

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**JAIPUR BENCH**

**CORAM: SHRI P.S.N. PRASAD,**  
**HON'BLE JUDICIAL MEMBER**

**SHRI RAGHU NAYYAR,**  
**HON'BLE TECHNICAL MEMBER**

**IA No. 203/JPR/2019**

**IB- 596(ND)/2018**

**TA No. 116/2018**

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

**IN THE MATTER OF:**

**M/s ADITYA BIRLA MONEY LIMITED**

**...OPERATIONAL CREDITOR/  
APPLICANT**

**VERSUS**

**M/s ARKAY INTERNATIONAL FINSEC LIMITED**

**...CORPORATE DEBTOR/  
RESPONDENT**

**For the Applicant:**

**Vijay Choudhary, Adv.**

**For the Respondent:**

**Nikhil Yadav, Adv.**

M/s Aditya Birla Money Ltd.

V/s

M/s Arkay International Finsec Ltd.



**IB- 596(ND)/2018**

**MEMO OF PARTIES**

**Aditya Birla Money Limited**

**Registered Office At:** Indian Rayon Compound,  
Veraval, Gujarat-362266,  
India

**...Operational Creditor/Applicant**

**VERSUS**

**Arkay International Finsec Limited**

**Registered Office at:** C-11, Raja Park,  
Jaipur-302004, Rajasthan

**...Corporate Debtor/Respondent**

**IA No. 203/JPR/2019**

**MEMO OF PARTIES**

**Aditya Birla Money Limited**

**Registered Office At:** Indian Rayon Compound,  
Veraval, Gujarat-362266,  
India

**...Non-Applciant /Respondent**

**VERSUS**

**Arkay International Finsec Limited**

**Registered Office at:** 123, Stock Exchange Building,  
Malviya Nagar, Jaipur, Rajasthan

**...Applicant/Operational Creditor**

M/s Aditya Birla Money Ltd.

V/s

M/s Arkay International Finsec Ltd.



**Order Pronounced On: 14.02.2020**

**ORDER**

**Per: Shri P.S.N. Prasad, Judicial Member**

1. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) read with Rule-6 of Insolvency and Bankruptcy Rules, 2016 ('the Code') by M/s Aditya Birla Money Limited ('Applicant') claiming to be an Operational Creditor with a prayer for initiation of Corporate Insolvency Resolution Process against M/s Arkay International Finsec Limited ('Respondent'). This Application is filed through Mr. Lalit Gola, an Authorised Representative of the Applicant, authorised vide letter dated 02.05.2018.
2. The Applicant is a Limited Company, registered with the Registrar of Companies, Ahmedabad, with CIN: L65993GJ1995PLCO64810 and the Registered Office of the Applicant is at Indian Rayon Compound, Veraval, Gujarat, 362266. The Applicant is engaged in the business of securities broking and is registered as a stock broker with Securities and Exchange Board of India.

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3. The Respondent is a Limited Company incorporated under the provisions of Companies Act, 1956 on 22.09.1995, duly registered with Registrar of Companies, Jaipur, with CIN: U67120RJ1995PLCO10776 and the Registered Office of the Respondent is at 123, Stock Exchange Building, Malviya Nagar, Jaipur, 302017, Rajasthan.
4. The main object of the Respondent company is: -  
To carry on the business of financiers, merchant bankers, financing agents, financial broker, recovery agents, bill discounters and to undertake, carry on and execute all kinds of financial operations and to carry on the business of the money lending (subject to the provisions of law) including hire purchase, leasing of movable and immovable properties, machineries and commodities of all kinds either by way of pledge mortgage, hypothecation, charge or without any securities to any person, individual, body corporate firm organisation, authority and subject to the provisions of Section 58-A of the Companies Act, 1956 and the rules framed thereunder and the directions issued by RBI from time to time as may be applicable and defined as under Banking Regulation Act, 1949. Provided that the company shall not carry on any Banking Business within the meaning of the Banking Regulation Act, 1949.....



