



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

**Company Petition No.(IB)-18(ND)/2020
&
I.A./2370/2022
IN
(IB)-18 (ND)/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:

Satya Narayan Sharma
Proprietor of: -
M/s. India Wood Craft

**.... Applicant/
Operational Creditor**

Vs.

M/s. NBCC (India) Limited

.... Corporate Debtor

CORAM:

SH. P. MOHAN RAJ, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on:29.03.2023

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

The instant application is filed by Mr. Satya Narayan Sharma, proprietor of M/s. India Wood Craft (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules')



with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. NBCC (India) Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor') for defaulting the payment of Rs. 99,37,989/- (Rupees Ninety Nine Lakhs Thirty Seven Thousand Nine Hundred Eighty Nine Only) which includes the principal due amount of Rs. 69,85,645/- (Rupees Sixty Nine Lakhs Eight Five Thousand Six Hundred Forty Five Only) along with Rs.29,52,344/- (Rupees Twenty Nine Lakhs Fifty Two Thousand Three Hundred Forty Four Only) which is the interest on account of the delayed payment from 30.06.2017 to till date 04.11.2019 @ 18% interest p.a.

2. The Respondent Company M/s. NBCC (India) Limited having CIN: L74899DL1960GOI003335 incorporated under the provisions of the Companies Act, 1956 having its registered office situated at NBCC Bhawan, Lodhi Road, New Delhi-110003. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
3. Succinctly stated facts of the present case as averred by the applicant are that the applicant is the proprietor of M/s. India Wood Craft engaged in the business of Interior Decorator Civil Works & Furnishers and the Corporate Debtor vide Letter of Acceptance dated 12.08.2016 in favour of the Applicant had awarded the work of "Interior Works including HVAC, Fire Fighting Furniture, CCTV systems and related Civil works for Software Technology Parks of India (STPI)" on the terms and conditions contained in Letter of Award No. NBCCICGMI (Raj & Guj)/LOA/STPI/Gandinagar/2016/2078 dated 12.08.2016 issued by the



Corporate Debtor. It was submitted that the awarded work was scheduled to be completed within 4 months reckoned from the date of start of the contract which was 10 days after date of issuance of the LOA.

4. It was submitted that the Applicant had raised seven (7) Running Account Bills and the same were duly received by the Corporate Debtor from time to time and the part payment against the said 7 Running Account Bills were made. The Applicant had made all its efforts to successfully complete the aforesaid work within the scheduled time and the Corporate Debtor neither complained about the timelines nor about the quality of work.
5. Further, it was submitted that the Applicant had also submitted the Security Deposit and the Retention money amounting to Rs.15,68,153/- (Rupees Fifteen Lakhs Sixty Eight Thousand One Hundred Fifty Three Only) which was scheduled to be refunded by the Corporate Debtor after the expiry of Defect Liability Period. The Corporate Debtor as per the terms and conditions of the Agreement and more so in the General Conditions of Contract ('GCC'), the Corporate Debtor itself prepared the 8th and Final Bill dated 30.06.2017 in which the Corporate Debtor had marked the 'actual date' of start as 25.08.2016 and date for completion as per LOA dated 22.12.2016. It was submitted that as per final bill the Corporate Debtor had arbitrarily held that the outstanding payment was only amounting to Rs.32,78,332/- (Rupees Thirty Two Lakhs Seventy Eight Thousand Three hundred Thirty Two Only) against the actual amount of Rs.44,79,398/- (Rupees Forty Four Lakhs Seventy Nine Thousand Three Hundred Ninety Eight Only) outstanding towards the Operational Creditor.
6. It was submitted that the Applicant had as per the time schedule and within the stipulated date of completion had completed the work on 22.12.2016 and the Corporate Debtor through letter no.



NBCC/ED/JP/2018 dated 12th March, 2018 had certified that the Applicant has executed the interior works including HVAC.

