

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

IA No. 85/JPR/2023 &
CP No. (IB)-78/9/JPR/2020

(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 TEEN MURTI CONSTRUCTION PVT. LTD.

...Operational Creditor/Applicant

Versus

**M/S RAJASTHAN URBAN DRINKING WATER SEWARAGE AND
INFRASTRUCTURE AND CORPORATION LTD. & ORS.**

...Corporate Debtor/Respondent

MEMO OF PARTIES

M/S TEEN MURTI CONSTRUCTION PVT. LTD.

R/o J-38/ G-2 Dilshad Colony
East Delhi – 110095 (Delhi)

...Applicant

VERSUS

**M/S RAJASTHAN URBAN DRINKING WATER SEWARAGE AND
INFRASTRUCTURE AND CORPORATION LTD. & ORS.**

R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)

THROUGH ITS DIRECTORS:

- 1. SHANTI KUMAR DHARIWAL**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 2. VEENU GUPTA**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 3. PAWAN ARORA**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 4. BHASKAR SAWANT**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 5. SANDEEP VERMA**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 6. JITENDRA KUMAR SONI**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 7. POOJA SHARMA**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)
- 8. ANJU GOYAL**
R/o Old Working Women Hostel
Building, Behind Nehru Palace, Lalkothi,
Tonk Road, Jaipur – 302015 (Rajasthan)

...Respondents

For the Applicant : Ashish Chauhan, Adv.

For the Respondent : Sunil Gogra, Adv.

Order Pronounced On: 12.07.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application is filed by M/s Teen Murti Construction Private Limited through its authorised signatory Mr Ashok Kumar Agarwal ('Operational Creditor' / 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Rajasthan Urban Drinking Water Sewerage and Infrastructure and Corporation Limited ('Corporate Debtor' / 'Respondent'), under Section 9 of the Insolvency and Bankruptcy Code 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules'). A copy of the Board Resolution dated 03.02.2020 is annexed as Annexure – A1 of the Application.
2. The Applicant, M/s Teen Murti Construction Private Limited, is engaged in the service business of construction of commercial institutions, mechanical power, and commercial residential service along with installing waterproofing and firefighting system. Its registered office is located at J-38/G-2, Dilshad Colony, East Delhi, Delhi – 110095. The copy of the Operational Creditor's master data is annexed as Annexure – A2 of the Application. The alleged default on the part of the Respondent for the non-payment of operational dues amounts to Rs. 86,53,478/- (Rupees Eighty-Six

Lakhs Fifty-Three Thousand Four Hundred and Seventy-Eight Only) along with interest payable @18% per annum.

3. The Corporate Debtor, M/s Rajasthan Urban Drinking Water Sewerage and Infrastructure and Corporation Limited, is a limited company incorporated under the Companies Act, 1956 on 01.12.2004, having CIN: U74999RJ2004SGC019961. The Respondent has its registered office at – Old Working Women Hostel Building, Behind Nehru Palace, Lal Khothi, Tonk Road, Jaipur – 302015. Further, the Respondent is engaged in providing financial services to Government/ Non-Government Agencies and Urban Local Bodies. The Corporate Debtor has an Authorised Share Capital of Rs. 50,00,00,000/- (Rupees Fifty Crores Only) and Paid-Up Share Capital of Rs. 48,66,99,950/- (Rupees Forty-Eight Crores Sixty-Six Lakhs Ninety-Nine Thousand Nine Hundred and Fifty Only). A copy of the Corporate Debtor’s master data is annexed as Annexure – A3 of the Application.
4. The details of the transactions leading to the filing of this Application are averred by the Applicant *vide* Diary No. – 401/2021 dated 24.02.2020 are as follows:
 - a. The Applicant and Respondent entered into mutual negotiations and agreed to construct the building of the National Institute of Fashion Technology (‘NIFT’). The Applicant was awarded the construction and finishing of the Boys, Girl Type B and C quarters (‘product’) *vide* Eight Work Orders (‘Agreement’) bearing numbers 4896 and 4908 dated

30.03.2012; 3995 and 3996 dated 11.10.2012; 6503 and 6553 dated 22.02.2013; 6561 dated 25.02.2013 and 1251 dated 31.07.2014. A copy of the Agreement is annexed as Annexure – A4 (Colly) of the Application. As per the Agreement, the total was estimated at Rs. 7,06,10,757/- (Rupees Seven Crores Six Lakhs Ten Thousand Seven Hundred and Fifty-Seven Only).