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5. It is the case of the Applicant that the respondent had availed the services from the Applicant and opened a Trading Account No. 1070913 with Applicant through its branch office at Jaipur and started trading from September, 2017 and continued till November, 2017. On 28.11.2017 the respondent had purchased 1,00,000 shares of Steel Exchange of India Limited ("SEIL") at the average rate of Rs. 130.055/- per share, and in view thereof Rs, 1,30,38,956.27/- was debited to the respondent's account. As per the applicant's books of accounts a sum of Rs. 90,24,817.40/- became due on 30.11.2017 from the respondent. Since the value of the SEIL shares were reducing and in view of the non-payment by the respondent, as per Regulation 3.15 of the Exchange Regulations, the applicant sold 30,873 shares of the Respondent for a consideration of Rs. 25,70,364.42/. When the value of shares reduced to Rs. 52.25/- on 08.12.2017, the Applicant had sold 69,127 shares out of the remaining shares and the thereby the respondent's account was credited with an amount of Rs. 36,05,249.28/- and reducing the debit balance to Rs. 28,83,058.80/-.
6. According to the Applicant, the Demand Notice dated 21.12.2017 was issued to the respondent claiming an outstanding amount of Rs. 28,90,835.10/- with interest @ 24% per annum. The said notice was delivered on 27.12.2017, neither any payment nor any reply was made

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by the respondent. The respondent had issued three cheques of Rs. 22,00,000/- each in favour of the Applicant having Cheque No. 926382 dated 09.02.2018, Cheque no. 926383 dated 20.02.2018 & Cheque No. 926384 dated 20.03.2018. The applicant had acknowledged the receipt of said cheque vide email dated 30.11.2017. Upon presentation of the said cheques the same were returned as dishonoured for the reason "Payment Stopped by Drawer". In consequence thereof the Applicant issued a legal notice dated 07.03.2018 to the respondent under Section 138 of the Negotiable Instruments Act, 1881. Thereafter, the applicant had issued a statutory demand notice dated 15.03.2018 under Section 8 of the IBC, 2016, demanding payment of Rs. 28,83,058.8/- plus interest @ 24% per annum and the same was replied vide reply dated 05.04.2018.

7. On perusal of the reply to the demand notice dated 05.04.2018, it is seen that the respondent has denied any outstanding amount to the Applicant and stated that an amount of Rs. 63,31,706.90/- is due from the applicant to the respondent. It is also stated that the respondent had instituted a case in the Court of District and Sessions Judge, Jaipur for which summons was sent to the applicant and its director on which the applicant had appeared in the Court through Advocate. The Respondent



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has denied the issuance of the cheque No. 926382 dated 09.02.2018 of Rs. 22,00,000/- to the applicant.

8. The applicant had sent rejoinder dated 02.05.2018 to the reply of the Respondent and denied that any amount of Rs. 63,31,706.09/- was due from the applicant to the Respondent and also stated that the petition filed before the District & Sessions Judge, Jaipur was frivolous and vexatious.
9. Thus, the applicant filed the present application under Section 9 of the Insolvency and Bankruptcy Code, 2016. The total amount claimed by the applicant as mentioned in Part IV is a sum of Rs. 28,83,058.80/- plus interest @ 24% per annum as an outstanding amount which is due and payable by the Respondent as described below:

#### PART IV

Sr. No.	Particulars of Operational Debt	
1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due.	Rs. 28,83,058.80/-



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2.	Amount claimed to be in default and the date on which the default occurred	Total amount of debt claimed to be in default is Rs. 28,83,058.80/- plus interest @ 24% per annum for the default period from the date of default. Date of default: 28.11.2017.
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10. The Respondent has filed reply on 28.09.2018 and raised the following preliminary objections:

- a) As per Clause No. 45 of Annexure 4 with heading Rights and Obligations Of Stock Brokers, Sub-Brokers and Clients of Client Registration Form, it is provided that any dispute arising shall be settled by the Arbitrator therefore, this Tribunal has no jurisdiction to hear the present application.
- b) No dues are pending to the Applicant from the Respondent, instead the Respondent is owed the sum of Rs. 63,31,706.09/- from the Applicant and in respect of same a case is pending before the Court of Additional District and Session Judge, Jaipur, filed by the Respondent under Section 9 of the Arbitration and Conciliation Act, 1996.
- c) The Respondent had not given or handed over any cheque to the applicant. In regard to the cheques mentioned by the applicant in the

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application, the Respondent had lodged a police complaint for loss and misplacing of blank signed cheque book which has the leaves of the cheque as alleged in the application. The Respondent had also informed with respect to the loss of the cheque book to the bank. Copy of the FIR is annexed with the reply as Annexure R/5. It is noted by the Tribunal that the FIR annexed with the reply is not duly signed. According to the respondent if the applicant is claiming an amount of Rs. 28,83,058.80 then how the Respondent can give 3 cheques of total amount of Rs. 66,00,000 to the applicant. The Respondent has denied the handwriting of Mr. Gyan Chand Mutha on the cheques alleged by the applicant. The demand notice dated 21.12.2017 annexed with the application as stated to be sent by the applicant does not contain any reference as to the said cheques issued on 30.11.2017.

- d) It is denied that Mr. Gyan Chand Mutha was duly authorised vide Board Resolution dated 25.03.2017 regarding dealing and opening account with the applicant.
- e) The franking on the Client Registration Form has been done on 31.08.2017 while the date of form is 06.09.2017. Copy of the complete form is annexed as Annexure R/7 with the reply.



11. The Respondent has admitted the fact of opening of Trading Account No. 1070913 with the applicant; though denied the document filed by the Applicant with respect to the Opening and Trading Account with the application. It is submitted by the Respondent that it has not authorised any person to purchase the shares of SEIL. Also, the contract note dated 28.11.2017 filed by the applicant does not have the signatures of either the Respondent or its Authorised Representative. It is also submitted that the cheques alleged by the applicant were presented in Chennai situated bank for clearance. The Respondent had not received any legal notice dated 07.03.2018 under Section 138 of the Negotiable Instruments Act, 1881 for dishonour of the said cheques. The respondent had received the Demand Notice under Section 8 of IBC, 2016 on 27.03.2018 and replied to said notice on 05.04.2018 that is within a period of 10 days of receipt of Demand Notice.
12. The Applicant filed rejoinder on 25.10.2018 and the pendency of case filed by the Respondent under Section 9 of the Arbitration and Conciliation Act, 1996 cannot be said to be a dispute because said petition is only an interim petition to secure an amount. The Respondent has neither raised any dispute nor filed any claim before any Arbitral Tribunal even after filing of alleged Section 9 petition, therefore, it cannot be considered that a suit or arbitral proceeding is pending. It is

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submitted by the applicant that the Respondent had received the Demand Notice on 16 March, 2018 and should have replied thereto latest by 26 March, 2018 but the Respondent had sent its reply to Demand Notice only on 5 April, 2018 i.e. beyond 10 days.

13. It is further submitted by the Applicant that the right under the IBC, 2016 is in addition to and not in derogation of the Arbitration and Conciliation Act, 1996. Thus, Section 42 and 8 of the Arbitration and Conciliation Act are not a bar for filing a petition under Section 9 of the IBC Code, 2016. It is further submitted that all trading transactions effected in the account of the Respondent are based on its knowledge and consent and the confirmations of the same were sent over the registered Email id and through SMS over registered Mobile No. of the respondent. Copy of confirmation mail is annexed. The receipt of 3 cheques of Rs. 22,00,000 each given by the Respondent on 30 November, 2017 was acknowledged by the applicant vide email dated 30 November, 2017. The applicant had presented the cheques only after due intimation to the Respondent. It was also contended that the story of lost cheques was concocted by the Respondent and is completely false. It is also submitted that the photocopy of the alleged police complaint and complaint submitted to the Bank are fabricated documents.



