NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH

PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY – MEMBER JUDICIAL

PRESENT: HON'BLE SHRI BINOD KUMAR SINHA-MEMBER TECHNICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 05.02.2020 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) NO. 450/9/HDB/2019
NAME OF THE COMPANY	Delecto Foods Pvt Ltd
NAME OF THE PETITIONER(S)	Jupiter Foods Products India Pvt ltd
NAME OF THE RESPONDENT(S)	Delecto Foods Pvt Ltd
UNDER SECTION	9 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
N. HARINATH, COUNSEL FOR APP. K. Prashant	ADVOCATES	9866010008	

Counsel for Respondent(s):

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

ORDER

Order pronounced in open court. CP admitted vide separate order.

MEMBER TECHNICAL **MEMBER JUDICIAL**

Rk

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

CP (IB) No.450/9/HDB/2019
Under section 9 of the IB Code, 2016
Read with Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016

In the matter of:-
M/S. DELECTO FOODS PRIVATE LIMITED

M/s. Jupiter Food Products Private Limited,
Regd. Office: Shiwalik Apartments, Gopika Enclave,
14/73, Civil Lanes, Kanpur,
Uttar Pradesh – 208 001.

...Petitioner/
Operational Creditor

Versus

M/s. Delecto Foods Private Limited,
Regd. Office: 202, 2nd Floor,
Oxford Plaza No.9-1-129/1,
S.P. Road, Secunderabad,
Telangana State – 500 003.

...Respondent/
Corporate Debtor

Order delivered on: 05.02.2020

Coram: Shri.K.Anantha Padmanabha Swamy, Member Judicial

Dr.Binod Kumar Sinha, Member Technical

Parties/Counsel Present:

For the Petitioner/
Operational Creditor : *Mr.N.Harinath, Counsel*
Mr.K.V.Raman, Counsel

For the Respondent/
Corporate Debtor : Mr.*L.Venkateshwar Rao, Counsel.*

05/02

Per: Dr.Binod Kumar Sinha, Member Technical

ORDER

1. Under consideration is a Company Application filed by M/s. Jupiter Food Products India Private Limited (in short, 'Petitioner/Operational Creditor') against M/s. Delecto Foods Private Limited (in short, 'Respondent/Corporate Debtor') under section 9 of the Insolvency and Bankruptcy Code 2016 (in short, I & B Code 2016) Read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, **'IB Rules 2016'**).

2. The Petitioner Company is having its Regd. Office at Shiwalik Apartments, Gopika Enclave, 14/73, Civil Lanes, Kanpur, Uttar Pradesh. The Respondent/Corporate Debtor is a Company having its Registered Office # 202, 2nd Floor, Oxford Plaza No.9-1-129/1, S.P. Road, Secunderabad, Telangana State.

3. Brief facts of the Application are as under:

   i. The Operational Creditor is a Food Products Company and deals in the business of growing, market gardening and horticulture of various kinds of food products since 1992.
   ii. That in the year 2018, the Corporate Debtor approached the operational creditor to purchase its stock and had started to place various purchase orders of "Liquid Chicory". Initially, it was requested by the Corporate Debtor that the payment of the freight charges shall be paid by the Operational Creditor on its behalf and asked the operational creditor to raise debit note for the same. Accordingly, the operational creditor paid the freight charges on behalf of the Corporate debtor and raised debit note.
   iii. Pursuant to the purchase order, the operational creditor has been supplying the products to the Corporate Debtor on regular basis and has not received any complaint or quality error in respect of the supply made by the operational creditor.
   iv. Since, the Corporate Debtor was regularly taking supply/delivery of the products from Operational Creditor, the Operational Creditor was maintaining a running account of the transactions undertaken with Corporate Debtor.
   v. In terms of the Agreement, Operational Creditor supplied products to the Corporate Debtor and raised Invoices as well as debit notes on the Corporate Debtors from time to time. Corporate Debtor despite admitting the receipt of

products and amounts due and payable failed to make the payment of the invoices on their respective due dates. However, in the beginning, the Corporate debtor paid the freight charges on 20.07.2016, 12.08.2016 and 17.08.2016. Later on, the Corporate Debtor ignored to pay the freight charges and showed the debit note raised by the operational creditor as payments of invoices.

