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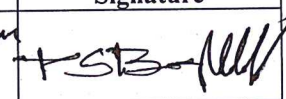
**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH**

**PRESENT: HON'BLE SHRI RATAKONDA MURALI- MEMBER JUDICIAL
HON'BLE SHRI NARENDER KUMAR BHOLA- MEMBER TECHNICAL**

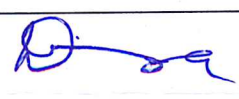
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 13.09.2019 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA No.646/2019 in CP(IB) No.345/9/HDB/2018
NAME OF THE COMPANY	Sathavahana Ispat Ltd
NAME OF THE PETITIONER(S)	Operational Energy Group Ltd
NAME OF THE RESPONDENT(S)	Sathavahana Ispat Ltd
UNDER SECTION	9 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
F.S. BAGHATH SINGH	Advocate	baghatfs@gmail.com 98421-90783	

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Divya Datta	Adv	quho192334	

ORDER

Orders passed vide separate order.

Petition is admitted.


Member (T)
Pavani


Member (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH

C.P.(IB).No.345/9/HDB/2018

U/s 9 of IBC, 2016

In the matter of:

M/s OPERATIONAL ENERGY GROUP INDIA PRIVATE
LIMITED,
5th floor, Gokul Arcade-East Wing,
No.2 & 2a, Sardar Patel Road,
Adyar, Chennai – 600 020
Tamilnadu State

... Petitioner/
Operational Creditor

VERSUS

M/s SATHAVAHANA ISPAT LIMITED,
No.314, Sri Ramakrishana Towers,
Nagarjuan Nagar,
Hyderabad – 500 073
Telangana state

... Respondent /
Corporate Debtor

Date of order: 13.09.2019

Coram:

Hon'ble Shri Ratakonda Murali, Member (Judicial)
Hon'ble Shri Narendra Kumar Bhola, Member (Technical)

Parties/Counsels Present:

For the Petitioner: Dr. P.S. Baghath Singh along with Shri V.
Subramanian, Advocates

For the Respondent: Ms Divya Datla, Advocate

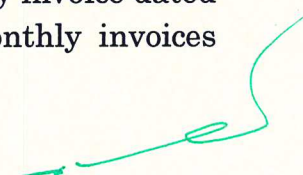
Heard on: 29.07.2019, 09.08.2019, 21.08.2019, 28.08.2019,
29.08.2019

**Per: Shri Ratakonda Murali,
Member (Judicial)**

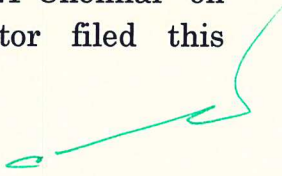
BRIEF OF THE CASE

1. Under consideration is the Petition filed by M/s Operational Energy Group of India Private Limited, Operational Creditor herein stating that M/s Sathavahana Ispat Limited, Corporate Debtor herein had defaulted in repaying a sum of Rs. 1,02,25,414/- (One Crore Two lakhs twenty five thousand four hundred and fourteen only) Hence this petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016, R/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

AVERMENTS:

2. The averments in the Petition in brief are: -
 - (a) That the Petitioner/Operational Creditor entered into an agreement on 01.08.2014 with the Respondent/Corporate Debtor for operation and maintenance of the power plant owned by Corporate Debtor for a period of 3 years from 01.09.2014 to 31.08.2017 with a provision to renew the agreement for further period.
 - (b) It is averred as per Article 10 – Terms of Payment of the Agreement, the monthly invoices of the Operational Creditor Company to be settled within 2 weeks from the date of receipt of invoices. It is their case that Monthly invoices from the month of August 2014 to the month of January 2017 were settled by the Corporate Debtor Company. The final payment was stated to have been settled by the Corporate Debtor Company on 27.02.2017 for the monthly invoice dated 01.02.2017. It is stated that the monthly invoices
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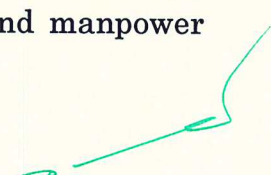
were sent to Corporate Debtor Company in time. Further Operational Creditor reminded Corporate Debtor to settle the payment.