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14. It is further submitted by the applicant that the Respondent vide Resolution dated 25 March, 2017 had appointed Mr. Gyan Chand Mutha for executing the account opening forms and agreement for opening and operating the trading account and demat account with the applicant. Hence, the bald denial of the transactions done by the Authorised Representative of the Respondent will not absolve their liability in the Trading Account. It is also submitted that the contract note is a digital document which need not have any seal and sign and therefore, the Respondent is liable to fulfil the obligations as per the contract note. The franking date should be before the execution. It is submitted that a welcome email dated 15 September, 2017 was sent by the applicant wherein copies of the Trading Account opening documents executed are shared with the Respondent and the Respondent had never raised any allegations or issues.
15. It is further submitted by the Applicant that the allegation of the Respondent that an amount is due from the applicant is false as the Respondent has neither raised any dispute nor submitted any documents in support of his claim at any forum. It is submitted that the legal notice dated 07.03.2018 was sent at the registered address of the Respondent and the same was returned with postal endorsement 'Left Without Instruction' and the Respondent proceeded further to file complaints

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with FTC III Metropolitan Magistrate Court, Saidapet, Chennai on 18 April 2018.

16. The Respondent had filed an Interlocutory Application bearing IA No. 203/JPR/2019 on 08.07.2019 under Rule 11 of the National Company Law Tribunal, 2013 with following prayers:

- a. Take on record the registration certificate issued by RBI to the Applicant/Respondent and Memorandum of Articles of Association of the Applicant/Respondent; and
- b. Hold that the Applicant/Respondent M/s. Arkay International Finsec Limited is not a "Corporate Debtor"; and
- c. Dismiss the Petition filed by the Non-Applicant/Petitioner under Section 9 of the Insolvency & Bankruptcy Code, 2016 being not maintainable against the Applicant herein as the Applicant herein is not covered within the scope and ambit of the term "Corporate Debtor"; and
- d. Pass any other appropriate order or direction in favour of the Applicant/Respondent which may be considered just and proper in the facts and circumstances of the case.

17. It is submitted by the Respondent in the said IA that a Certificate of Registration under Section 45-IA of the Reserve Bank of India Act, 1994 was granted on 03.03.1998 to carry on business of Non-Banking

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Financial Institution. Copy of certificate issued by RBI is annexed with the application. Therefore, the respondent is a 'Financial Service Provider' as defined under Section 3(17) of the IB Code, 2016 and does not come within the purview of the definition of Corporate Person as defined under Section 3(7) of IBC, 2016 and accordingly, an application under Section 9 of IBC, 2016 is not maintainable and is liable to be dismissed. The object clause in the MoA of the Respondent also provides that the main object of the Respondent is to carry on the business of financial operations and financial services. It is further submitted that the certificate issued by RBI, MoA and AoA of the Respondent were inadvertently left out and could not be annexed with their reply. However, the said documents are necessary documents for the purpose of proper adjudication of the Insolvency Petition filed by the Applicant.

18. The applicant filed a reply to IA No. 203/JPR/2019 and submits that neither in the reply notice dated 09.04.2019 nor in the reply to the present Application, the respondent had ever raised the contention as raised in this IA. It is further submitted that the respondent is not engaged in providing any financial services and the debt under dispute does not relate to any such financial services rendered to the applicant and the applicant never avail any financial services from the respondent.