vi. That the Operational Creditor has tried all means to communicate with the Corporate Debtor to get the admitted outstanding dues.

vii. In view of the aforesaid mentioned circumstances and admitted liability of the Corporate Debtor, Operational Creditor issued a Statutory Demand Notice dated 29.01.2019 under section 8 of the Code read with Rule 5 (Demand notice by Operational Creditor) of the Insolvency and Bankruptcy Rules, 2016, calling upon the Corporate Debtor to unconditionally repay the unpaid operational Debt (in default) in full within 10 days from the receipt of the Notice.

viii. On receipt of such notice, the Corporate Debtor gave its response vide its letter dated 06.02.2019 and admitted its liability against the invoices but disputed the amount claimed by the operational creditor. Thereafter, the operational creditor vide its letter dated 05.03.2019 clarified the claim amount and liabilities by enclosing detailed statement of accounts. In response to the above letter dated 05.03.2019, the Corporate Debtor gave its evasive reply vide its letter dated 25.03.2019 where under the operational Debtor has further delayed the matter on the basis of fictitious ground which clearly shows the malafide intention of not to pay the dues pending against it.

4. The Learned Counsel for the Petitioner/Operational Creditor referred to copies of several documents attached with the application in order to prove the existence of Operational Debt and amount in default. These are as listed below:

"1. Board Resolution.

2. A copy of the Certificate of Incorporation of the Corporate Debtor.

3. A Copy of the Master Data as available on the website of Ministry of Corporate Affairs

4. Copy of Purchase Order no.197/2017-18 dated 16.02.2018.

5. Copy of Purchase order no.256/2017-18 dated 01.03.2018.

6. Copy of Purchase order no.274/2017-18 dated 15.03.2018.

7. Copy of Purchase order no. DFPL/0207/2018 dated 22.11.2018.

8. Copy of Invoice no.110 dated 16.02.2018.

9. Copy of Invoice no.112 dated 22.02.2018.

10. Copy of Invoice no.113 dated 24.02.2018.
11. Copy of Invoice no.117 dated 06.03.2018.
12. Copy of Invoice no.125 dated 29.03.2018.
13. Copy of Invoice no.25 dated 28.09.2018.
14. Copy of Invoice no.198 dated 24.11.2018.
15. Copy of Invoice no.32 dated 24.11.2018.
16. Copy of Invoice no.35 dated 07.01.2019.
17. Copy of the statement of account for the period 01/04/2017 to 31.03.2019 being maintained by Operational Creditor.
18. Statutory Demand Notice dated 29.01.2019 under section 8 of the Code read with Rule 5 (Demand Notice by Operational Creditor) of the Insolvency and Bankruptcy Rules, 2016 along with its proof of despatch.
19. Copy of the letter/reply dated 06.02.2019.
20. A copy of the letter dated 05.03.2019.
21. The copy of the letter dated 25.03.2019."

5. The Respondent/CD has filed its counter affidavit in which inter-alia it has been stated as under:

   i. That the CD is a 100% export oriented unit engaged in the business of manufacturing and exporting spray dried instant chicory. The main raw materials used in the manufacturing process are liquid chicory and roasted chicory grains. The quality of liquid chicory is measured in Brix. Brix is standard method to measure the solids percentage in a given sample. It is denoted in " % " of liquid chicory supplied. The minimum Brix is 72 % as mentioned in the purchase orders placed on all suppliers including the Operational Creditor. In addition, the liquid chicory should be totally free from foreign particles and foreign matter as their presence even in negligible quantities would affect the overall quality of the spray dried chicory which is meant for export markets.

   ii. In the course of its business , the Corporate Debtor has been procuring liquid chicory and roasted chicory cubes from the Operational Creditor since April, 2016. In the supplies made during 2016 – 17, there were shortages in quantity as well as supply in damage drums the value of which comes to Rs.42,595/-. The Corporate Debtor immediately informed the

Operational Creditor about the shortage in quantity as well as damaged drums vide e-mails dated 06.09.2016 and 27.09.2016 and raised debit notes dated 03.09.2016; 27.09.2016.