- b. As per the Agreement, the Applicant was required to complete the Work Order within the stipulated time. However, given the failure on the part of the Corporate Debtor to hand over the site in the pre-determined time, delay in taking decisions *qua* drawings designs, supplying of raw materials, releasing of funds and stay on the operation of the sand mine by National Green Tribunal resulted in hampering of the work process undertaken by the Operational Creditor. Thus, the extension of time was allowed for the completion of Work Order Nos. 3996, 6504, 6553 and 6561 by the Corporate Debtor, without any penalty or compensation. Resultantly, the extension of time purports admission of impediments caused through the actions of the Corporate Debtor. A copy of the letters requesting for an extension of time and their respective Final Time Extension case is annexed as Annexure – A5 (Colly) of the Application.
- c. Consequently, it raised monthly invoices ‘on running account’ basis wherein the Respondent, as per Clause 37 of the General Condition of Contract (‘GCC’), made a deduction of 10% on the total value of work

done from the generated invoice being payable at the time of expiry of Defect Liability Period of twelve months. A copy of GCC is annexed as Annexure – A6 of the Application. Hence, the Corporate Debtor made payment against the generated invoices after deducting the necessary aforesaid deductions.

- d. Subsequently, the Operational Creditor finished the Work Order in the first quarter of 2015 and after carrying out extra/ deviated items, inspections and records of no objections *qua* quality of work, raw materials and related requirements; and it handed over the possession of the product to the authorised personnel of the Corporate Debtor. In consideration of the aforesaid Work Order, it raised invoices amounting to Rs. 8,21,32,486/- (Rupees Eight Crores Twenty-One Lakhs Thirty-Two Thousand Four Hundred and Eighty-Six Only) against the awarded amount of Rs. 7,06,10,756/- (Rupees Seven Crores Six Lakhs Ten Thousand Seven Hundred and Fifty-Six Only).
- e. Meanwhile, the Applicant followed up with the concerned personnel of the Corporate Debtor for clearing the unpaid invoices through various letters and email communications. A copy of such communication is annexed as Annexure – A7 (Colly) of the Application. Consequently, Respondent *vide* email dated 15.06.2018 provided the details of the measurement book and running account bills admitting its operational

liability. A copy of the email dated 15.06.2018 is annexed as Annexure – A8 (Colly) of the Application.

- f. Further, authorised officials of the Corporate Debtor handed over the duly sanctioned final bills of Work Order Nos. 1251, 6504, 6561, 6553 and 3996 ('Final Bills'). The details of the final bill amounting to Rs. 1,39,47,680/- (Rupees One Crore Thirty-Nine Lakhs Forty-Seven Thousand Six Hundred and Eighty Only) are recorded in the measurement book which is in the custody of Respondent, that was duly acknowledged, admitted, and never disputed. In regard to the remaining three Work Order bills, the Respondent referred to its ledger accounts communicated *vide* email dated 15.06.2018. A copy of Final Bills is annexed as Annexure – A9 (Colly) of the Application. In spite of the expiry of twelve months of the defect liability period, the Corporate Debtor failed to make payment of its legal dues including the refundable 10% security amount under Clause 37 of GCC.
- g. Being aggrieved by the non-actions of the Corporate Debtor, it earlier filed an application under Section 9 of the Code bearing CP No. 63/9/JPR/2018 – *M/s Teen Construction Private Limited v. M/s Rajasthan Urban Drinking Water Sewerage and Infrastructure Corporation Limited* ('First Application'), wherein Respondent admitted its liability of Rs. 91,55,221/- (Rupees Ninety-One Lakhs Fifty-Five Thousand Two Hundred and Twenty-One Only) and drew a Settlement

Plan dated 06.08.2018 ('Settlement Agreement') containing payment schedule. This Settlement Agreement was taken on record *vide* Order dated 06.08.2019. A copy of the Settlement Agreement and Order dated 06.08.2019 is annexed as Annexure – A10 and A11 of the Application.