- (c) It is the case of Operational Creditor that during the first week of August 2017, the Corporate Debtor initiated renewal of contract for further 3 years from September 2017. Due to the small difference of amount quoted by the Operational Creditor, the Corporate Debtor ended the agreement dated 01.08.2014. The Operational Creditor requested Corporate Debtor to make payment of Rs.94,45,841/- for the period of six months up to 31st July 2017 and handover the site on 08.09.2017 to Corporate Debtor. Further it is stated that Corporate Debtor gave assurance to settle the balance payment.
- (d) The Petitioner Company / Operational Creditor on 16.10.2017 sent a demand notice to Corporate Debtor demanding payment of Rs.1,02,25,414/- as on 16.10.2017 plus interest thereon which comes to the tune of Rs.1,08,19,190/- (Monthly invoices – Rs.1,02,25,414/- plus interest as on 16.10.2017 – Rs.5,93,776) to which Corporate Debtor replied on 30.10.2017. Operational Creditor sent a rejoinder on 17.11.2017 to the reply given by Corporate Debtor. On 03.01.2018, the Operational Creditor is stated to have obtained Record of Default from the National E-Governance Services Limited (NESL) to confirm the balance due from the Corporate Debtor Company. On 05.01.2018, the Operational Creditor replied to the Corporate Debtor's letters dated 30.11.2017 & 27.12.2017.
- (e) This Petition was filed initially before the Hon'ble National Company Law Tribunal, Chennai Bench on 08.01.2018 and it was numbered as CP / 159 / (IB) / CB/2018 and it was listed on 28.02.2018. In pursuant to the order passed by the NCLT-Chennai on 03.04.2018, the Operational Creditor filed this
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Petition on 05.04.2018 before this Tribunal, and the same is re-numbered as CP(IB) No.345/9/HDB/2018.

- (f) It is the case of Operational Creditor that the Corporate Debtor filed reply to which Operational Creditor filed rejoinder. It is the case of Operational Creditor that Corporate debtor never disputed the amount of claim mentioned in the demand notice dated 16.10.2017. There was no notice of dispute for the amount to be received by the Operational Creditor and further there is no record of dispute in the information utility. It is therefore the case of Operational Creditor that there is no pre-existing dispute in this case. Hence, urged this Tribunal to admit the Petition.

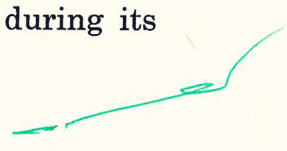
COUNTER:

3. Counter is filed by Corporate Debtor. Averments in brief in the Counter are:-
- (a) The Operational Creditor and Corporate Debtor entered into an agreement on 01-08-2014 and the same was signed on 01-08-14.
- (b) That as per article 8.2 of the Agreement the tenure of the contract was for an initial period of 3 years which ended on 31-07-17. Copy of the Agreement dated 01-08-2014 is marked as Annexure R2.
- (c) It is submitted that as per Article 2 of the Agreement the purpose of awarding this contract to the Operational Creditor was to ensure a safe, secure, optimum, high level performance, full time power plant availability, free of failures, breakdowns and unplanned interruptions and to secure long life of the plant and machinery. Further the Operational Creditor is to provide all the required knowledge, expertise, experience, organizational and manpower
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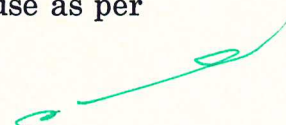
resources for operation and maintenance of the power plant.