iii. During the year 2017-18, the corporate debtor had procured liquid chicory and roasted chicory cubes from the operational creditor as well as one M/s. Murali Krishna. In that year, the corporate debtor had procured a total quantity of 3,56,415 kgs of chicory valued at Rs.1,40,41,230.30ps from the operational creditor and a quantity of 2,22,180 kgs of chicory valued at Rs.83,92,833.60ps was procured from M/s. Murali Krishna. While the raw material supplies procured from M/s. Murali Krishna were free from any defects, the supplies made by the operational creditor had the problem of low Brix in respect of invoices no.79 dated 02.01.2018; 93 dated 30.01.2018; 110 dated 16.02.2018; 112 dated 22.02.2018 and 113 dated 24.02.2018. The corporate debtor addressed e-mails 30.01.2018; 05.02.2018, 28.02.2018 and 02.03.2018 to the operational creditor bringing to its notice the issue of low Brix and consequently raised in all, five debit notes dated 13.03.2018 in a sum of Rs.2,79,512/-. The emails and debit notes raised on the operational creditor were collectively enclosed as Annexure-II to the counter affidavit.

iv. For the year 2018-19, due to repeated quality issues and low Brix in respect of supplies made by the operational creditor, the corporate debtor started placing orders on one more supplier thereby reducing dependence on the operational creditor. Out of a total quantity of 10,69,435 kgs of chicory (valued at Rs.4,54,97,194.90ps) procured by the corporate debtor during 2918-19, the supplies made by the operational creditor have dwindled to 2,19,000 kgs valued at Rs.84,53,580/-. Even in respect of these reduced supplies from the operational creditor, the corporate debtor repeatedly faced shortages, low Brix and quality issues dues to presence of dust and oil particles in liquid chicory that adversely affected the quantity as well as quality of chicory produced. There were shortages in respect of supplies made under invoices no.84 dated 26.05.2018; 91 dated 30.05.2018; 169 dated 19.09.2018; 176 dated 08.10.2018; 214 dated 22.12.2018 and the value of shortages come to

Rs.11,691/-. In this connection, the corporate debtor addressed e-mails dated 05.06.2018 and 12.09.2018 to the operational creditor and raised debit notes dated 26.10.2018, 31.10.2018 and 28.12.2018. The emails and debit notes are collectively enclosed as Annexure-III to the counter-affidavit. In respect of supplies made under Invoice no.150 dated 22.08.2018, there were serious issue of quality and out of the total invoice value of Rs.8,94,230/-, a sum of Rs.6,00,101/- was not considered and the corporate debtor sent an e-mail dated 12.09.2018 to the operational creditor about the same. The email dated 12.09.2018 is enclosed as Annexure-IV to the counter affidavit. In so far as supplies made under invoices no.198 dated 24.11.2018 and 21 dated 22.12.2018, there was issue of low Brix and the corporate debtor addressed a mail dated 27.12.2018 is bringing to the notice of the operational creditor about the low Brix and the value not considered was Rs.97,269/-. The mail dated 27.12.2018 is enclosed as Annexure V to the counter-affidavit. Photographs evidencing poor quality of supplies made by the operational creditor are enclosed as Annexure VI to the counter-affidavit.

v. Though the corporate debtor repeatedly brought the quality issues to the notice of the operational creditor, it did not bother to take any remedial measures. On the contrary, it assured the corporate debtor about the quality of liquid chicory supplied by it and on the basis of such assurances, the corporate debtor manufactured spray dried chicory and exported the same. Subsequently the corporate debtor has received complaints from overseas buyer that the product, i.e. spray dried instant chicory manufactured by it is 'not meeting the quality standard' and penalized the corporate debtor by 50% of total invoice value. The liquid chicory that was responsible for poor quality that resulted in rejection of exported goods by overseas buyer and imposition of penalties was supplied by the operational creditor under invoices no.091 dated 30.05.2018; 131 dated 23.07.2018 and 148 dated 11.08.2018. The total value of liquid chicory made by the operational creditor under these three invoices is Rs.26,82,690/- while the value of penalties imposed by the overseas buyer comes to US$42,510.72 which is equivalent to

Rs.29,75,750/-. In addition, the Corporate Debtor has lost its carefully crafted reputation as a quality supplier of instant chicory among the overseas buyer besides losing important customer basis.

vi. The total loss suffered by the Corporate Debtor due to poor quality of supplies, low Brix, shortages and damaged drums comes to Rs.36,71,262/-. Though the corporate debtor has repeatedly sent mails and raised debit notes, there was no response from the operational creditor except making false assurances that it would ensure quality, higher Brix in the next supplies. In addition, the corporate debtor has lost orders from an important overseas customer and the loss of business is tentatively quantified at Rs.50,00,000/- and the corporate debtor reserves its right to take necessary steps against the operational creditor for recovery of the same.

