

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.49/BB/2021
U/s 9 of I&B Code, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

M/s. SFO Technologies Pvt. Ltd.

Plot No.2, Cochin Special Economic Zone,
Kakkanad,
Cochin – 682 037.

... Petitioner/Operational Creditor

Versus

M/s. Vanu India Pvt. Ltd.

Registered Office at
Vaswani Presidio, Sy. No.84/02,
Unit Nos.102 and 103, 1st Floor,
Panathur Main Road, Varthur Hobli,
Bengaluru – 560 103.

... Respondent/Corporate Debtor

Order delivered on: 25th May, 2022

Coram:

1. Hon'ble Shri Ajay Kumar Vatsavayi, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri C.K. Nandakumar, Sr. Advocate
with Shri Sushanth Venkatesh Pai, Adv.

For the Respondent : Shri Arjun K. Perikal, Adv.

ORDER


Per: Ajay Kumar Vatsavayi, Member (J)

1. The present petition is filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC/Code') r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. SFO Technologies Private Limited (hereinafter referred to as 'Petitioner / Operational Creditor') with a prayer to initiate Corporate



Insolvency Resolution Process (CIRP) against M/s. Vanu India Private Limited (hereinafter referred to as 'Respondent / Corporate Debtor').

2. The Corporate Debtor namely, 'Vanu India Private Limited' is a Company incorporated on 11.01.2007 with CIN No.U72200KA2007PTC041464 with its registered office at Vaswani Presidio, Sy. No.84/02, Unit Nos.102 and 103, 1st Floor, Panathur Main Road, Varthur Hobli, Bengaluru-560103. Hence the jurisdiction lies with this Adjudicating Authority. The Nominal Share Capital of the Respondent Company is Rs.5,00,000/- (Rupees Five Lakhs only) and its Paid up Share Capital is Rs.5,00,000/- (Rupees Five Lakhs only).
3. Brief facts of the case, as stated in the Petition, are as under:
 - i.) The proceedings arise from a transaction between the parties herein pertaining to supply of 1000 Nos. of VA 20001-0009 Components and PCB Population using Components along with Non-Recurring Engineering (NRE) charges and Compensation for the excess raw material (residual) after execution of 1000# PO arising due to minimum order quantity purchases as specified by component suppliers. Printed Circuit Board Assembly (PCBA) is the major product to be manufactured and supplied by the Operational Creditor to the Corporate Debtor. It involves procurement of Print Circuit Board, Components, assembling of the Components, populating the Components to the PCBA and the Final testing of the Populated PCB as per the technical specification and drawings provided by the Corporate Debtor. The PCBA are used for the final electronic product called Base stations of mobile phone towers, which function as telecommunication module.
 - ii.) The products that were to be supplied by the Operational Creditor to the Corporate Debtor were exclusive and unique to the Corporate Debtor and had to accordingly be procured by the Operational Creditor based on the specifications and requirements of the Corporate Debtor. Hence, it was made clear right from the very



beginning that the Corporate Debtor would be liable to reimburse the Operational Creditor for all such material procured by the Operational Creditor specifically for the Corporate Debtor in the event the Corporate Debtor cancelled or rescheduled the Purchase Order/s as the material so procured would be obsolete for the Operational Creditor in the event that the Corporate Debtor failed to honour its commitments. This was clearly indicated in the terms and conditions of the Quotation dated 12.09.2018 shared by the Operational Creditor with the Corporate Debtor.

- iii.) Thereafter, the Operational Creditor and Corporate Debtor had several rounds of negotiations with each other. The Corporate Debtor agreed with the terms and conditions stipulated in the above-mentioned Quotation and accordingly issued a Purchase Order dated 25.09.2018 bearing No.Vanu/2018-19/007 for supply of 1000 nos. of VA 20001-0009, NRE Cost-PCB Tooling and excess material cost amounting to Rs.9,52,83,286/- (Rupees Nine Crores Fifty-Two Lakhs Eighty-Three Thousand Two Hundred Eighty Six only).
- iv.) However, right from the outset the Corporate Debtor defaulted on its obligations and failed to make payment of the advance amount of Rs.2,28,62,374.63/- (Rupees Two Crores Twenty-Eight Lakhs Sixty-Two Thousand Three Hundred Seventy Four and Sixty-Three Paise only) and therefore the contract could not go further. In fact, no such payment has been made by the Corporate Debtor till date.
- v.) The Corporate Debtor failed to comply with the terms of the Purchase Order and Quotation and the stocks procured by the Operational Creditor specifically for the Corporate Debtor were lying unused in stock with the Operational Creditor. Due to the failure of the Corporate Debtor to discharge its contractual obligations, the Operational Creditor had a huge quantity of material procured by it specifically for the Corporate Debtor lying unused in stock with itself as well as with its vendors / suppliers. The Operational Creditor also lost its hard-earned goodwill and reputation with its vendors and