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It is also submitted that the respondent neither actually carries on any of the financial services provided under Section 3 (16) of the IBC, 2016 nor it has placed on record anything to show that it is actually engaged in the business of providing such financial services and hence it cannot be said that merely because the Respondent has a registration certificate from the RBI under Section 45-IA of the RBI Act, the Respondent is deemed to be a “Financial Service Provider” and on that account, excluded from the definition of a “Corporate Person” and/or a “Corporate Debtor” under the Code.

19. On perusal of the record it is seen that on 19.09.2019 this Tribunal had allowed the prayer to take on record the registration certificate issued by the RBI to the respondent and the Memorandum and Articles of Association of the respondent and left all other prayers to be decided along with the main application.
20. The applicant had filed written submissions in the main petition on 25.11.2019 and reiterated that respondent is not engaged in providing financial services. It was also submitted that the respondent has admitted this fact in the KYC Form annexed with the main application at Serial No. 5 under heading “Status”, the Respondent/Corporate Debtor has itself placed a tick mark next to Private Limited Company, and not against “FI” (Financial Institution) or “Bank”. Also, at Page no.

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49 of the said KYC Form the respondent has mentioned that it intends to invest in the stock market with its "own funds" and not through "borrowed funds". Having himself so answered in the KYC Form the respondent now cannot take a stand that he is a NBFC and does not fall under the definition of Corporate Debtor with respect to the transaction under consideration.

21. It is also submitted that the moving an application for seeking interim measures etc by the court under Section 9 of Arbitration and Conciliation Act, 1996 does not amount to dispute under the IBC, 2016 and relied on the judgment of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited, Civil Appeal No. 9405 of 2017 decided on 21.09.2017* whereby the Hon'ble Supreme Court has observed as follows:

*"It is clear that such notice (of dispute) must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation*

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*and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster."*

22. The applicant further submits that the said petition under Section 9 of Arbitration and Conciliation Act, 1996 cannot be termed as "commencement of arbitral proceedings" as defined under Section 21 of the Arbitration and Conciliation Act, 1996 as no notice invoking arbitration has been served by the respondent. The provisions of **Section 21** as under –

*"Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent".*

23. It is also stated that reply to the demand notice dated 05 April, 2018 by the respondent does not amount to a notice of dispute under the IB code, 2016.
24. The Respondent has filed his written submissions and submits that in compliance of the order of the tribunal the respondent wrote a letter dated 31.10.2019 seeking confirmation from RBI regarding status of the

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NBFC of respondent and status of returns filed with regulator/RBI. In response to which RBI confirmed the veracity of the certificate held by the Respondent and also affirmed the timely filing of returns. The copy of said letter from RBI is filed vide diary No. 2663/2019 dated 14.11.2019. The respondent has also relied upon the order passed by the Hon'ble NCLAT in the matter of ***'Randhiraj Thakur Vs. M/s Jindal Saxena Financial Services Private Limited in CA (AT) (Insolvency) Nos. 32 & 50 of 2018, wherein it was held that***

*“M/s. Mayfair Capital Pvt. Ltd.’ (2nd Respondent) being a ‘financial service provider’ and having excluded from the definition of ‘corporate person’ under sub-section (7) of Section 3 of the I&B Code the application under Section 7 was not maintainable against ‘M/s. Mayfair Capital Pvt. Ltd.*

*10. If the entire scheme of the I&B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of ‘corporate persons’, ‘partnership firms’ and ‘individual’ in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganisation and insolvency resolution. However, an exception had been carved out while enacting the Code that the ‘financial service providers’ have been kept outside the purview of the Code. Being a consolidating legislation only those acts are*

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*permitted which are mentioned in the Code and it cannot be made applicable to 'financial service providers' including 'non-banking financial institutions' and MFI's banks, which have been kept outside the purview of the Code."*

25. The Respondent also relied on the below mentioned part of the judgment passed by the Hon'ble Supreme Court in ***Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited, Civil Appeal No. 9405 of 2017 decided on 21.09.2017***

*"requirement of existence of dispute is sufficient for rejection of application for insolvency filing of suit or arbitration proceedings not required before receipt of demand notice by Corporate Debtor".*

