substantial delay failed to complete installation and commissioning of the project and amount of Rs.22,92,471.00 was kept on hold against 30% retention amount.

30. The Respondent submits that there are arbitration clauses under term point No. 15 of PO 60BP12122016 and Term point No 14 of Purchase Order No. 80AAMK17012017. As such, the claim of the applicant ought to have been referred to an arbitration under the aforesaid clauses of the Purchase Orders. In the presence of arbitration clauses, the instant Company Petition under the Insolvency and Bankruptcy code, 2016 is not maintainable as there is substantial dispute.

31. The Respondent submits that perusal of the Audited Report dated 14.10.2019 of the Respondent Company would clearly reveal that the Respondent Company has substantial assets and is not liable for being declared insolvent. The Respondent Company has not been provided with the services as mandated to provide by the Applicant in terms of the Purchase orders PO 60BP12122016 and Purchase Order No. 80AAMK17012017 i.e. the works were not delivered to the Respondent in a turnkey stage and for which the Respondent had to again get the balance works done by the other parties i.e. from one Sai Electro Enterprises and Sure Solutions by incurring additional expenses to the tune Rs.2,65,500.00 and Rs.5,69,744.00 for bringing the project to a turnkey stage not to speak of the losses incurred on account of the delay in the commencement of production from the project. The Respondent reserves its rights to file appropriate applications before appropriate legal forum claiming damages from the Applicants. Copy of the Audit Report dated 14.10.2019 is annexed herewith and marked as **Annexure-D** and copy of Ledger Account of Dynamic Engineers Ltd is annexed here with and marked as **Annexure-E** and copies of Tax invoices and ledger accounts of Sai Electro Enterprises is annexed herewith and marked as Annexure-F and copies of tax invoices and ledger accounts Sure solutions is annexed as **Annexure-G** respectively.

32. The Respondent submits that the statements made that total amount of Rs.42,26,263.00 of the petition is a misleading statements. It is denied and disputed that principal amount of Rs.31,40,647.00 outstanding. It is denied and disputed that the Respondent is liable to pay interest amount of Rs.10,85,616.00 and the same is false and misleading statement. There is no agreement between the parties for 18% P.A. The disputed arose due to lapse and default in the part of applicant in executing and completing the project. The applicant company is not entitled to any relief.

33. Now, the Petition is filed on 04.12.2019 under section 9 of the Insolvency and Bankruptcy Code,2016 for the unpaid Operational Debt due of Rs.42,26,263.00 (Rupees Forty-two Lakh Twenty-Six Thousand Hundred and Sixty-Three only)) which includes interest of Rs.10,85,616.00.

34. The case was taken up by this Adjudicating Authority on 06.01.2020, 30.01.2020, 06.02.2020, 17.02.2020, 25.02.2020, 02.03.2020, 20.03.2020, 11.11.2020, 09.12.2020 and 20.01.2020. The Arguments of the counsels of the Operational Creditor and the Respondent were heard. On 17.02.2020 reply affidavit on behalf of the Corporate Debtor/Respondent was submitted. On 10.11.2020, rejoinder on behalf of the Operational Creditor/Petitioner was submitted. Further on 19.01.2021, sur-rejoinder on behalf of the Corporate Debtor/Respondent was submitted.

35. The matter was finally heard on 08.02.2021. During the course of proceedings, the Learned Counsel for the Operational Creditor has submitted that the Petition may be admitted and an Interim Resolution professional appointed in accordance with the Provisions of the section 16 of the Insolvency and Bankruptcy Code, 2016. Further, it is submitted that the Corporate Insolvency Resolution Process be initiated as per Section 9 of the Insolvency and Bankruptcy Code,2016 and the moratorium period may also be declared.

36. It is observed that:-

i) The Application has been filed on 04.12.2019 under section 9 of the Insolvency and Bankruptcy Code,2016 for the unpaid Operational Debt due of Rs.42,26,263.00 (Rupees Forty-Two Lakh Twenty Six Thousand Two Hundred and Sixty Three only) which includes interest @ 18% per annum as per the respective invoices enclosed.

a. Date of invoices are from 31.03.2017 to 19.08.2017.

b. Dates of first default occurred varies on different dates as per the terms of respective contract(s) beginning from 30.04.2017 till 19/09/2017

36. (ii) The Application is filed within the limitation period as the date of default of respective contract(s) begins from 30.04.2017 and the date of filing this petition under Section 9 of IBC is 04.12.2019. The CD has made part payments to the Operational Creditor such as payment of Rs.2,45,97,802.00 till 31.03.2017. In addition to that, payment of Rs.63,94,395.00 and Rs.5,00,000.00 were made by the CD on 14th August and on 28th December 2017, respectively, to the Operational Creditor.

36. (iii) Commercial purchase order (PO) No 80AAMK17012017 dated 17/1/2017 issued by the Respondent for Rs.2,30,74,92.00 with delivery date 05/01/2016 (prior to the date of PO) with delivery schedule by 20/1/.2017 i.e. after 2 days of PO with condition of payment i.e. 10% advance, 60% dispatch and 30% after installation and commissioning or as agreed. Hence the contention of the Petitioner that the date of delivery has been shifted to 05/03/2017 with amendment in other terms and conditions of the supply of goods.