suppliers for failing to take the stock of the material from the suppliers and vendors and for failing to pay them in time with respect to the stock of the material purchased by it. Thus, on both counts, the Operational Creditor had to suffer a loss in reputation and goodwill.

- vi.) Despite several meetings and exchange of mails between the parties herein, the Corporate Debtor did not have any intention to honour its commitments. The Operational Creditor had to make payment of the stock procured by it and the stock procured by its vendors and suppliers specifically for use by the Corporate Debtor in order to salvage its reputation and goodwill with its vendors and suppliers to prevent its other projects from suffering due to lack of supply of raw material by the very same suppliers and vendors.
- vii.) Upon realizing that the Corporate Debtor had no intention of honouring its commitments, despite admitting and acknowledging its liability, the Operational Creditor issued a notice of claims dated 05.11.2019 to the Corporate Debtor. Despite receiving the same, the Corporate Debtor did not respond until 04.02.2020.
- viii.) The Corporate Debtor in its email dated 04.02.2020 gave vague excuses for its inability to honour its commitments and discharge its admitted liability. It even sought to adjust the payment due to the Operational Creditor by offering to engage it in other projects.
- ix.) Thereafter, pursuant to the request of the Corporate Debtor to provide it with the exact cost of material physically lying in stock with the Operational Creditor and the value of the material for which Purchase Orders had been placed by the Operational Creditor with its vendors / suppliers, the Operational Creditor reconciled its accounts and informed the Corporate Debtor vide its email dated 12.02.2020 that the Corporate Debtor was due and liable to pay a sum of USD 5,96,003 equivalent to sum of Rs.3,03,42,000/- (Rupees Three Crores Three Lakhs Forty-Two Thousand only). It is significant to mention that there has been no reply from the

Corporate Debtor till date to the said email which yet again demonstrates its conduct of delaying and denying the payment that it is legitimately and rightfully due to make to the Operational Creditor.

- x.) Hence, the Operational Creditor was constrained to issue a Demand Notice in Form-3 as contemplated under Rule 5 of the Insolvency and Bankruptcy (AAA) Rules, 2016 r/w section 8 of the Code. The said Demand Notice dt.15.10.2020 was issued by the Operational Creditor to the Corporate Debtor on 16.10.2020 vide RPAD and it was served upon the Corporate Debtor on 20.10.2020. Thus, the ten days' period expired on 30.10.2020. Despite receiving the same, the Corporate Debtor failed to make any payment whatsoever towards the amount due and payable by it to the Operational Creditor and also, no notice of dispute has been received till date, despite more than three months having lapsed. Hence, this application.
4. While opposing the instant Company Petition, the Corporate Debtor filed its statement of objections dated 25.12.2021 by *inter alia* contending as under:
- i.) It is submitted that the Respondent is a subsidiary of Vanu Inc. which was founded in 1998, and the Respondent Company was incorporated in India in the year 2007. The Respondent is a global provider of turnkey mobile communications solutions that allow MNOs to serve off-grid markets. The Respondent is one of the market leaders in its area of business and has several employees across their offices in Gurgaon and Bangalore. The Respondent is a having a profit of Rs.52,80,375/- for the financial year ended 31.03.2020.
- ii.) As part of its routine operations, the Respondent provides technology services to another Company called Himachal Futuristic Communications Limited ('HCFL'), which participated in a tender floated by Bharatiya Sanchar Nigam Limited ('BSNL') for mobile network rollout in the State of Arunachal Pradesh and two districts in the State of Assam. Post tender evaluation, HFCL was awarded L2



contract for mobile network rollout, which in turn issued a purchase order in-favour of the Respondent dt.16.10.2018, for the supply of 1040 PCB Board. Based on HFCL's Purchase Order to the Respondent, the Respondent issued a Purchase Order dated 25.09.2018 bearing reference No. VANU/2018-19/007 ('Respondent Purchase Order') in favour of the Operational Creditor for the supply of built units, VA 20001-0009 Components and PCB Population using Components and the same was inclusive of Non-Recurring Engineering charges ('NRE charges') and compensation towards Excess Material Cost. A copy of the Respondent Purchase Order has been placed on record as Annexure-C.