It is seen that under the Settlement Agreement, the Operational Creditor agreed to undertake rectification/ repair of the defects as suggested by the NIFT administration vide its Letter No. 15621(4)/BLDG PML/2017P-813 dated 01.06.2019. The Corporate Debtor would release the fifth and subsequent payment instalments upon the successful completion of the work mentioned in the aforesaid letter.

- h. It has also filed an affidavit under Section 9(3)(c) of the Code on record *vide* Diary No. 951/2021 dated 09.04.2021 stating that neither it has received any payment after 19.11.2019 nor any tender of unpaid operational dues has been made in the bank account of the Applicant. A copy of the Bank Statement from 19.11.2019 to 22.03.2021 is annexed as Annexure – 1 of the Affidavit. *However, it has been admitted by the Operational Creditor during the course of the application that the Corporate Debtor has only paid the first four instalments out of a total of nine, as mentioned in the payment schedule of the Settlement. The instalments were received well after the filing of the present application under Section 9 of the Code.*

- i. Given the non-action of the Corporate Debtor for clearing the unpaid invoice, within the reasonable time from the date of the invoice issued to the Respondent, failing which an interest @18% per annum is being charged by the Applicant. Thus, the Applicant is claiming interest on the unpaid invoice amounting to Rs. 3,89,406/- (Rupees Three Lakhs Eighty-Nine Thousand Four Hundred and Six Only) till 08.11.2019.
- j. The Applicant, in pursuance of the above cause of action, issued a Demand Notice dated 19.11.2019 ('Demand Notice') to the Respondent through speed post on the registered office address of the company, including the Directors of Respondent. The Demand Notice under Section 8 of the IBC stated unpaid Operational Debt as Rs. 90,42,884/- (Rupees Ninety Lakhs Forty-Two Thousand Eight Hundred and Eighty-Four Only) including interest @18% per annum. The notice called for the immediate payment of the operational due within ten days from receipt of the Demand Notice failing which proceedings to initiate CIRP against the Respondent's company was stated to start. Copy of the Demand Notice dated 19.11.2019, postal slip and its tracking report are annexed as Annexure – A12, A13 and A14 (Colly) of the Application, respectively. No reply has been filed by the Corporate Debtor in pursuance of said Demand Notice.
- k. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV**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.	Total amount of debt: Rs. 90,42,884/- (Rupees Ninety Lakhs Forty-Two Thousand Eight Hundred and Eighty-Four Only)
2.	Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Rs. 90,42,884/- [#] Total Principal Amount: Rs.86,53,478/- Total Interest Due: Rs. 3,89,406/-* Date from which Debt fell Due: 23.07.2021

* Calculated the Interest Amount @18% p.a. from the period of 09.08.2019 to 08.11.2019.

No computation of the amount to be claimed from the Corporate Debtor is annexed in the Application.

5. Notices were issued in the aforesaid Application, and the Respondent filed a Reply *vide* Diary No. 2706/2021 dated 13.12.2021 stating that:

- a. It is a government public sector undertaking where it works as a nodal agency for civil construction work of development schemes under Article 243G and 243W of the Constitution of India, 1950 and releases work payment to contractors engaged by them. Accordingly, it received the contract from the principle department, NIFT *vide* Memorandum of Understanding dated 28.01.2011 ('MoU'). As per MoU, the respondent is entitled to an agency margin of 7.5% of the actual cost of work undertaken for the purposes of administrative costs.

b. The Applicant has not approached the Adjudicating Authority with clean hands and concealed material information to place itself as an Operational Creditor, as it has submitted an incomplete application based on *suppressio veri* and *suggestio falsi* facts for its benefit. There is a pre-existence of the dispute between the Operational Creditor and the Corporate Debtor before the initiation of the earlier application, CP No. 63/9/JPR/2018 as the Applicant failed to provide desired quality, and delivery of the product within the stipulated time despite several reminders through emails and letters. The Respondent relied on the email, notices and letters conversations which are reproduced herein for ease of reference, and are annexed as Annexure – 1 (Colly) of the Reply:

Letter No.	Dated	Particulars
254	07.03.2013	Notice for the delay in the construction of the Boys' Hostel (G+3) Skeleton Work
419	29.12.2014	Show Cause Notice for construction of type C (G+2) 24 quarters Skeleton
493	09.02.2015	- do -
691	31.03.2015	Final Notice for construction of type C (G+2) 24 quarters Skeleton
428	31.12.2014	Show Cause Notice for finishing work at Girls' Hostel Building
319	07.11.2014	Notice for the slow progress of Girls' Hostel (G+3) for Work Order No. 6553 dated 22.02.2013.
693	31.03.2015	Final Notice for finishing work at Girls' Hostel Building
491	09.02.2015	Show Cause Notice for finishing work at Girls' Hostel Building
414	23.12.2014	Show Cause Notice for internal work at Girls' Hostel Building

158 and 159	04.07.2016	Notice regarding non-completion of work and facing difficulty by NIFT due to defects in the quality of work
-	01.06.2019	Communication of defective work in NIFT

- c. In addition, it has relied on the communication between NIFT and the Respondent where NIFT pointed out some of the shortcomings, incompleteness, and rectification of civil, electrical, and plumbing issues of the product. A copy of the aforementioned communications is annexed as Annexure – 2 (Colly) of the Reply. Given the harmony and cordial relation between the parties in the present application, the respondent agreed to the Settlement Agreement in the First Application. Thus, the First Application was not decided on the merits of the case, therefore, the Corporate Debtor has the right to bring pre-existing disputes between the parties.
- d. Further, the Settlement Agreement dictated *that it is agreed between both parties that defective work related to the petitioner of NIFT which has been communicated by Respondent vide Letter dated 01.06.2019 by which defect has been communicated by principle awarder (NIFT) vide their Letter No. 1562(4) Bldg. – PML/2017 dated 21.05.2019 and which is further notified by Respondent to Petitioner. That fifth and further instalment of payment shall be released by Respondent on completion of the work and whose cost of work shall be in between of range of Rs. 7 – 8 Lacs (approx.).* Furthermore, by paying four instalments, as per the

Settlement Agreement, the Respondent has honoured its commitment. A copy of Letter No. RUDSICO/Jodhpur/2019-20/Camp Jaipur/Spl 1 dated 13.03.2020 is annexed as Annexure – 3 of the Reply.

- e. Moreover, the Respondent has attached the Bid Document and Contract Data for the Work Order of Type C (G+24) quarters, skeleton work which contains an arbitration clause of adjudication of disputes between the parties. Hence, the act of the Applicant in directly approaching the Adjudicating Authority is pre-matured. A copy of the Bid Document and Contract Data is annexed as Annexure – 4 (Colly) of the Reply.
- f. For the reasons mentioned above, while submitting the Reply, the Respondent relied upon these cases:

- i. *Mobilox Innovations Private Limited vs. Kirusa Software Pvt. Ltd., 2018 1 SCC 353.*

The Hon'ble Supreme Court held that regarding the pre-existence of dispute, the IBC defines 'dispute' as:

Section 5(6) – “dispute” includes a suit or arbitration proceedings relating to-

- a. The existence of the amount of Debt;*
- b. The quality of goods and services; or*
- c. The breach of a representation or warranty;*

- ii. *Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited, Civil Appeal No. 9597 of 2018.*

In *Transmission Corporation (supra)*, the Hon'ble Supreme Court again reiterated that the existence of an undisputed debt is a *sine qua non* of initiating CIRP. It further states that *the adjudicating*

authority shall satisfy itself that there is a debt payable and there is operational debt, and the corporate debtor has not repaid the same.

iii. *MCL Global Steel Private Limited vs. Essar Projects India Limited, Company Appeal (AT) (Insolvency) No. 29 of 2017.*

In MCL Global (*supra*), while dealing with the existence of a commercial dispute, the Hon'ble NCLAT held *that CIRP was initiated in a violation of the principles of Natural Justice. The email issued by the Appellant – Corporate Debtor and not disputed by the Respondent – Operational Creditor also relates to the quality of work and non-completion of work within time along with a reply to notice under Section 8 of the Code showing the existence of the dispute.*

6. The Operational Creditor filed its rejoinder *vide* Dairy No. 1791/2022 dated 15.06.2022, wherein it reiterated its contentions as taken in its application, in addition to the following:

- a. Corporate Debtor in the First Application has duly admitted its liability and made payment of the first four instalments as mentioned under the Settlement Agreement, totalling Rs. 38,25,429/- (Rupees Thirty-Eight Lakhs Twenty-Five Thousand Four Hundred and Twenty-Nine Only) and instalment two to four were paid after institution of the present application. The Applicant is always ready and willing to perform his obligations, as completing due repair work of approximately eight lakhs would enable it to receive Rs. 91,55,221/- (Rupees Ninety-One Lakhs Fifty-Five Thousand Two Hundred and Twenty-One Only). However,

the Respondent is not giving necessary permissions for the completion of the product despite several talks and conversations.