36. (iv) The Petitioner has handed over the project on 17/06/2017 and the Respondent has paid Rs.63,94,395.00 and Rs.5,00,000.00 on 16.08.2017 and 28/12/2017 respectively.

36. v) Demand notice has been issued on 10/05/2019 demanding payment of Rs.31,40,647.00 as unpaid operational due along with interest of interest of Rs.10,85,616.00 and proof of delivery of Demand Notice has been submitted vide Postal track consignment dated 15/05/2019 as item delivered (page 79 of the application) Affidavit of service dated on 14/11/2019 has been filed.

36. vi) The OC has not proposed any name of a Resolution Professional to be appointed as IRP.

36. vii) The Respondent, in its reply affidavit, has stated that it has incurred additional expenses to the tune of Rs.8,35,244.00 for bringing the project to a turnkey stage.

36. viii) The Respondent in its reply affidavit has also mentioned that it has shown credit balance of Rs.22,92,471.00 as on 01.04.2018 in its balance sheet in favour of the Petitioner but it has written off/reversed the entire amount of Rs.22,92,471.00 by raising a Debit Note against the Petitioner on 07.08.2018 for failure of the Petitioner in handing over the project as per the terms and condition of PO.

36. ix) Writing off/reversing the credit amount from the books of the accounts by the Respondent itself by raising Debit Note, after 13(Thirteen) Months plus from the date of hand over the site to it by the Petitioner, does not exempt the Respondent from the liability of making payments to any creditor. The liability cannot be escaped by raising the Debit Note on its own unilaterally.

36. x) Though there is an arbitration provision, in case of dispute, no arbitration proceeding or any suit has been filled before the Demand Notice is issued on 10.05.2019.

36. xi). Defence raised by the Respondent taking the shelter of the reversal of the credit of Rs.22,92,471.00 from its Balance Sheet by raising a Debit Note on its own, after 13 months at handing over the site by the Petitioner is a moonshine defence.

ORDER

37. Considering the material, papers made available on record, the arguments advanced by the learned Lawyers of both sides and the facts mentioned in the Para 36(i) to 36(xi), this Adjudicating Authority is satisfied that,

- a) Existence of operational debt is above Rs. One Lac;**
- b) Debt is due and unpaid;**
- c) Default has occurred starting from 30.04.2017.**
- d) Petition has been filled within the limitation period, as the date of default has started from 30.04.2017 and the petition has**

been filed on 04.12.2019. The last payment of Rs.5,00,000.00 has been received from the Corporate Debtor on 28th December 2017.

e) Demand notice dated 10.05.2019 has been served on 15.05.2019 and the proof of delivery of notice has been filed.

f) Existence of dispute prior to the issue of notice is not found.

Hence, this Petition CP. (IB) No.40/GB/2019 is hereby admitted.

38. As per the provision of Section 13 and 14 of the I.B Code on the date of commencement of insolvency, this Adjudicating Authority declares moratorium for prohibiting all of the following from today, namely:

(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 Securitisation 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.

II. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

III. The provisions of sub-section (1) shall not apply to-**(a)** such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority; **b)** a surety in a contract of guarantee to a corporate debtor.

IV. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process.

39. Since the Petitioner has not suggested any name of a Resolution Professional, this Adjudicating Authority hereby appoints Mr. Manish Agarwalla, having Insolvency Professional Registration Number IBBI/IPA-001/IP-P02082/2020-2021/13198, Registered Address: Room No 9, 5th Floor, Parmeshwari Building, Chatribari Road, Parmeshwari Building, Chatribari, Guwahati, Assam, 781001, email ID: camanishagarwalla@gmail.com as an Interim Resolution Professional. The IRP is advised to file declaration disclosure statement within two days from today before this Registry.

40. The Interim Resolution Professional is further directed to make public announcement of moratorium in respect of Corporate Debtor Company soon after receipt of an authenticated copy of this order and to act further as per the order/direction issued by this Adjudicating Authority, to follow the provisions of Section 13 and 14 and relevant provisions of the Insolvency and Bankruptcy Code. The Interim Resolution Professional shall perform all his duties contemplated, inter-alia, in 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 persons 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, the Interim Resolution Professional would be at liberty to make an application to this Tribunal with a prayer for passing an appropriate order. 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 his obligation imposed by Section 20 of the Code and perform all his duties strictly in accordance with the provisions of the Code, Rules and Regulations.

41. An authentic copy of this order is to be communicated by this Registry to the Operational Creditor, Corporate Debtor, as well as to the Interim

Resolution Professional and the Registrar of Companies, Guwahati by Speed Post/Registered Post at the earliest.

42. Hence, this CP.(IB) No.40/GB/2019 stands admitted on 22/03/2021, with the above Observations and Directions.

**Sd/-
(Prasanta Kumar Mohanty)
Member (Technical)
&
Adjudicating Authority**

**Sd/-
(H.V Subba Rao)
Member (Judicial)
&
Adjudicating Authority**

Ky-deka