- iii.) It was agreed that the Respondent was only required to pay an advance amount towards the NRE charges and that the remaining amounts payable under the Purchase Order would be made only against invoices to be raised by the Operational Creditor pursuant to the delivery of the products. However, despite the same and in contrast to the terms of the Respondent Purchase Order, the Operational Creditor began demanding arbitrary amounts without having delivered any products / components nor having raised any invoices for the same. Therefore, the Respondent has clearly disputed the dues alleged by the Operational Creditor, and despite the same the Operational Creditor filed the instant Application.
- iv.) It is contended that the Demand Notice dated 15.10.2020 u/s 8 of the Code was received at the Corporate Debtor office only on 20.10.2020, when there were lockdown conditions prevailing across the country and the Respondent's offices were completely shut down and remained inoperative. Accordingly, the Respondent did not have any opportunity of informing the Operational Creditor regarding the existing dispute against the sums demanded in the Demand Notice.
- v.) Further, the current application filed by the Petitioner is incomplete on account of non-production of any invoice raised on the Respondent. In fact, no invoice has ever been raised by the Petitioner

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on the Respondent till date against which payment can be said to be due to the Petitioner. As per the terms of the Respondent Purchase Order, any payment was only to be made to the Operational Creditor against an invoice and within sixty days of such invoice. In the absence of any invoice from the Operational Creditor, no amount became payable and hence no amount fell due for the purported demand issued against the Respondent. The Respondent places reliance on the following Payment Terms contained in the Quotation dated 12.09.2018 bearing No.VA20001-0009 Qty. 1000 Nos. issued by the Operational Creditor ('Operational Creditor Quotation'), reproduced below:

"Payment Terms

- *SFO will submit invoices to Customer upon shipment of Products. Each invoice will, at a minimum, reference the customer purchase order number, part number, unit price and total price. Payment terms are applicable from the date of SFO's invoice to Customer. Customer agrees to notify SFO within 10 (ten) calendar days of any incorrect invoices received. On any correct invoices not paid by the due date, Customer shall pay finance charges at the rate of 3% per month.*
- *Payment terms for NRE are 100% advance with PO."*

vi.) Accordingly, it was the obligation and contractual duty of the Operational Creditor to raise an invoice on the Respondent at the time of shipping, which would eventually become due and payable after being confirmed as a correct invoice by the Respondent. Moreover, only NRE charges were payable as advance, which constituted only USD 8625.75 as per the Operational Creditor Quotation and as confirmed in the Respondent Purchase Order to the tune of Rs.6,21,055/- (calculated at the prevailing exchange rate of 1 USD = INR 72). The Operational Creditor did not raise any dispute to the Respondent Purchase Order issued and hence accepted that the NRE charges would constitute only a part of the total Purchase Order amount. Thus, it is not permitted to the Operational Creditor to demand an amount of Rs.228,62,374.63/-



as payable towards advance, which is clearly in contravention to the terms of the Respondent Purchase Order and the Operational Creditor Quotation.

- vii.) It is submitted that the Respondent, under the Respondent Purchase Order, had placed an order for finished products on the Operational Creditor and not for any partial or incomplete components. Moreover, the Operational Creditor had reached out to the Respondent seeking for their assistance in procuring certain components required to prepare the finished product under the Respondent Purchase Order. The parties had reached an agreement as regards the timeline for the delivery of the products under the Respondent Purchase Order. However, the Operational Creditor, has not delivered any contracted deliverable or finished product to the Respondent under the Respondent Purchase Order and accordingly has not raised any invoice on the Respondent either. The Respondent has also offered to source the built units from the Operational Creditor as contracted, even if the end-user, i.e. BSNL is not procuring the same, but the Operational Creditor has not been able to source the components required for completing the deliveries till date. In view of this, no amount becomes payable to the Operational Creditor as claimed for or in any other manner whatsoever.
- viii.) It is contended that the nature of the contracted deliverables is not such that the components or parts can be sourced from one vendor and the supply of finished goods from such sourced components can be awarded to another vendor. The Respondent Purchase Order was necessarily a turn-key job awarded to the Operational Creditor, which it has failed to complete.
- ix.) It is further contended that the Respondent has been fully committed to the completion of its contractual obligations under the Respondent Purchase Order and also enabling fulfilment of contractual obligations by the Operational Creditor. To this end, the