26. The respondent also submits that there is no need to give notice under Section 21 of the Arbitration and Consolation Act, 1996 before filing application under Section 9 of the said Act.
27. The respondent also submits that as per Clause 45 of the client registration form this Tribunal has no jurisdiction to decide the matter. Clause 45 states "The Stock Broker and the client shall abide by any award passed by the Arbitrator (s) under the Arbitration and Conciliation Act, 1996. However, there is also a provision of appeal

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within the Stock exchanges, if either party is not satisfied with the arbitration award.” Thus, it is evident that arbitration is neither the sole or final remedy for disputes if any.

28. Heard the submissions made by both the parties. On perusal of all the files it is seen that the respondent had executed the KYC form in its own name i.e. M/s Arkay international Finsec Ltd. for the purpose of trading in Securities, i.e. financial product. The RBI, i.e. financial service regulator has granted the certificate of registration to carry on the business of Non-Banking Financial Institution in 1998. As per the Memorandum of Association of the Respondent the main objects include among other things, to carry on the business of financiers and to invest in and acquire and hold, sell, buy or otherwise deal in shares, debentures, bonds etc. Such activities fall under the definition of Financial Service as stated above. The RBI has also confirmed vide letter dated 06.11.2019 that the respondent is holding Certificate of Registration No. 10.00021 dated 03.03.1998, to carry on the business of non-banking financial institution and has filed all its return.
29. However, the fact that the RBI has granted Certificate of Registration to carry on the business of non-banking financial institution to the Corporate Debtor was neither brought to the knowledge of the Applicant at the time of executing the KYC nor in the reply to the

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statutory notice sent by the Applicant. The said fact is bought to the notice of the Tribunal and the Applicant only after 2 months from the date of the Application being filed by the applicant, thorough an IA. Also, as noted above in para 19, the respondent has intentionally deceived the applicant while executing the KYC Form. Now he can not escape from his liability by raising an objection of NBFC. It can be said that though the respondent is an NBFC, however, without ignoring the fact that the respondent himself entered into the transaction with the Applicant in the capacity of a Private Limited Company. Thus, in regard to the transaction under consideration the respondent falls under the definition of Corporate Debtor and cannot fall under the shell of the term 'NBFC'.

30. Further the question with respect to pre-existing dispute, it is necessary to go through Section 9 of the Arbitration and Conciliation Act, 1996 which reads as below:

***“Section 9. Interim measures, etc., by Court. —***

*(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*

*(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*

*(ii) for an interim measure of protection in respect of any of the following matters, namely:—*

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(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."



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31. The respondent in Arbitration Application filed before the Court of District and Sessions Judge, Jaipur has prayed as below:

*“that the respondent be directed to not to destroy/ usurp the deposited amount of the petitioner and according to the arbitration clause not to destroy/ usurp the deposited amount of the petitioner till the proceedings relating to the dispute by Arbitral Tribunal in relation to the mistakes and for the safety of the deposited amount be deposited in the form of FDR in the Court.”*

The respondent has contended in its reply to the present application also that a deposited amount of Rs. 63,31,706.09/- is due from the Applicant and in respect of the same dispute is pending before the Court of Additional District and Sessions Judge, Jaipur. On scrutiny of the files it is found that the respondent has not filed any document before the Tribunal showing an amount had been deposited with the applicant while opening the Trading Account and the same is due from the Applicant to the Respondent.