vii. With regard to allegations that the operational creditor had supplied liquid chicory in the quantity and as per description and specifications mentioned in the purchase orders placed by the corporate debtor and to its complete satisfaction, nothing can be farther from truth. As stated above, the supplies made by the operational creditor had repeated issues of shortages in quantity, damaged drums, low Brix, quality issues due to presence of dust particles and oil in the liquid chicory. The corporate debtor repeatedly brought to the notice of the operational creditor about the persistent issues of quality, low Brix etc., to no avail. Though the operational creditor was aware of the quality issues, it remained a mute spectator and did not bother to improve the quality of supplies made by it. Consequently, the corporate debtor has suffered heavy loss of business besides losing its reputation as a quality supplier of instant chicory.

viii. With regard to the allegation that the operational creditor has been maintaining a running account and that an outstanding amount of Rs.58,83,226/- is due and payable by the corporate debtor, it is submitted that while it is true that there was a running account, the corporate debtor denies that it owes any amount to the operational creditor much less the amount of Rs.58,83,226/- as alleged or at all. In fact, the corporate debtor

has from the beginning raised debit notes on the operational creditor for low quality, shortage of supplies, low Brix, damaged drums and sent several e-mails in this regard. The corporate debtor also called upon the operational creditor to depute its representatives to ascertain the quality issues raised by it and also to reconcile the accounts. Though the operational creditor has received the e-mails, it did not bother to respond to any of them. Nor did it bother to have the accounts reconciled. If the accounts are reconciled, then it would become obvious that the corporate debtor does not owe any amounts of the operational creditor and on the contrary, it is the operational creditor that owes monies to the corporate debtor. It is also denied that the corporate debtor is liable to pay any amount towards interest much the alleged sum of Rs.7,95,749/- as claimed or at all.

ix. With regard to the allegation that the corporate debtor has admitted its liability vide its letter dated 06.02.2019 issued in reply to the statutory demand notice dated 29.01.2019 issued under Section 8 of the Code read with Rule 5 (Demand Notice by operational creditor) of the Insolvency and Bankruptcy Rules, 2016, it is submitted that nothing can be farther from truth. In its reply dated 06.02.2019, the corporate debtor categorically disputed that it owes a sum of Rs.58,83,226/- to the operational creditor. On the contrary, it was suggested that the operational creditor can depute one of its representatives to reconcile the accounts and also to discuss the issue of quality etc., so as to arrive at the exact amount, if any, payable to the operational creditor.

x. Instead of deputing its representative and getting the accounts as well as the issue of quality etc., reconciled, the operational creditor sent one more notice dated 05.03.2019 which was duly replied to by the corporate debtor through its advocate vide reply notice dated 25.03.2019. It is also pertinent to mention here that after the reply notice dated 25.03.2019 was sent, the corporate debtor received a letter dated 02.05.2019 from its overseas buyer whereby it lodged a complaint with regard to supply of instant chicory that was found emitting bad odor and fermented smell and raised a claim for US$42,512/- equivalent to Rs.29,75,750/-. A copy of the letter dated 02.05.2019

received from overseas buyer is enclosed as Annexure-VII to the counter-affidavit. In addition, the corporate debtor has suffered potential business loss quantified for the present at Rs.50,00,000/- due to low quality supplies made by the operational creditor.

xi. It is further submitted that the corporate debtor is a 100% export oriented unit earning valuable foreign exchange for the country besides providing employment to hundreds of people. The corporate debtor is commercially solvent and it has always been prompt in meeting its payment commitments as and when they arise and in fact it does not have any problems or outstanding amounts payable to any of its suppliers. The present petition filed by the operational creditor is motivated and mala fide and it is misusing the mechanism provided under the Insolvency and Bankruptcy Code to extract monies that are not due at all from the corporate debtor. The operational creditor instead of having the accounts reconciled has rushed to the Hon 'ble Tribunal on false and trumped up charges. The corporate debtor has raised serious issues of quality, shortages, low Brix and rejection of goods by overseas buyers due to low quality liquid chicory supplied by the operational creditor. In view of the above, it is submitted that there are no merits in the present application and the same is liable to be dismissed. On the other hand, if the petition is admitted, it would cause irreparable injury to the corporate debtor which is financially healthy and sound. As such the present petition is vexatious and is liable to be dismissed as such."