Respondent provided trainings to the Operational Creditor's employees and also loaned Test Jigs to the Operational Creditor for conducting testing and verification. This loaned equipment, which is worth Rs. 2.9 crores in value has been lying in the possession of the Operational Creditor since May 2019. The Respondent is currently undertaking necessary actions for recovery of its equipment from the possession of the Operational Creditor.

- x.) To further the Respondent's statement of an existing dispute between the parties, the Respondent relies on email dated 4.2.2020 from the Respondent to the Operational Creditor, which states Respondent's intentions of putting in best efforts to resolve the issues between the parties and expecting similar efforts from the Operational Creditor. This email exchange between the parties shows that there were issues under the Respondent Purchase Order, which required resolution through amicable solutions by the parties. Further, the dispute existed is demonstrated from the notice of claim dated 05.11.2019 issued by the Operational Creditor to the Respondent by way of email dated 07.11.2019 which makes a demand of USD 8,02,883.53 on the Respondent. Upon receipt of said email of 04.02.2020 seeking reconciliation and resolution, the Operational Creditor replied on 12.02.2020 seeking an amount of USD 5,96,003.90 as against the original demand of USD 8,02,883.53. This stark difference in the demand amount claimed by the Operational Creditor unequivocally establishes that there was a dispute and discrepancy as to the amounts payable, if at all, to the Operational Creditor and hence, no default occurred at the end of the Respondent.
- xi.) It is contended that there has been no acceptance from the Respondent of the charges as claimed by the Operational Creditor and the communications from the Respondent are being quoted by the Operational Creditor out of their correct context. The intentions of the emails sent by the Respondent was to reconcile the amounts

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between the parties which reconciliation is pending till date and pending which no amount is liable to be paid to the Operational Creditor by the Respondent.

xii.) It is also contended that the revision by the Operational Creditor of the amount claimed from the Respondent vide its email dated 05.11.2019 and revised vide email dated 12.02.2020 shows that the amount to be paid was not determined and underwent serious reconsideration. Under such circumstances, it does not lie with the Operational Creditor to claim such disputed and undetermined amount as a debt due to it. The said claim is disputed by the Respondent on aforesaid grounds. Further, the Operational Creditor has claimed an amount of Rs.228,62,374.63/- without any contractual or legal basis. The documents produced by the Operational Creditor on record clearly state that advance was only towards an amount of Rs.6,21,055/- and the claim of the Operational Creditor ought to be reduced to that extent.

xiii.) It is submitted that the documents that the Operational Creditor has claimed reliance on with respect to claiming that the Respondent has acknowledged the debt are being read without the correct context and there is no express acknowledgement of the debt from the Respondent. Further, the Respondent does not owe any sums of money to the Operational Creditor and the same is disputed by the Respondent herein.

5. In response to the aforesaid objections, the Operational Creditor vide its rejoinder dated 04.02.2022 has *inter alia* further stated as under:

i.) The Quotation dated 12.09.2018 makes it clear that the material to be purchased by the Operational Creditor were specific to the contract with the Corporate Debtor and hence it would be liable to pay the cost of such material in case of any cancellation or any other change. The Corporate Debtor is also aware such products have a limited shelf-life and if the same were not put to use within their shelf-life, the same would be rendered obsolete, and still the



Corporate Debtor has failed to provide specific delivery instructions till date. Hence, there is no question of it trying to wriggle out of its liability by contending that the Operational Creditor has not raised any invoice upon it. Unless and until the Corporate Debtor communicates a firm delivery date with firm instructions, the Operational Creditor would not be in a position to revert confirming the same or asking for modification thereof.