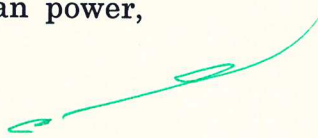
- (d) It is averred as per the Agreement the Operational Creditor commenced the operation and maintenance of the power plant and raised monthly invoices from July, 2014 and Corporate Debtor made payments promptly up to January, 2017.
- (e) It is the case of Corporate Debtor that as per clause 3 of the Agreement, the Operational Creditor was to operate the power plant and appoint personnel of management cadre for key operations and also maintenance staff as per the orgonogram (annexure 3) of the agreement which was accepted mutually by the Operational Creditor as well as Corporate Debtor.
- (f) That, the Corporate Debtor vide e-mail on 03.06.2015 informed the Operational Creditor about low manpower availability and short fall of manpower at the power plant. Further it is stated that Corporate Debtor informed Operational Creditor about availability of only 3 technicians out of 7 Technicians as per the agreement at the plant site at all times to handle the work. Due to short fall of manpower the remaining employees at the power plant were doing continuous work which was not acceptable by the Corporate Debtor. The shortfall of manpower was affecting the maintenance jobs during shifts and G-shifts. On 04-06-2015 the Petitioner Company accepted the shortfall of men at the work site and agreed to take action for filling up the vacancies at the power plant. The Operational Creditor also mentioned about the uncertainty in payment of salaries by the Corporate Debtor. Around 35% of employees were replaced by new employees with poor operating knowledge of the power plant due to which the consumption of coal drastically increased. Further it is also stated that it was brought to the knowledge of Operational Creditor that only one person was

available at the boiler desk and there was no shift in charge during plant operation. Copy of the e-mail dated 25-12-2015 is marked as Annexure R5.


- (g) It is the further case of Corporate Debtor that on 27-04-2016, the Operational creditor was informed about the unavailability of man power at the control room which was under stabilization after shutdown of the plant and that having no person available at the operator room is a huge risk for the power plant to which Operational Creditor on 28-04-2016, replied that they would try their best to identify boiler desk operators and were also trying to depute man power from other sites of the Operational Creditor to ensure the smooth functioning of the Corporate Debtor. It is the case of Corporate Debtor that the number of employees as agreed in the agreement was never maintained by the Operational Creditor.
 - (h) The Corporate Debtor on 27-04-2016 sent an e-mail stating that the Operational Creditor violated Clause 14.5 of the Agreement by engaging ex-employees of the Corporate Debtor at the other units of the Operational Creditor Company. It is further alleged that the Operational Creditor Company was plundering employees from the Corporate Debtor and caused manpower reduction in the Corporate Debtor Company.
 - (i) It is submitted that the Corporate Debtor vide e-mail dated 28-07-2016 informed the operational creditor that there is delay in payment and it would be regularized by the month of October – November, 2016 and as assured by the Corporate Debtor, the payment was regularized to the Operational Creditor Company.
 - (j) It is submitted that due to the negligent attitude of the Operational Creditor there was a breakdown of the boiler at the power plant on 07-01-2017 during its
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operation and maintenance which caused huge loss to the Corporate Debtor which compelled it to stop payment amounting to Rs.1,00,000/- as penalty for the breakdown of the boiler. The same was stated to have been intimated to the Operational Creditor vide e-mail dated 27-02-2017.