6. The Petitioner/OC has filed its written submissions and Rejoinder reiterating the averments made in the petition and further prayed to allow the Application
7. The Corporate Debtor filed its sur-rejoinder & written submissions in which it repeated, re-iterated and re-affirmed the contents of the same as mentioned in its counter –affidavit and further prayed to dismiss the Petition.
8. Heard submissions of the Operational Creditor and Corporate Debtor, and perused the record, pleadings and written submissions.
9. It is a matter of record that certain goods were supplied by the Operational Creditor to the Corporate Debtor as evidenced by the Purchase Orders and invoices as well as the e-mail correspondence between parties.

10. It is also a matter of record that there was delay in payment/non-payment by the Corporate Debtor in respect of goods supplied and the same is evidenced by way of correspondence between the parties including copies of whattsapp messages, as filed by the Operational Creditor in its support. Further, the correspondence also shows that some of the consignments had quality issues, which were resolved by way of return of goods and raising of debit notes by the Corporate Debtor, as per the agreed terms between parties following the normal business practices.

11. Further, it is also a matter of record that on receipt of notice u/s.8 of the IBC, 2016 dated 29.01.2019 claiming an operational debt due to the tune of Rs.58,83,226/- (Rupees Fifty Eight Lakhs Eighty Three Thousand Two Hundred and Twenty six Only) from the Operational Creditor, the Corporate Debtor did not raise the issue of any pre-existing dispute, but only raised the issue of quantum of debt being a lesser amount. The relevant portion of the reply dated 06.02.2019 is extracted hereunder.

> "Our above clients wish to state that as per their accounts, the amount due and payable to your clients is much lesser than what has been claimed by them. We enclose herewith a statement of account showing the Account position as on date.
>
> Our clients therefore dispute that they owe your clients the sum of Rs.58,83,226/- as claimed by your clients.
>
> If your clients so desire, they can depute one of their representative to our office to reconcile the accounts mutually and also to discuss the quality issue etc., so as to derive the exact amount that can be payable to your clients. We wish to state that our clients reserve their right to lodge claim if any for supplying inferior quality material to our clients that put our client into huge business loss for not exporting the finished products to their esteemed overseas customers. "

12. The Corporate Debtor also enclosed with the above reply, a statement of a/c showing the amount due from them to the Operational Creditor at Rs.40,46,021.94/- as against the claim made of Rs.58,83,226/- by the Operational Creditor. Thus, the Corporate Debtor itself admitted the liability to the tune of Rs.40,46,021.94/- in their reply to the Statutory Notice u/s.8 of IBC. Although, they stated that they reserve their right to lodge claim if any for supply of inferior quality material, they did not mention anything about any pre-existing dispute.

13. Sec.8 of the IBC 2016 stipulates as under:

Section 8: Insolvency resolution by operational creditor:

8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, [1][if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [2][payment] of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation*.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding [3][payment] of the operational debt in respect of which the default has occurred.*

14. It is clear from a perusal of the provisions of section 8 of the Code that when a demand notice u/s 8 is served on the Corporate Debtor, the Corporate Debtor may do either of the following:

a. Bring to the notice of the Operational Creditor that there is existence of a dispute or pendency of a suit or an arbitration proceeding already filed before the receipt of such notice; or
b. Bring to the notice of the operational Creditor that the claim amount has already been paid either through electronic transfer or by encashment of cheque by the Operational Creditor.

15. Thus it is always open to the 'Corporate Debtor' to point out existence of dispute, if any or to show that claimed amount has been paid already and there is no debt due and payable. However, such existence of dispute should be that of a period prior to the issuance of the demand notice under Section 8(1) of the Code. In "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– [2017 1 SCC OnLine SC 353], the Hon'ble Supreme Court held that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. The Hon'ble Supreme Court further observed that if the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the

operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered.

16. Further as to what are the relevant facts to be examined by the Adjudicating Authority while examining an application under Section 9, Hon'ble Supreme Court held 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."*

17. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist prior to issuance of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of 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', the application under Section 9 cannot be rejected and is required to be admitted.