32. As referred by both the parties, the Hon'ble Supreme Court in the matter of *Sundaram Finance Limited Vs. NEPC India Limited, civil appeal No. 141-143 of 1999, dated 13 January, 1999* has observed:



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*“When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is preferable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, there-fore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal, but a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said*

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*Act. If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings”.*

33. Further the Hon’ble Supreme Court in the matter of “Mobilox Innovative Private Limited vs. Kirusa Software Private Limited”, held as follows:

*“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the*

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*notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*

34. The respondent has neither contended nor filed any document showing initiation of Arbitration Proceedings. Filing only an application under Section 9 of the Arbitration and Conciliation Act, 1996 for an interim measure of protection before initiating Arbitral proceeding, shows only an intention to initiate Arbitration proceedings but does not establish existence of dispute. It is seen in the delivery report filed by the Applicant that the Demand notice under Section 8 of IBC, 2016 was

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delivered on 16.03.2018 and the respondent has replied on 05.04.2018. Giving a notice of pendency of application under Section 9 of the Arbitration and Conciliation Act, 1996 by the respondent after 10 days from receipt of demand notice, does not hit Section 8(2) of IBC, 2016. Thus, the dispute raised by the respondent is patently feeble legal argument unsupported by evidence on the basis of pending application under Section 9 of the Arbitration and Conciliation Act, 1996, for an interim measure without establishing that an amount of Rs. 63,31,706.09/- is due to the respondent.

35. In accordance with Section 238 of the IBC, 2016, the provisions of the Code have overriding effect on the Arbitration and Conciliation Act, 1996. The Registered Office of the Corporate Debtor is situated in Jaipur and therefore this Tribunal has jurisdiction to entertain and try this Application. The matter is within the purview of Law of Limitation.
36. The Applicant has not proposed the name of any Interim Resolution Professional. In view of the same, this Tribunal appoints Mr. Vijendra Bangar having Registration No. IBBI/IPA-002/IP-N00688/2018-19/12205 and email address bangarv@gmail.com and contact number 9414070501, as the IRP of the Respondent. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15,17,18,19,20 and 21 of the Code.

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37. The consequences of initiation of CIRP shall be inter alia, as follows: -

- (i) The Resolution Professional Mr. Vijendra Bangar, having Registration No. IBBI/IPA-002/IP-N00688/2018-19/12205 is hereby appointed as the Interim Resolution Professional (IRP) to take over the affairs of the Corporate Debtor/ respondent and duties as required to be performed by him under the Provisions of IBC, 2016, including issue of publication in widely circulated newspapers as contemplated under the Provisions of IBC, 2016 and calling for the claims from the creditors of the Corporate Debtor/respondent and collating of the same shall be done.
- (ii) Further as a consequence of admission, moratorium as envisaged under Section 14 of IBC, 2016 is invoked in relation to the Corporate Debtor/respondent which will be in vogue during CIRP of the Corporate Debtor/respondent. The IRP shall carry out is Corporate Insolvency Resolution Process strictly as per the timelines specified and as envisaged under the Provisions of IBC, 2016 in relation to the Corporate Debtor/respondent.
- (iii) The said IRP shall act strictly in compliance with the provisions of IBC, 2016. With a view to defray his expenses to be incurred and fees on account, the Operational Creditor is directed to deposit a sum of Rs. 2,00,000/- (Two Lakh only) to the account of IRP within 3 days from the date of this order. The IRP shall duly file

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the status report appraising this Tribunal about the progress of CIRP unfolded in relation to the respondent / Corporate Debtor. In terms of Sections 17 and 19 of IBC, 2016 all personnel of the Corporate Debtor including its promoters and Board of Directors, whose powers shall stand suspended will extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- (iv) In terms of Section 9 of IBC, 2016 a copy of this order shall be communicated to the Operational Creditor, respondent/Corporate Debtor as well as the Interim Resolution Professional appointed by this Tribunal to carry out the CIRP at the earliest not exceeding one week from today. A copy of this order shall also be communicated to IBBI for its records.

In the circumstances this Application stands admitted.

Sd/-

**SH. RAGHU NAYYAR,  
MEMBER (TECHNICAL)**

Sd/-

**SHRI P.S.N PRASAD  
MEMBER (JUDICIAL)**

*Mansi J.*

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