- (k) It is the case of Corporate Debtor that on 28.02.2017 the Operational Creditor requested not to deduct the penalty amount for the breakdown of the boiler. The total loss incurred by the Corporate Debtor is stated to be to the tune of approximately Rs. 40 lakhs.
- (l) It is submitted that the Operational Creditor committed breach of the Agreement and did not comply with the terms and conditions of the Agreement. It is the case of Corporate Debtor that as per section 73 of the Contract Act, 1872 the Corporate Debtor is entitled to receive compensation for the loss incurred by it due to non-performance of the Agreement and that the Operational Creditor did not carry out his duties in accordance with Agreement. Further as per Article 12 of the Agreement any dispute or controversy to be settled as per the provisions of Arbitration & Conciliation Act, 1996.
- (m) It is averred the Operational Creditor in the Demand Notice issued on 16-10-2017 sought an amount of Rs. 1,02,25,414/- with interest. It is alleged this was for the first time that the Operational Creditor demanded interest on the pending amount and had never mentioned it earlier in any of the communications exchanged between the Petitioner Company and the Respondent Company.
- (n) It is also the case of Corporate Debtor that in reply to the demand notice on 30-10-2017, the Respondent Company expressed its intentions to settle the matter and intended to invoke the Arbitration clause as per the agreement.
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- (o) The Operational Creditor is stated to have violated the terms and conditions of the Agreement by not invoking the Arbitration clause. On 08-12-2017 the Corporate Debtor issued a letter to the Operational Creditor invoking the arbitration clause as per the agreement and also mentioned the issues which caused substantial loss to the Corporate Debtor like: 1) business and reputation on account of supply of Unplanned forced shutdowns of the Power Plant 2) Frequent Trippings 3) frequent replacement of manpower 4) Shortage of manpower 5) Absence of shift in charges for so much time 6) Absence of Control Room Operator 7) Absence of Safety Officer 8) No operation manager in Plant for 2 out of 3 years of contract.
- (p) On 09-12-2017, in reply to letter of Corporate Debtor dated 08-12-2017, the Operational Creditor informed the Corporate Debtor that it has no right to initiate arbitration proceedings. As discrepancies existed as per the Agreement, the Corporate Debtor with an intention to settle the disputes issued a letter invoking the arbitration clause, so that the same could be settled in a peaceful manner. The Operational Creditor did not mention any of the above facts in the demand notice dated 16-10-2017 or in the petition filed before this Tribunal. Therefore, the Corporate Debtor urged this Tribunal to dismiss the Petition on account of suppression of material facts.
- (q) It is the case of Corporate Debtor that Operational Creditor avoided the arbitration notice issued by the Corporate Debtor and instead issued demand notice on 16-10-2017. It is also their case that Operational Creditor never claimed interest prior to this demand notice. In reply to the demand notice on 30-10-2017, the Corporate Debtor apprised the Operational Creditor that payments were done promptly up to January, 2017, in spite of insufficient man power,
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forced shut downs and also inefficient shift in-charges and in spite of repeatedly informing the Operational Creditor about its inefficiency and under performance as per the Agreement. Further it is averred that Operational Creditor was made aware of the massive tripping which occurred on 07-01-2017 that led to a loss of approximately Rs. 40 lakhs.

- (r) It is also the case of Corporate Debtor that it wanted to settle the matter as the Operational Creditor underperformed all the obligations under the Agreement for which Corporate Debtor filed an Arbitration application bearing Sr No. 2593 of 2018 before the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh. The Corporate Debtor vide letter dated 26-05-2018 informed that an Arbitrator was nominated from their end and intend to continue the arbitration application before the Hon'ble High Court for initiation of reconciliation process between the parties.
- (s) The Corporate Debtor also relied on the provisions of section 73 of the Indian Contract Act, 1872 which stipulates violation of the terms and conditions of the Agreement would amount to breach of the Agreement and the Operational Creditor would be liable to pay damages.
- (t) It is alleged that the Operational creditor did not respond to the Arbitration notice though Corporate Debtor pointed out that the debt was disputed and stated that any action initiated would be at the cost of the Operational Creditor.
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REJOINDER:

4. Rejoinder is filed by Operational Creditor reiterating the averments made in the Petition. Averments in brief are:-
- (1) The Operational Creditor denies the contention of the Corporate Debtor that this petition is not maintainable and avers that the same is maintainable on the sole ground that there is no dispute between the parties in any aspect except the legally eligible undisputed balance amount of *Rs.1,02,25,414/- as on 16.10.2017 plus interest* to be paid by the Corporate Debtor.
 - (2) It is contended the demand notice issued by the Operational Creditor is true and did not suppress any facts. After sending demand notice dated 16.10.2017, there are multiple replies and rejoinders up to 03.04.2018. On the other side the Corporate Debtor never disputed the balance amount mentioned in the Demand Notice and other vital facts.
 - (3) It is the case of Operational Creditor that the Corporate Debtor clearly accepted that the contract dated 01-08-2014 is a renewable / extendable one that there is no dispute between the parties till the date of handover of the site to the Corporate Debtor on 08.09.2017 even though the initial contract period came to an end on 31.07.2017.”
 - (4) Section 73 of the Contract Act, 1872 deals with the compensation for loss or damage caused by breach of contract. It is averred the Operational Creditor performed in accordance with the terms and conditions of contract during the contract period without any breach, fault or any violation. The Operational Creditor handed over the site to the Corporate Debtor on 08.09.2017. Hence, Corporate Debtor has no locus standi to claim the breach of contract. It is alleged in fact breach of contract was committed by the Corporate Debtor by stopping the
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legally eligible undisputed balance payment of Rs.1,02,25,414/- as on 16.10.2017 plus interest. So, section 73 of the Contract Act, 1882 is applicable to the Operational Creditor and not to the Corporate Debtor.

- (5) It is the case of Operational Creditor that the demand notice was sent by the Petitioner Company/Operational Creditor to the Respondent Company/Corporate Debtor on 16.10.2017. Thereafter the Corporate Debtor never disputed the amount of balance payment in its reply and also in its subsequent communications with Corporate Debtor till date. There were no arbitration or civil proceedings initiated by both the parties on the date of issue of demand notice i.e. 16.10.2017.
- (6) It is the case of Operational Creditor that Corporate Debtor deducted an amount of Rs.1,00,000/- for single forced shut down / tripping on 07.01.2017. But Corporate Debtor in their reply notice stated that they have incurred Rs. 40 lakhs for each forced shutdown/tripping which contradicts the earlier version of the Corporate Debtor. Hence, there is no dispute regarding the break down occurred on 07.01.2017 between the parties which was settled in the month of February 2017.
- (7) It is contended the Operational Creditor has no other option except to proceed under the legal provision of IBC, 2016 to recover the balance payment from the Corporate Debtor. Therefore, it urged this Tribunal to allow the present Petition in the interest of justice.
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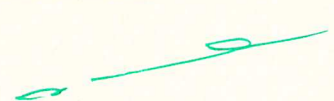
DISCUSSION:

5. We have heard the counsel for Operational Creditor and the counsel for Corporate Debtor. Both sides filed written submissions. The points urged in the written submissions will be dealt in the course of the order.
6. The learned counsel for Operational Creditor contended that there is no dispute that petitioner/Operational Creditor and Corporate Debtor entered into an agreement of Operational and Maintenance on 01.08.2014 for a period of three years with effect from 01.09.2014 with a provision to renew the agreement for further periods. Learned counsel for Operational Creditor contended that the agreement came to an end on 31.08.2017. Monthly invoices were to be settled within two weeks from the date of receipt of invoices. The learned counsel for Operational Creditor further contended that the monthly invoices from the date of agreement till January 2017 were all settled by Corporate Debtor. The final payment was made on 27.2.2017 for the month of January 2017. The Learned counsel contended that Operational Creditor used to raise monthly invoices in favour of Corporate Debtor on time but they were not settled from the month of February, 2017. The Operational Creditor directed Corporate Debtor to pay the amount due under the invoices from February, 2017 up to 31.07.2017. The Operational Creditor handed over the site to Corporate Debtor on 08.09.2017.
7. The learned counsel for Operational Creditor contended that the Operational Creditor issued demand notice under section 8 of I&B Code on 16.10.2017 for a total amount of Rs 1,08,19,190/- (comprising of invoices –Rs.1,02,25,414 plus interest of Rs.5,93,776/-). The Corporate Debtor issued a reply dated 30.10.2017. Operational creditor gave rejoinder.
8. The counsel contended that operational creditor obtained information of record of default from the National E-Governance Services Limited. The Operational Creditor initially filed CP/159/(IB)/CB/2018 before NCLT Chennai


Bench which was returned for presentation before this Tribunal as registered office of Corporate Debtor is located in Hyderabad. Hence it is filed before this Tribunal.