7. It was submitted that the Defect Liability Period also got expired and the Corporate Debtor became liable to release the Security Deposit and Retention Money amounting to Rs.15,68,153/- (Rupees Fifteen Lakhs Sixty Eight Thousand One Hundred Fifty Three Only). It was also mentioned that the Applicant during the execution of the work also paid the Service Tax of Rs 9,38,094/- (Rupees Nine Lacs Thirty Eight Thousand Ninety Four Only) to the Service Tax Department .
8. The Applicant had sent reminders both verbal and in writing vide e-mail dated 17.08.2017, 16.08.2017, 16.11.2017 04.12.2017, 02.02.2018, 26.02.2018, 14.06.2019, 27.06.2019 and 02.07.2019 to the Corporate Debtor requesting to release the payment but the Corporate Debtor did not take any steps whatsoever. The Applicant being aggrieved had sent a Demand Notice dated 04.11.2019 upon the Corporate Debtor and its directors which has been duly delivered on 15.11.2019 to the registered address of the Corporate Debtor available on MCA Master Data as evident from the tracking report of the speed post receipts. It is submitted that Applicant has not received any reply to the demand notice delivered to the Corporate Debtor even after the successful receipt of the demand notice, accordingly, admission of the present application under Section 9 of the Code, 2016 is prayed.
9. Per Contra in the reply filed by the Corporate Debtor, the Corporate Debtor submitted that the Corporate Debtor is a Government Company engaged in the business of civil engineering, holding the status of a Navratna Central Public Enterprises and the issue regarding the maintainability of CIRP against Government Companies is pending adjudication before a Division Bench of the **Hon'ble Bombay High Court**



in the matter of Hindustan Antibiotics Ltd. v. Union of India & Ors.
[W.P.(C) No. 11366 of 2019].

10. The Corporate Debtor submitted that the Corporate Debtor had floated an e-tender vide NIT No. ET/CGM (Raj & Guj)/NBCC/2016/2, dated 12.07.2016 for the interior works including HVAC, fire fighting furniture, CCTV systems and related Civil Works on behalf of M/s. Software Technology Parks of India ('STPI'), as per the MoU (Memorandum of Understanding) signed between STPI and Corporate Debtor. The work under the said tender was awarded to the Applicant vide Letter of Award No. NBCCICGMI (Raj & Guj)/LOA/STPI/Gandinagar/2016/2078 dated 12.08.2016 ('LoA') following which the Applicant and the Corporate Debtor had entered into a Formal Agreement dated 05.09.2016 ('agreement').
11. Further, the Corporate Debtor submitted that as per Clause 23.2 of the General Conditions of Contract contained in the Agreement dated 05.09.2016, it was clearly agreed that payment to the Applicant would be released by Corporate Debtor, only after receiving the corresponding payment from the client/ owner of the work, i.e., STPI and any delay in release of the corresponding payment shall not entitle the contractor to compensation/interest from NBCC.
12. The Corporate Debtor submitted that the 8th and final bill dated 30.07.2017 was initially prepared for a sum of Rs.32,78,332/- but thereafter, the bill was finally passed for a revised amount of Rs.32,78,243/-, after correction of a typographical error in the bill and the said correction was duly signed and accepted by the Applicant. The said bill had been duly forwarded by Corporate Debtor to STPI for release of payment, however, till date the said payment has not been finalised and approved by STPI i.e. the client/ owner. It was also submitted that as per Clause 23.1 of the General Conditions of Contract all payments of running



bills made by Corporate Debtor so far have been in the way of an advance against the final payment and not as payments for work actually done, completed and accepted by the Respondent and shall not preclude the recovery for unsound, imperfect or unskilled work. Therefore, till the clearance of the final bill, Corporate Debtor reserves its right to settle/ adjust the final bill amount against any default in work and the claim of the Applicant against the Corporate Debtor cannot be sustained as the same is raised prematurely.

13. The Corporate Debtor further submitted that clause 23.2 clearly states that the contractor shall become entitled to payment only after NBCC has received the corresponding payment(s) from the client/ owner. Moreover, Clause 35 clearly indicates that if there is no defect in the work, Engineer In-charge of NBCC will furnish final certificate of completion. Clause 38 clearly mentions that the contractor is responsible for rectification of defect in the work for the period of 12 months from the date of taking over of work by NBCC or client, whichever is later. In the present case, handing over of the work by the Applicant was only on 24.8.2017 as noted by STPI in its letter dated 25.4.2018, wherein various quality issues and pending works were noted by the STPI on the work done by the Applicant.

14. Further, the Corporate Debtor submitted that the Applicant had erroneously placed reliance on letter bearing no. NBCC/ED/JP/2018 dated 12.03.2018, issued by Corporate Debtor that the work done by the Applicant has been certified by Corporate Debtor and such experience certificates are routinely issued by Corporate Debtor to contractors like Applicant on their request, so that they may use them exclusively for business purposes, to obtain more work, therefore, such letters cannot be used to measure that actual quality of work done.