- b. There exists no pre-existence of the dispute between the parties as the Corporate Debtor has not only allowed the extension of time owing to defaults and delays on its part but also has sanctioned the final bills upon due checking and inspections of the product. Thus, the Corporate Debtor should not agitate the already admitted liability against the same party.
- c. Further, the existence of an arbitration clause can never affect proceedings under Section 9 of the Code and Section 238 of the Code gives overriding effect to all the other statutes. Mere insertion of an arbitration clause in the Agreement cannot be considered as the existence of the dispute to reject the application under Section 9 of the Code and relied on the judgment of the Hon'ble NCLAT in the case of *Mitcon Consultancy & Engineering Services Ltd. vs. Vitthal Corporation Ltd., Company Appeal (AT)(Insolvency) No. 101 of 2018.*

7. The Applicant has filed an Interim Application ('IA') bearing IA (IBC) No. 85/JPR/2023 for taking additional documents on records and has stated the following:

- a. That the Adjudicating Authority recommended the parties to try and settle the matter amicably. Resultantly, the Applicant approached the Respondent and a meeting was held between the parties. In the meeting, it was agreed that a joint visit will be organised with Resident Manager,

Unit – 1, Jodhpur, RUDISCO ('RM Jodhpur') on 04.10.2022 at NIFT and will check the defects as notified by the NIFT administration *vide* its Letter No. 15621(4) BLDG-PMC/2017/P-813 dated 21.05.2019 ('Defect Removal Letter'). The Applicant undertook to rectify and remove all the defects stated in the aforementioned letter to the satisfaction of RM Jodhpur. After the removal of all such defects, the Corporate Debtor will make a balance payment in one go. A copy of the minutes of the meeting in Letter No. Rudsico/PD-(H)/JPR/2022-23 is annexed as Annexure – 1 of the IA.

- b. Consequently, the Applicant cured all the defects to the satisfaction of the NIFT Administration and further intimated the same to the concerned officials of the Corporate Debtor *via* WhatsApp Messages. A copy of the WhatsApp Messages is annexed as Annexure – 2 (Colly) of the IA. In addition, the NIFT administration has issued Letter No. RUDSICO/BUILDING CONSTRUCTION WORK/ P-6781 dated 13.12.2022 whereby it had specifically stated that the Applicant has completed the work as per the commitment. A copy of the Letter dated 13.12.2022 is annexed as Annexure – 3 of IA. However, the Respondent did not clear the dues of the Operational Creditor despite performing its part of the contract without any variance.

8. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, Rejoinder, Additional Affidavits, and the Documents enclosed with the Application.
9. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of the Laws of Limitation, as the cause of action arose in 2019, and the Application was filed before this Adjudicating Authority in 2020. Hence, the period of three years after the Default occurred had not been exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
10. It is abundantly clear from the documents produced before us that the Respondent has defaulted in making full payments against the services provided by the Operational Creditor.
11. In the instant case, the First Application under Section 9 of the Code was disposed of in view of the Settlement Agreement between the parties *vide* Order dated 06.08.2019 and is being reproduced for ease of reference:

‘This application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016. The learned counsels for both the parties are present and filed a Memo vide Diary No. 1484/2019 dated 06.08.2019 stating that the matter is settled for a total amount of Rs. 91,55,221/-

with nine instalments with different dates. In view of the settlement reached as filed vide Diary No. 1484/2019 dated 06.08.2019 in this Tribunal, the company petition is disposed of with the same terms as mentioned therein in the said Memo. In view of the disposal of the main Company Petition all IAs stand closed.'