9. The Learned Counsel contended that there were no Arbitration proceedings pending before issuing demand notice dated 16.10.2017. The plant was in operation and maintenance. The Corporate Debtor has alleged tripping of the Plant on 07.01.2017 for which Corporate Debtor deducted Rs.1,00,000/- and there is no question of sustaining any loss or damage. The Corporate Debtor is simply alleging that it sustained loss/damage to the tune of Rs.40,00,000/-.
10. The learned counsel contended that after issuing demand notice Corporate Debtor started to initiate proceedings under Arbitration and Conciliation Act before Hon'ble High Court Telangana. Prior to demand notice there was no attempt to initiate action under Arbitration and conciliation Act. Thus there is no preexisting dispute and petition is liable to be admitted.
11. On the other hand Counsel for Corporate Debtor contended that there was an agreement for operation & maintenance of Captive Thermal Plant with 30 MW installed capacity and also 8.43 MW multi fuel power plant at Haresamudram Village Bommanahal Mandalam, Ananthapuram District, Andhra Pradesh. The contention of Learned Counsel is that as per Organogram, 7 technicians were to be present with the power plant but only 3 persons were available and informed the Operational Creditor about the short fall of man power in operation & maintenance of power plant by sending email dated 25.12.2015.
12. Counsel contended on 06.01.2017, the Corporate Debtor sent a notice to the Operational Creditor appointing an Arbitrator. The penalty of Rs.1,00,000/- was levied on Operational Creditor on 07.01.2017. Counsel for Corporate Debtor stated though Corporate Debtor invoked the

arbitration clause in the agreement, the Operational Creditor did not respond and again on 08.12.2017 Corporate Debtor issued a letter invoking the arbitration clause and there was reply by Operational Creditor raising objection. Counsel contended on 12.04.2018, the Corporate Debtor informed the Operational Creditor about application filed in the Hon'ble High Court bearing Arbitration Case No.4 of 2018. Thus learned counsel contended that there is a prior dispute such as tripping of plant on 07.01.2017 resulting in loss of Rs.40,00,000/- to the Corporate Debtor and as such the petition cannot be admitted as there is a dispute and prayed for rejection of the petition.