15. The Corporate Debtor had filed an application bearing i.e., Interlocutory Application(IBC)/2370/2022 for placing on record additional documents including, the correspondence exchanged between the Corporate Debtor, STPI and Applicant on the ground that the said e-mail correspondence are extremely important to show that there is a pre-existing dispute between the parties, even before the issuance of Demand Notice. **Considering the submissions of both the parties, the said application is allowed and additional documents are taken on record.**

16. On behalf of the Applicant, Rejoinder has been filed to the reply filed by the Corporate Debtor, wherein the submissions of the Corporate Debtor are rebutted and it was submitted that the Corporate Debtor had not raised any dispute about the quality of work executed by Applicant. It was submitted that the Corporate Debtor's contention is in regard to the payment of their admitted liability i.e. payment should be made after receiving the corresponding payment from STPI and it is the duty of the Corporate Debtor to manage its affairs regarding the availability of funds and receipt of corresponding payments from concerned person cannot be a defence that the Applicant should bear the brunt of non-payment for years for the work executed by the Applicant. In this regard, reliance is placed on the **Hon'ble Supreme Court in the matter of Zonal General Manager Orcon International Ltd. vs. Vinay Heavy Equipments, C. A No. 4211/2015** wherein it was held that the department cannot deny the payment to the contractor on account of "back to back payment" clause in the agreement if the principal employer, who is not releasing the funds, was not involved in the award of work order and execution of agreement executed between the department and the contractor.

17. It was submitted that the fact that the final bill was duly passed and acknowledged/passed by the Corporate Debtor itself be construed as the Acknowledgment of 'Debt'. Further, it was submitted that the Corporate



Debtor had never made any complaints in respect of the work done as is evident from the letter dated 12.03.2018 wherein it was specifically mentioned that the quality of the work is well satisfactory and the defect liability period had also expired.

18. Further, the Applicant submitted that the annexures annexed with the application to show the so called pre-existing disputes are not at all relevant as those relates to the communication between the STPI and Corporate Debtor and the Applicant is not party to the said communication and such emails were beyond the period of defect Liability/maintenance period. Thus, the said emails are not binding as the contract itself had come to an end by a flux of completion of work and expiry of defect liability/ maintenance period. It was also submitted that the Corporate Debtor with whom the Applicant had Privity of Contract never raised any objections with regards to the quality of work, and had rather issued final bill and certificate of satisfaction.

19. In support of the averments made in the application, rejoinder and written submission, the Applicant had placed reliance on the following documents:

- i. Copy of the Letter of Award No. NBCC/CGM/(Raj&Guj)/LOA/STPI/Gandinagar/ 2016/ 2078 dated 12.08.2016.
- ii. Copy of the Final Bill dated 30.06.2017.
- iii. True copy of the ledger account statement of the Operational Debtor maintained by the Operational Creditor.
- iv. True copy of the letter no NBCC/ED/JP/2018 dated 12th March, 2018
- v. Verbal and written reminders by the i Operational Creditor are evident vide mails and I letters dated 17.08.2017, 16.08.2017, 'j 16.11.2017 04.12.2017, 02.02.2018, 26.02.2018, 14.06.2019, 27.06.2019 and 02.07.2019
- vi. True copy of the Demand notice dated 04.11.2019.



20. In support of the averments made in the application, reply and written submission, the Corporate Debtor had placed reliance on the following documents:

- i. Copy of Clause No.3, 23, 19 of the General Conditions of Contract (CGC)
- ii. Copy of Letter dated 15.11.2019 issued by Corporate Debtor to STPI.
- iii. Agreement along with GCC between the Applicant and the Corporate Debtor.
- iv. Completion Certificate proforma
- v. Copy of Letters dated 25.04.2018 along with E-mail dated 07.09.2017, 23.11.2017, 26.03.2018, 08.06.2018, 06.07.2018, 23.07.2018, 06.08.2018, 20.08.2018, 28.08.2018, 25.10.2018, 19.11.2018, 25.04.2019, 24.04.2019, 05.05.2019, 24.05.2019 and 30.05.2019.

21. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply, rejoinder and written submissions filed by the parties. The relevant documents annexed with the respective submissions have been perused. From the submissions of the Learned Counsel for the Parties and materials on record, the following issues arise for consideration :-

- A. Whether the CIRP can be initiated against M/s. NBCC (India) Limited ('Corporate Debtor'), a Government Company holding the status of a Navratna Central Public Enterprises ?
- B. Whether there was an Operational Debt exceeding the pecuniary Threshold Limit as envisaged under Section 4 of the Code, 2016?
- C. Whether there was existence of any dispute between the parties or the record of pendency of a suit or arbitration proceedings filed before the receipt of demand notice in relation to such dispute?



If issues A and B are answered in the positive and issue C is answered in negative, the present application filed under Section 9 of the Code, 2016 would have to be admitted. However, if issue C is answered in the positive, the present application filed under Section 9 of the Code, 2016 would have to be rejected.

ISSUE – A

22. As regards issue A, the Hon'ble Supreme Court in **Hindustan Construction Company Limited & Anr. Vs. Union of India & Ors. [Writ Petition (Civil) No. 1074 OF 2019, judgement dated 27.11.2019]** held that the CIRP process can be initiated against a government company by virtue of it being covered under the first part of definition of 'corporate person' as provided in section 3(7) of the Code, and hence insolvency proceedings against Government company can be initiated by virtue of it being covered under the ambit of Section 3(7) of the Code. In the above cited HCC Case (Supra), the Hon'ble Supreme Court while agreeing with argument put forth by the Solicitor General of India observed that :-

As correctly argued by the learned Solicitor General, Shri Tushar Mehta, the first part of 'corporate person', as defined in Section 3(7) of the Insolvency Code, means a company as defined in Clause 20 of Section 2 of the Companies Act 2013. Sections 2(20) and 2(45) of the Companies Act, 2013, which define 'company' and 'Government company' respectively, are set out herein below:

"2(20). "company" means a company incorporated under this Act or under any previous company law;" "2(45). "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company."



From a reading of the aforesaid definition, **Shri Tushar Mehta is clearly right in stating that the three entities who owe monies under arbitral awards to the Petitioner No.1, being Government companies, would be subsumed within the first part of the definition.** However, so far as NHAI is concerned, Dr. Singhvi's argument of either deleting certain words in Section 3(7) of the Insolvency Code, or adding certain words in Section 3(23)(g) of the Insolvency Code into Section 3(7) cannot be accepted."

23. The Corporate Debtor, i.e., M/s. NBCC (India) Limited having CIN: L74899DL1960GOI003335 is incorporated under the provisions of the Companies Act, 1956 having its registered office situated at NBCC Bhawan, Lodhi Road, New Delhi-110003, and therefore, irrespective of it being a Government Company, it will be squarely covered under the definition of Corporate Person as provided in section 3(7) of the Code and therefore, Corporate Insolvency Resolution Process against the Corporate Debtor can be initiated. Therefore, the answer to the Issue- A is in affirmative.

ISSUE – B

24. As regards issue B, the Applicant in Part - IV of Form-5 of the present Application has shown total outstanding amount of Debt as Rs.99,37,989/- (Rupees Ninety Nine Lakhs Thirty Seven Thousand Nine Hundred Eighty Nine Only) which includes the principal due amount of Rs.69,85,645/- (Rupees Sixty Nine Lakhs Eighty Five Thousand Six Hundred Forty Five Only) along with Rs.29,52,344/- (Rupees Twenty Nine Lakhs Fifty Two Thousand Three Hundred Forty Four Only) which is the interest on account of the delayed payment from 30.06.2017 to till date 04.11.2019 @ 18%.

25. From the records it is seen that the Demand Notice under Section 8(1) of the Code, 2016 was issued on 04.11.2019 and received by the Corporate Debtor on 15.11.2019. The present application under Section 9 of the Code, 2016 is filed on 18.12.2019 and registered on 02.01.2020. Therefore, notification



dated 24.03.2020 issued by MCA whereby and whereunder the minimum amount of default as specified under Section 4 of the Code, 2016 was increased to Rs.1 Crore will not be applicable in the present case and the threshold amount of default of Rs.1 Lakh will only be applicable in the present case. Therefore, the Operational Debt as claimed in the present application is above the pecuniary threshold limit of Rs.1 Lakh as envisaged in Section 4 of the Code, 2016 before MCA notification dated 24.03.2020. **Accordingly, the answer to the Issue- B is in affirmative.**