- ii.) Vide email dated 9.11.2018, the Operational Creditor communicated issues with regard to procurement and supply of the raw material and components. The Corporate Debtor vide its reply email asked the Operational Creditor to proceed and further stated that it could expect the delivery date to be in February, 2019. However, there has been no subsequent communication from the Corporate Debtor issuing any specific delivery instructions. Vide subsequent emails the Operational Creditor kept calling upon the Corporate Debtor to provide delivery instructions, etc. to prevent further obsolescence of the components and raw material procured by it for this project. Since there was no reply, the Operational Creditor issued a Demand Notice in Form-3 u/s 8 of the Code to the Corporate Debtor on 15.10.2020.
- iii.) It is clear from the email dated 04.02.2020 issued by Mr. Anoj Singh, Director of the Corporate Debtor, that the contract for which they had sought the products from the Operational Creditor had not proceeded as expected and therefore the Corporate Debtor had been unable to fulfil its contractual obligations with the Operational Creditor, including providing delivery instructions. He also called upon the Operational Creditor to provide the cost of the material so that a mutually amicable solution could be worked out.
- iv.) The amount claimed in the email dated 12.02.2020 reduced when compared to the amount claimed in the Demand letter dated 05.11.2019, as the Operational Creditor adjusted the value of some stock which could be put to use in other projects and the value of

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the stock wherever it could return the same to the suppliers by cancelling the Purchase Orders raised on them. The averment of the Corporate Debtor that the difference in the amounts claimed in the Demand Letter dated 05.11.2019 and the Demand Notice dated 15.10.2020 and email dated 12.02.2020 would show that the amount due is not crystallised is a false averment.

- v.) The Demand Notice was served at its registered office on 20.10.2020. The lockdown restrictions had been relaxed to a large extent in October, 2020 and the existence of such lockdown restrictions as a reason for not having replied to the Demand Notice is untenable. In any event, the Demand Notice having been issued by email as well to the Directors of the Corporate Debtor on 21.10.2020 is yet another ground on which the untenable defence of the Corporate Debtor for not having replied fails.
- vi.) The Quotation dated 12.09.2018 unequivocally stipulates that a sum of Rs.2,28,62,374.63/- was payable as advance by the Corporate Debtor at the time of placing the Purchase Order as the materials were being procured on a Minimum-Order-Quantity basis. The email dated 04.02.2020 issued by the Director of the Corporate Debtor would also indicate that there has been no default on the part of the Operational Creditor and the project did not proceed due to issues that the Corporate Debtor faced with the end customer.
- vii.) The averment pertaining to the project being a turn-key project has no bearing on the fact that the Corporate Debtor is due and liable to pay the cost of the material procured by the Operational Creditor and the payment of the advance amount, as stipulated in the Quotation dated 12.09.2018. Further, it has never been mentioned in any document/email, including the Purchase Order that the project was a turn-key project.
- viii.) The fact that the Corporate Debtor had sent some equipment to the Operational Creditor only for the purpose of carrying out testing is a matter of record. The said equipment is still kept intact by the



Operational Creditor. The contention of the Corporate Debtor that the Operational Creditor has not supplied any contracted deliverable product and that the parties had agreed on any timeline for delivery of the product is false and denied.

- ix.) It is further submitted that when the Quotation dated 12.09.2018 itself stipulates the payment of the advance amount as well as the Material Liability for excess / obsolete material due to re-scheduling / cancelling of the Purchase Order, the contention that the payment was not made as no invoice was raised by the Operational Creditor on the Corporate Debtor is denied as false and untenable. Further, such a contention that the non-raising of invoice being the reason for non-payment has never been raised by the Corporate Debtor and raising such defences for the first time before this Tribunal merely as a feeble attempt to escape its liability.
6. The Operational Creditor has filed written arguments dated 25.02.2022 by *inter alia* stating that, vide email dated 13.11.2018, the Corporate Debtor called upon the Operational Creditor to proceed with the procurement. Thus, the parties have acted in furtherance of the Quotation and the Operational Creditor has acted on the basis of the directions of the Corporate Debtor. Despite the Operational Creditor promptly procuring and undertaking work on its behalf, the Corporate Debtor failed to make payment of the advance amount. Thus, the parties have acted in furtherance of the Quotation dated 12.09.2018 and the Corporate Debtor cannot back-track on its obligations at this point. The Operational Creditor, after adjusting for the material that it could use in other projects and return to the suppliers, wherever possible, so as to reduce the liability of the Corporate Debtor, communicated the cost and quantity of such material to the Corporate Debtor vide its email dated 12.02.2020, to which there was no reply. Subsequent to the issue of Demand Notice in Form-3 on 15.10.2020, the Corporate Debtor neither replied within the stipulated period of ten days or anytime thereafter nor has it notified any pre-existing dispute till date. Thus, there is a deemed admission of the liability. The



learned Counsel for the Operational Creditor, in support of his submissions, has relied upon the following decisions:

- i.) *Consolidated Construction Consortium Ltd. vs. Hitro Energy Solutions Pvt. Ltd. (2022) SCC Online SC 142;*
- ii.) *Innoventive Industries Ltd. vs. ICICI Bank (2018) 1 SCC 407;*
- iii.) *Pedersen Consultants India Pvt. Ltd. vs. Nitesh Estates Ltd. (MANU/NL/0328/2019).*

Thus, a conjoint reading of the definition of the terms 'claim' (Section 3(6)); 'debt' (Section 3(11)); 'default' (Section 3(12)) and 'operational debt' (Section 5(21)) along with above-referred judgments of the Hon'ble Apex Court and Hon'ble NCLAT make it clear that there is an unpaid operational debt in the instant case and the claim is maintainable before this Tribunal as it arises from a contract in relation to provision of goods though it did not materialize in actual supply of goods. The Corporate Debtor is well aware of its liability to pay the same and its failure to do so is a 'default' in terms of Section 3(12) of the Code.

7. The Corporate Debtor has filed written submissions vide Diary No.821 dated 02.03.2022 by *inter alia* stating as under:
 - i.) The Corporate Debtor being satisfied with the said Quotation issued the Purchase Order dated 25.09.2018 in favour of the Operational Creditor and also had duly informed that the Purchase Order was a turn-key job awarded to Operational Creditor. No invoice has ever been raised by the Operational Creditor on the Corporate Debtor till date and in the absence of the same, no amount became payable and due for the purported debt alleged by the Operational Creditor. It is therefore submitted that since the Operational Creditor has failed to perform its obligations under the Purchase Order, no debt is due, and thus the Petition is liable to be rejected.
 - ii.) To further the Corporate Debtor's argument that there is a pre-existing dispute between the parties, the Corporate Debtor relies on email dated 04.02.2020 from the Corporate Debtor to Operational

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Creditor, which states the Corporate Debtor's intentions of putting in best efforts to resolve the issues between the parties and expecting similar efforts from the Operational Creditor. Further, the Corporate Debtor has not accepted the charges claimed by the Operational Creditor and the correspondences between the parties are being quoted by the Operational Creditor out of their context.

- iii.) The Operational Creditor in email dated 12.02.2020 seeks for an amount of USD 5,96,003.90 as against the original demand of USD 8,02,883.53. The Operational Creditor has frivolously stated that the amount subsequently reduced owing to the reason that the Operational Creditor has reused some of the stock for other projects, and this in turn has reduced the claim amount. It is however clarified that the said contention is an afterthought, and the reason the Operational Creditor had not crystalized the alleged claim is due to the fact that the Operational Creditor was well aware that no amounts were payable, and therefore it could attempt to browbeat the Corporate Debtor into paying some amounts by reducing its claim.
- iv.) A bare perusal of the workings (Annexure II-d of the Petition) would elucidate that the alleged total due amounts to Rs.5,71,15,000/- (excluding the interest payable). However, the claim made in the Petition is Rs.3,03,42,000/-, which clearly evinces that the amount alleged is not agreed and finalized between the parties to become due and payable.
- v.) The Purchase Order was subject to document validation and no advance was paid to the Operational Creditor to start production. The Corporate Debtor only asked the Operational Creditor to tie-up with the vendors and did not ask for Operational Creditor to place orders and procure materials but only to contact its vendors and enquire if the required materials were available and thereafter intimate the Corporate Debtor of the same for approval. The Operational Creditor in its enthusiasm has on its own placed orders



for raw materials and thus the Corporate Debtor cannot be held liable for such unwarranted actions of the Operational Creditor. Further, the Corporate Debtor has also informed the Operational Creditor that the HFCL's Purchase Order clearly stated that in the event the Purchase Order issued by BSNL is cancelled for any reason whatsoever, the HFCL's Purchase Order would be treated as cancelled without any financial reparation on HFCL.