13. On 08.01.2014, the Parties entered into operation & maintenance agreement. The agreement was for 3 years. It is very interesting to note that Corporate Debtor settled the claim due under invoices till January 2017. The alleged deficiency of services were not considered to be a matter of dispute at any time. Operational creditor continues to operate and maintain the power plant and raising invoices from 2014. The minor deficiencies if any related to the past years and there was no default in paying the invoices for the said period in which Corporate Debtor alleged deficiency of service. The Corporate Debtor allowed the Operational Creditor to operate and maintain the power plant notwithstanding any minor deficiency in the services. Payments were not withheld by Corporate Debtor for the period during which Corporate Debtor alleged there was deficiency of service. It goes to establish that Corporate Debtor was not giving any importance for alleged minor deficiency of services. Corporate debtor allowed operational creditor to continue to operate and maintain the plant. If really it was a dispute, then why did Corporate Debtor make payment to the Operational Creditor during the period when minor deficiency in the services were said to be reported. The alleged dispute with regard to the deficiency of services is only imaginary. There is no real dispute as projected by Corporate Debtor. If required manpower are not provided as per organogram, yet it is not shown to be a permanent deficiency. These are all routine
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matters which are bound to occur in the case of contract entered between the parties. Regarding alleged tripping on 07.01.2017, the Corporate Debtor imposed penalty of Rs. 1,00,000/-. It was deducted from the monthly bill invoices. There is no iota of evidence from the side of Corporate Debtor to establish that it sustained damage of Rs.40,00,000/- for alleged tripping except its own self estimation. Having deducted Rs.1,00,000/- from the invoices raised for the particular month then it cannot be said corporate debtor sustained loss which is estimated at Rs.40,00,000/-. Interestingly the invoices raised for the month of January, 2017 was finally settled on 27.02.2017. When the invoices amount was settled then it is not open to Corporate Debtor to allege its sustained loss of Rs.40,00,000/- due to tripping of power plant. If really there is a dispute between Operational Creditor and Corporate Debtor with regard to the alleged tripping on 07.01.2017, then how the Corporate Debtor settled the invoice raised for the month of January, 2017. Therefore the tripping of the Plant on 07.01.2017 can never be a dispute between the Operational Creditor and Corporate Debtor as invoice for the said month was settled. The demand notice was issued to Corporate Debtor on 16.10.2017 alleging that plant was under operation & maintenance till 08.09.2017 and invoice was raised for the month of August 2017 and interest is also claimed. The Corporate Debtor gave reply alleging pre-existing dispute and further alleging invocation of arbitration clause in the agreement by filing application before Hon'ble High Court, Telangana.

14. It is not in dispute that Corporate Debtor initiated proceedings under Arbitration and conciliation Act only after receiving demand notice. The dispute must be pre-existing dispute in the sense it should be in existence prior to Demand Notice. So proceedings under Arbitration and Conciliation Act should have been initiated prior to Demand Notice to say that there was a pre-existing dispute. However, the proceedings started under Arbitration and Conciliation Act in April, 2018 which is long after issuing of demand notice. Therefore it cannot be said that there was pre-existing dispute. The contention of learned counsel that it issued notice to the Corporate Debtor invoking
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Arbitration Clause. The notice was dated 06.01.2017 which is shown at Page No.114 of the counter booklet.

15. After careful reading of this letter it shows that it has not come into existence on the date on which it was said to have been issued because the references in the letter are dated 08.12.2017 and 27.12.2017. How a letter dated 06.01.2017 contained reference letters of December, 2017 and that too it was said to have been sent to the counsel for Operational Creditor. How Corporate Debtor came to know the name and the address of the Advocate of Operational Creditor on 06.01.2017. The reason is that there was no correspondence between the Corporate Debtor and Operational Creditor through the Advocate of Operational Creditor prior to 06.01.2017. Had there been any communication sent by the Counsel for Operational Creditor to the Corporate Debtor prior to 06.01.2017, then one can understand that the Corporate Debtor knew the address of the Counsel for Operational Creditor. Thus, for the above reasons, the letter dated 06.01.2017 cannot be relied. This letter is purported to be an information to the Operational Creditor that the Corporate Debtor is going to invoke Arbitration Clause of the Agreement. It is interesting to note that the Operational Creditor had not initiated any arbitration proceedings in spite of alleged dispute prior to Demand Notice. Therefore, it cannot be said that there is a pre-existing dispute in the form of proceedings started under Arbitration and Conciliation Act prior to issue of Demand Notice.
16. The main contention of the Corporate Debtor that there was a pre-existing dispute. The question whether there was really a pre-existing dispute prior to Demand Notice. If Corporate Debtor is able to establish existence of a dispute before issuing Demand Notice dated 16.10.2017, then Petition cannot be admitted. In this case Corporate Debtor filed additional written submissions on 04.09.2019. Further, the case of Corporate Debtor it was informing the Operational Creditor through emails about deficiency in services such as required man-power were not provided as per orgonogram. May be Corporate Debtor pointed out