ISSUE – C

26. So far the question of pre-existing dispute between the parties is concerned, the Applicant has contended that the communications relied upon by the Corporate Debtor to show the so called pre-existing disputes are not relevant, as those relate to the communications between the STPI i.e., principal/owner of the project and the Corporate Debtor and the Applicant is not a party to the said correspondence. It is further contended that in view of the letter dated 12.03.2018 issued by the Corporate Debtor to the Applicant, any pre-existence of dispute cannot be countenanced. The Corporate Debtor, on the other hand, seeks to buttress the contention of the existence of the pre-existing dispute between the parties with reference to the e-mail correspondence between the Applicant, Corporate Debtor and STPI.
27. We find it necessary to appreciate and discuss the nature of dispute between the parties to arrive at a considered view. The term ‘dispute’ has been defined in Section 5(6) of the Code, 2016 which is as under:-

“Section 5(6) of the Code, 2016:-

5(6) “dispute” includes a suit or arbitration proceedings relating to–
(a) the existence of the amount of debt;
(b) the quality of goods or service; or
(c) the breach of a representation or warranty;”



28. We observe that there are several communications between the STPI and Corporate Debtor, but there are certain email communications between the STPI, the Corporate Debtor and the Applicant also, which are to be considered by us. For example the STPI , vide its e-mail dated 30.05.2019 addressed to the Applicant as well as the Corporate Debtor had in crystal clear words raised the issues of defective goods and deficient services. The extract of e-mail dated 30.05.2019 is reproduced below:-

"From: "Dikson J.Christian" <dikson.christian@stpi.in>

To: "Prakash Chopra" <pchopra.0409@gmail.com>, "India Wood Craft <indiawoodcraft@gmail.com>, "P.S. CHOPRA" <ps.chopra@nbccindia.com>

Cc: "Anchal Pandey" <anchal.pandey@stpl.in> Sent: Thursday, May 30, 2019 3:14:27 PM

Subject: Fwd: Coolinat 9th Floor, GIFT One Building, GIFT City, Gandhinagar

Dear Sir,

The problem informed vide trailing mail dated 25.04.2019 & 24.05.2019 were not attended, till date.

As numerous complaints are receiving from our Incubatees regarding low cooling, hence you are requested to resolve the matter immediately.

We would like to inform that 08 more chair are found broken (photo attached). The total damaged chairs are 32 as date. Out of these 32 chairs 16 chairs have been repaired by changing the handles of the chairs & 16 chairs are still lying damaged and repair is not possible. In this respect you are requested to resolve the issue of frequent problem with chairs.

You are also requested take necessary action for connection of BMS and resolve quality issues with respect to Chairs, UPS and Carpet.

With regards,

Dikson J. Christian

STPI-Gandhinagar “



29. The Applicant in its correspondence with the Corporate Debtor vide letter dated 14.06.2019, had addressed the issue of defective goods and deficient services raised by the STPI, which are sufficient to establish that the Applicant was well aware of the issues raised by the STPI with regard to the goods supplied and services rendered. Accordingly, the contention of the Applicant that the communications relied upon by the Corporate Debtor is not relevant as those relates to the communication between the STPI and Corporate Debtor and the Applicant is not a party to the said communication cannot be accepted as it is evident from the record that the Applicant is well aware of the fact that disputes raised regarding defective goods/deficient services were duly communicated to the Corporate Debtor. Further, the STPI vide letter dated 25.04.2018 addressed to the Corporate Debtor, had highlighted several quality issues and pending works with respect to the project work which were also highlighted in the trailing mail.
30. The Applicant in its own averment at Part IV of the Form-5 of the Application had contended that in the Final Bill, the Corporate Debtor had arbitrarily held the outstanding payment as Rs.32,78,332/- (Rupees Thirty Two Lakhs Seventy Eight Thousand Three hundred Thirty Two Only) against the actual amount of Rs.44,79,398/- (Rupees Forty Four Lakhs Seventy Nine Thousand Three Hundred Ninety Eight Only) outstanding towards the Applicant, which indicates another dispute regarding the quantum of debt.
31. The Applicant has heavily relied on the letter dated 12.03.2018 to argue that there was no defect or deficiency in the goods/services rendered by them, which is evident from the said letter dated 12.03.2018. However, it must not be overlooked that the Corporate Debtor while issuing the letter dated 12.03.2018 to the Applicant has clearly mentioned that it was issued only **upon the specific request of M/s. India Wood Craft ('Applicant') for business Development purposes and will not be used against NBCC in any manner.** The Corporate Debtor had also placed on record Agreement dated 16.09.2016 along with General Conditions of Contract (GCC), NIT, BOQ & Other Document wherein Section 3 of General Conditions of Contract at