- vi.) The documents produced by the Operational Creditor on record clearly state that the advance payable was only towards an amount of Rs.6,21,055/-, being the NRE Charges and the claim of the Operational Creditor ought to be reduced to that extent. Since the said amount falls below the threshold limit under which a Section 9 application can be filed, the petition is liable to be rejected.
- vii.) The Corporate Debtor is a profit-making Company, providing value to its shareholders and has made a profit of Rs.52,80,375/- for the FY ended 31.03.2020. It has several employees across its offices in Gurgaon and Bengaluru and is ably running its administration. It is also submitted that in the instant case, the aspect of the existence of a pre-existing dispute was raised well before the issuance of the Demand Notice under Section 8, as is clearly forthcoming from the email communications between the parties.
8. The learned Counsel for the Respondent, in support of his submissions, has relied upon the following decisions, vide Diary dated 02.03.2022:
- i.) *Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353;*
 - ii.) *Transmission Corporation of Andhra Pradesh Ltd. vs. Equipment Conductors and Cables Ltd. (2019) 12 SCC 697;*
 - iii.) *Sumilon Polyster Pvt. Ltd. vs. Parikh Packaging Pvt. Ltd. (2020) SCC OnLine NCLAT 834;*
 - iv.) *Umesh Saraf vs. Tech India Engineers Pvt. Ltd. (2020) SCC OnLine NCLAT 677;*
 - v.) *Duke Sponge and Iron Pvt. Ltd. vs. Laxmi Foils Pvt. Ltd. and Others (2020) SCC OnLine NCLAT 931;*



- vi.) *Universal Solutions of America LLC vs. Travancore Cements Ltd. (2019) SCC OnLine NCLAT 945;*
- vii.) *Avalon Sports and Media vs. Intex Tech (2019) SCC OnLine NCLAT 1205.*
9. Heard Shri C.K. Nandakumar learned Senior Counsel along with Shri Sushanth Venkatesh Pai, learned Counsel for the Petitioner / Operational Creditor and Shri Arjun K. Perikal, learned Counsel for the Respondent / Corporate Debtor and carefully perused the pleadings on record.
10. The Hon'ble Supreme Court of India in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2017) 1 SCC OnLine SC 353*, observed as under:

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) *Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)*
- (ii) *Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

11. A careful examination of the facts as narrated by both the sides and submissions made on their behalf, reveals that the Petitioner issued Annexure – II(F) Quotation dated 12.09.2018 to the Respondent-Corporate Debtor where under it was mentioned that out of the total cost of the products, the total advance payment required was Rs.2,28,62,374.63/-. It was further mentioned therein under the payment terms, 'sixty days from the date of Invoice'. However, the Respondent-Corporate Debtor issued the Annexure – II(G) Purchase Order dated 25.09.2018 for a total amount of Rs.9,52,83,286/- out of which the NRE Costs are Rs.6,21,055/- and under



the payment term 'sixty days from the date of Invoice'. It is not in dispute that since the products were not supplied to the Respondent-Corporate Debtor, no Invoice was issued by the Petitioner and hence the payment term of 60 days from the date of Invoice has no relevance. The only remaining issue is that the Petitioner is claiming that the Respondent-Corporate Debtor was required to pay an advance amount of Rs.2,28,62,374.63/- and whereas the Respondent-Corporate Debtor is denying liability to pay any advance amount. The Respondent-Corporate Debtor further contending that even if the NRE cost of Rs.6,21,055/- is to be treated as the advance payment, since the same is less than the minimum threshold of Rs. 1 Crore, the C.P is not maintainable. The Petitioner failed to show any document where under the Respondent – Corporate Debtor agreed to pay any advance amount of Rs.2,28,62,374.63 as claimed by it. The contention of the Petitioner that it has procured the material costing more than the threshold limit of Rs.1 Crore for the purpose of manufacturing the components to the Respondent-Corporate Debtor cannot be gone into by this Adjudicating Authority in a summary proceeding under section 9 of the I&B Code, 2016.

- 12.** In the circumstances and for the aforesaid reasons we are of the view that the Petitioner-Operational Creditor failed to prove the debt and default on the part of the Respondent-Corporate Debtor. Accordingly, the CP bearing CP (IB) No.49/BB/2021 is dismissed. However, it is made clear that this order shall not preclude the Petitioner from availing any other remedy in accordance with Law for the redressal of its grievances against the Respondent and any observations made herein above shall not have any bearing on such proceedings, if initiated by the Petitioner.

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(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

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(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)