some deficiency of services here and there but the fact remains that Operational Creditor was allowed to work for the complete period of the contract under the Agreement which is 3 years and was allowed to perform its duties as per the Agreement for the full period. Had it been true that Corporate Debtor suffered alleged losses due to break down of plant etc then why Corporate Debtor allowed the Operational Creditor to continue the contract for the full period. The Corporate Debtor should have taken steps for cancellation of the contract if it had really suffered losses only on account of certain deficiency in supplying man power. The interesting point is that the alleged deficiency of services related to the year 2015-16 and the latest one on 07.01.2017. The Corporate Debtor settled the invoices raised up to January 2017. Notwithstanding the alleged deficiency of services for providing man-power resulting in alleged losses, the Corporate Debtor continued to pay the amount covered by monthly invoices till January 2017. Hon'ble Apex Court has clearly held in *Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd on 21 September, 2017* that dispute must not be spurious, imaginary and hypothetical but must be real. The deficiency of services were never considered as a dispute. The reason is that Operational Creditor continued to execute the terms of Agreement and monthly invoices raised were being settled. Therefore, there was absolutely no dispute for the alleged break down of plant on 07.01.2017 for which the Corporate Debtor deducted Rs. 1 lakh from the invoice amount and Operational Creditor did not agree for deduction. However, the invoice raised for the month of January, 2017 was subsequently settled on 27.02.2017.

17. The default occurred for the invoices raised from February 2017. For the invoices raised from February 2017, absolutely there is no allegation of deficiency of services. This is a particular period which Operational Creditor claimed that invoices raised were not paid. Interestingly during this period, the Corporate Debtor never alleged any deficiency of services such as not providing man power. Therefore, there is absolutely no dispute for the period for which default was committed by the Corporate Debtor and
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for the alleged deficiency of services in the past, the amount covered by the invoices were all paid. Thus, one cannot come to a conclusion that there was a pre-existing dispute in the circumstances narrated above. The fact is that the amount covered by the invoices from February 2017 were not paid which is not in dispute. In other words, it is not the case of Corporate Debtor that it had paid the amount covered by invoices from February 2017. So, the amount is due which is not paid.

18. Therefore, the Operational Creditor is able to establish that the debt is an operational debt against which Corporate Debtor has committed default. Therefore, the Petition deserves to be admitted.
19. The Operational Creditor has failed to name anyone as Interim Resolution Professional and has requested the Tribunal to appoint one for the Corporate Insolvency Resolution Process. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period 1st July 2019 to 31st December, 2019 in compliance with Section 16(3) (a) of the Code in order to avoid delay.
20. Accordingly, this Tribunal appoints Mr. Mahadev Tirunagari having registration number IBBI/IPA-002/IP-N00320/2017-2018/10925 e-mail id: mahadev.pcs@gmail.com, mobile: 9866620104 as Interim Resolution Professional. The aforesaid interim resolution professional has no disciplinary proceedings pending against him. He shall file his written communication and all relevant papers immediately before Registrar of this Tribunal but not later than two days.



ORDER

21. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

- (1) The Bench hereby prohibits 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; Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;
- (2) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (3) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, inter alia, by Sections 15, 17,18,19,20, and 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of CIRP. His Conduct should be above Board and independent and he should work with utmost integrity and honesty. 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 her in managing the affairs of the Corporate Debtor. The interim resolution professional is under duty to protect and preserve the value of the property of the Corporate Debtor and shall perform all his functions strictly in accordance with the provisions of the Code.

- (5) The Petitioner / Operational Creditor is directed to pay a sum of Rupees 2,00,000/- (Two Lakhs Only) to the interim resolution professional as appointed vide para 20 above, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the committee of creditors as accounted for by interim resolution professional and shall be paid back to the petitioner.
- (6) That the order of moratorium shall have effect from 13.09.2019 till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- (7) That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.

Accordingly, this Petition is admitted.


(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)


(RATAKONDA MURALI)
MEMBER (JUDICIAL)

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