12. The First Application under Section 9 of the Code was disposed as per the Settlement Agreement, wherein the Corporate Debtor duly admitted the operational liability of Rs. 91,55,221/-; upon clearing and removal of certain defects as per Defect Removal Letter, the Respondent was required to make payment as agreed between the parties in the Letter No. Rudsico/PD-(H)/JPR/2022-23. The grievances of NIFT regarding the shortcomings in the product as indicated in the Defect Removal Letter have been completed to the satisfaction of the NIFT and Corporate Debtors' administration(s). Thus, the Respondent is not allowed to blow hot and cold at the same time and unjustly enrich itself without fulfilling its part of the contract.

13. The Applicant had filed the Application seeking payment towards eight instalments as per the settlement terms. The Applicant carried out its obligation for completion of the work as mentioned in the Settlement Agreement. In addition, it is acknowledged by the Applicant that it has received a total of four instalments as per the payment schedule mentioned in the Settlement Agreement, during the course of the proceedings, for its earlier filed application CP No. 63/9/JPR/2018. Hence, the total pending

operational dues arising out of the remaining instalments are to the tune of Rs. 53,53,478/- (Rupees Fifty-Three Lakhs Fifty-Three Thousand Four Hundred and Seventy-Eight Only).

14. The Corporate Debtor is specifically relying on the communications made during the 2013-2016 period wherein the Operational Creditor was warned to finish the product within the agreed timelines. Such timelines were appropriately allowed considering various exigencies in the sanctioned Final Bills in which no deduction or penalty was imposed on the Operational Creditor. Also, the sanctioned Final Bills were made part of the Settlement Agreement. Consequently, the Corporate Debtor is estopped to backslide on an already admitted liability having released a part payment under the Settlement Agreement. Hence, the defences put forth by the Corporate Debtor is nothing but a moonshine defence.

15. It is seen that the timeline of the payment schedule as stated in the Settlement Agreement was not followed by the Respondent *vis-a-vis* has not paid a substantial amount of Rs. 53,53,478/- (Rupees Fifty-Three Lakhs Fifty-Three Thousand Four Hundred and Seventy-Eight Only). There was a requirement to maintain and adhere to the payment schedule which the Corporate Debtor did not follow. However, the Applicant has accepted the payment of its Operational Dues during this application as per the Settlement Agreement.

16. The Hon'ble NCLAT in the case of *M/s Brand Realty Services Ltd. v. M/s Sir John Bakeries India Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 958 of 2020* held on the issue of default of instalment of settlement agreement that:

'Be that as it may, a perusal of the Agreement dated 28th November, 2014 indicates that the said Agreement entitled the Appellant to receive certain payment from the Corporate Debtor. The present cannot be said to be case of default in payment of instalment. The Agreement was not a kind of Settlement Agreement rather the Agreement gave rights and obligations to the parties hence the very basis of rejecting the Application by the Adjudicating Authority is erroneous. We thus are of the view that the Impugned Order deserved to be set aside on this ground alone.'

17. Additionally, no suit or arbitration was pending before the Demand Notice was issued under Section 8 of the Code, and no prior dispute existed between the parties. The Respondent had ample opportunities to bring the matter before the arbitrator for its genuine grievances against the Operational Creditor. The emails and notices relied on by the Respondent disputing the quality, and delivery of the product pertains to a period between March 2013 and July 2016. Whereas it has already sanctioned final bills after due checking and through inspections. Nevertheless, the Operational Creditor has completed the Work Orders to the satisfaction of the concerned officials of the Corporate Debtor. Therefore, this contention of the Respondent is untenable and rejected in its entirety.

18. The Hon'ble NCLAT, in the case of *Hasan Shafiq v. CT Technologies Aps & Anr., Company Appeal (AT) (Insolvency) No. 802 of 2020*, while considering various judgments of the Hon'ble Apex Court has held that:

‘19.... We, thus, conclude that Application under Section 9 of the Code was fully maintainable and could not have been thrown out on the ground that there was a clause in Agreement dated 25th March, 2012. Despite there being clause of arbitration in Agreement, Application under Section 9 was fully maintainable and could be proceeded with by Adjudicating Authority. The proceedings under Code having been given overriding effect, the right to initiate Application under Section 9 shall not be taken away by the Operational Creditor by any Agreement of arbitration in the contract, when Operational Creditor elect to initiate proceedings under Section 9, it cannot be rejected on the aforesaid ground. We, thus, do not find any substance in the above submission of Learned Counsel for the Appellant.’