Clause 35.0(Completion Certificate and Completion Plans) elaborates the procedure of issuing the Completion Certificate in the format prescribed at Annexure 4.8. However, the letter no. NBCC/ED/JP/2018 dated 12th March, 2018 as relied by the Applicant is not in the prescribed format as prescribed in the General Conditions of Contract. In fact, the Corporate Debtor had not issued Completion Certificate in the prescribed format ever. Therefore, the letter dated 12.03.2018 cannot be accepted as an evidence certifying that there exists no dispute between the parties with regard to the goods or services rendered by the Applicant.

32. Although, the Corporate Debtor did not raise any dispute by way of reply to notice under Section 8(1) of the Code, 2016, it is advantageous to refer to the recent judgement of the **Hon'ble NCLAT in case M/s. Brand Realty Services Ltd. Vs. M/s. Sir John Bakeries India Pvt. Ltd. judgement dated 10.03.2022[Company Appeal (AT) (Ins.) No. 958 of 2020]**, wherein it was observed that:-

“It is further fortified then we look into the scheme of Section 9(5)(ii) which provides that the Adjudicating Authority can reject the Application if-“notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility. **The above provision indicates that even if no notice of dispute has been received, and there is record of dispute in the Information Utility the Application under Section 9 is to be rejected by the Adjudicating Authority. The above provision clearly indicates that even in absence of notice of dispute, Adjudicating Authority can reject the Application if there is record of dispute in the Information Utility. It goes without saying that record of dispute in the Information Utility can very well be pointed out by the Corporate Debtor before the Adjudicating Authority when notice is issued under Section 9. Further in Reply to Section 9 Corporate Debtor can bring the material to indicate that there are pre-existing disputes in existence prior to issuance of demand notice under Section 8.** We thus are of the considered opinion that mere fact that Reply to notice under Section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that



there are pre-existing dispute which may lead to the rejection of Section 9 application.”

33. In the instant case the Corporate Debtor has brought on record by way of its reply to the instant application, material to indicate pre-existence of dispute and we are of the considered view that there is sufficient evidence on record to exhibit a ‘Pre-Existing Dispute’ between the parties prior to the issuance of the Demand Notice under Section 8 (1), IBC, 2016. Further, the defence is not spurious, mere bluster, plainly frivolous or vexatious. It is also important to note that the Hon’ble Supreme Court in **Rajratan Babulal Agarwal vs Solartex India Pvt. Ltd. & Ors. [Civil Appeal No. 2199 of 2021]** had observed that when we speak about evidence of pre-existing dispute, we must not overlook the law laid down in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 SCC 353]** wherein it was observed that, *“the court need not be satisfied that the defence is likely to succeed. The standard, in other words, with reference to which a case of a pre-existing dispute under the IBC must be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit.”*
34. It is pertinent to note that this Adjudicating Authority must not be oblivious to the limited nature of examination of the case of the Corporate Debtor projecting a pre-existing dispute and shall not overlook the boundaries of this Adjudicating Authority’s jurisdiction while determining the question of existence of pre-existing dispute between the parties.
35. Further, from the submissions of the parties, we observe that there exists controversy regarding issue of Completion Certificate and calculation of the Defect Liability Period and the onus of payment by Corporate Debtor to the Applicant. This Adjudicating Authority do not wish to delve into the other submissions of the parties regarding the applicability of ‘Back to Back Payment’, Defect Liability Period and other related issues in view of our observations regarding the existence of pre-existing dispute.



36. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The Applicant is at liberty to seek remedy under the other applicable law and the rights of the Applicant shall not be prejudiced on the grounds of dismissal of the present Application.
37. Accordingly, the interlocutory application i.e., **I.A/ (IBC)/2370/2022 stands allowed.** The instant Company Application (**IB-18/(ND)/2020**), filed under Section 9 of the Code, 2016 being devoid of **merits stands dismissed.** No order to costs.

Let copy of the order be served to the parties.

Consign the file to the record room.

Sd/-
(DR.BINOD KUMAR SINHA)
MEMBER (T)

Sd/-
(SH. P. MOHAN RAJ)
MEMBER (J)