19. Consequently, it is evident from the above that the Corporate Debtor has defaulted in payment of the Debt to the Operational Creditor. Further, he has raised the point of the dispute which flouts the principle of law stating that if there is a pre-existing dispute between the parties, an Application filed under Section 9 is not maintainable. Thus, the defence of the Corporate Debtor for the pre-existence of a dispute does not fall under Section 5(6) of the Code.

20. The first issue for consideration is whether the demand notice in Form No. 3 dated 19.11.2019 was served upon the Respondent. The demand notice was sent *via* a speed post on 21.11.2019. The postal receipt is attached on Page 168 (Annexure-13) of the Application.

21. The next issue for consideration is whether the Respondent disputed the Operational Debt. The Respondent/Corporate Debtor has filed a Reply and argued that they had been dissatisfied with the services provided for the product. However, they have not submitted any authentic communication to

substantiate the same. The communications submitted by the Corporate Debtor goes against its conduct of accepting the services and denying the payment without any cogent reasons triggering CIRP under Section 9 of the Code. Thus, as per the documents placed on record with the Adjudicating Authority, there is no dispute as to the outstanding liability of the Corporate Debtor towards the Operational Creditor.

22. In *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited*, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows:

'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 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 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.'

However, the defence must be plausible, and while not examining it on merits, it must not appear as a moonshine defence. Therefore, in the present matter at hand, there is a clear debt, repayment of which has been defaulted by the Corporate Debtor, and there appears to be no pre-existing dispute between the parties. Any allusion to such a dispute does not seem to be confirmed.

23. We have gone through the contents of the Application filed in Form No. 5 and found the same to be complete. As discussed above, there is a total unpaid operational debt (in Default) of Rs. 53,53,478/- (Rupees Fifty-Three Lakhs Fifty-Three Thousand Four Hundred and Seventy-Eight Only), excluding the interest @18% per annum. Applicant/Operational Creditor has given Demand Notice in Form No. 3 dated 19.11.2019, duly served on the Respondent/Corporate Debtor. This Adjudicating Authority has held above that the Operational Creditor correctly delivered the Demand Notice in Form No. 3, and no pre-existing dispute is proved.

24. It has been shown that the Corporate Debtor has failed to make payment of the aforesaid amount due as mentioned in the statutory notice to date. It is also observed that the conditions under Section 9 of the IBC stand satisfied. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC.

25. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP'), but it is not obliged to do so. In the instant

case, the Operational Creditor has not proposed the name of any person to be appointed as IRP. Hence, this bench will appoint the IRP from the pool of RPs empanelled with the IBBI. Therefore, the bench is appointing Mr. Vikram Singh Rathore, bearing Registration No. IBBI/IPA-003/IP-N00203/2018-19/12361 with the e-mail address vikram.nimbli@gmail.com as the IRP in the present matter. The said IRP is directed to file the written consent to act as an interim resolution professional in Form – 2 provided under Rule 9 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.

26. In this matter, the Interim Resolution Professional appointed herein, Mr. Vikram Singh Rathore, shall exercise all the powers enumerated under the Code read with Rules made thereunder. The Applicant shall provide a copy of the Application, if not provided already, along with this order to IBBI for its records.

27. 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 and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.

28. Consequences of initiation of CIRP shall be inter-alia as follows:

- a. The IRP appointed by the Adjudicating Authority, Mr. Vikram Singh Rathore, is directed to take over the affairs of the Corporate

Debtor and duties as required to be performed by him under the provisions of the Code, including the issue of the publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.

- b. Further, as a sequel of admission, moratorium, as envisaged under Section 14 of the Code, is invoked in relation to the Corporate Debtor, which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.
- c. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defraying his expenses to be incurred and fees on the account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Rupees Two Lakh Only) within three days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors.
- d. In terms of Sections 17 and 19 of the Code, all personnel of the Corporate Debtor, including promoters and Board of Directors, whose powers shall stand suspended, shall 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.

- e. In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor, as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

29. Accordingly, CP No. (IB)- 78/9/JPR/2020 is admitted. Further, IA (IBC) No. 85/JPR/2023 is taken on record and disposed of.

-Sd-

**DEEP CHANDRA JOSHI
JUDICIAL MEMBER**

Sd-

**ATUL CHATURVEDI
TECHNICAL MEMBER**