18. In "Innoventive Industries Ltd. v. ICICI Bank and Anr.– (2018) 1 SCC 407", the Hon'ble Supreme Court while explaining the provisions of Section 9 observed and held:

> *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment*

amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services. 28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is preexisting- i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

19. From the aforesaid findings, it is clear that the claim means a right to payment even if it is disputed. Therefore, merely because the 'Corporate

Debtor' has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute. Explaining the legal position as to disputed claim, Hon'ble NCLAT have held in the case of Pedersen Consultants India Pvt. Ltd Vs. Nitesh Estates Limited [Company Appeal (AT) (Insolvency) No. 720 of 2018] as under :

> *"In the present case, as we have observed that there is no record to suggest pre-existence of dispute with regard to the services rendered by the Appellant, we hold that the application under Section 9 should not have been rejected by the Adjudicating Authority on the ground that the dispute about the quantum of payment cannot be determined. The Respondent disputed that the alleged debt is not the amount as shown in the Form. However, on mere dispute of amount, the application under Section 9 cannot be rejected, as in terms of Section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank and Anr." (Supra) noticed the definition of 'claim' and held that even if the right of payment is disputed, the Code gets triggered the moment default is of rupees one lakh or more (Section 4). In the circumstances, in absence of any pre-existing dispute, it was not open for the Adjudicating Authority to reject the application under Section 9."*

20. In the light of the above discussion, when the facts of the instant case are considered , it is observed that having received the statutory notice u/s 8 from the Operational Creditor, the Corporate Debtor had sent a reply within 10 days of receipt of the notice. However, on a perusal of the Corporate Debtor's reply to the statutory notice u/s 8 (excerpted supra) it is observed that the Corporate Debtor had neither brought to the notice of the Operational Creditor any pre- existing dispute nor sent any evidence of payment of the amount claimed. It simply disputed the quantum of amount claimed and sent an authenticated copy of the ledger account of the Operational Creditor in its books of accounts to claim that the actual liability is to the tune of Rs.40, 46,021.94 only as against the claim of Rs.58, 83, 226/- as made by the Operational Creditor. No doubt the Corporate Debtor mentioned in the said reply that it reserved its right to lodge claim, if any, in future, for supply of inferior quality material, no pre-existing dispute was mentioned in the said reply. Thus, in the instant case, there is no record of any pre-existing dispute which was brought to the notice of the Operational Creditor. As held by Hon'ble NCLAT in the case of Pedersen (supra) , on mere dispute of amount , the application under section 9 cannot be rejected, as the Code gets triggered the moment default is of Rupees 1 lakh or more and there is no pre-existing dispute. Admittedly, the

Corporate Debtor had a liability to the tune of Rs.40, 46,021.94 towards the Operational Creditor which it had failed to pay.

21. In view of the above factual and legal position, this Adjudicating Authority is satisfied that the Operational Creditor has proved its case by placing evidence that default has occurred for which the Corporate Debtor was liable to pay. The Petitioner has complied with all the requirements as stipulated under the provisions of the IB Code, 2016 for the purpose of initiating Corporate Insolvency Resolution Process. In these circumstances, having satisfied with the submissions made by the OC this Adjudicating Authority is inclined to admit the instant Petition.

22. Accordingly, the instant petition is hereby admitted and this Adjudicating Authority orders the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within the timelines stipulated in the IB Code, 2016 (as amended), reckoning from the day this order is passed.

23. This Adjudicating Authority hereby appoint Mr.Chillale Rajesh, IBBI/IPA-001/IP-P00699/2017-2018/11226 as IRP. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the Insolvency and Bankruptcy Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.

24. The moratorium is hereby declared which shall have effect from the date of this Order till the completion of Corporate Insolvency Resolution Process, for the purposes referred to in Section 14 of the I& B Code, 2016. It is hereby ordered to prohibit all of the following, namely:-

    a) *The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.*

    b) *Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;*

    c) *Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction*

of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.*

e) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

25. However, the supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period. Furthermore, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.

26. The IRP shall comply with the provisions of Sections 13 (2), 15, 17, & 18 of the Code. The directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor is expected to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his function under Section 20 of the I & B Code, 2016.

27. The Operational Creditor and the Registry are directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of I & B Code, 2016.

28. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor.
29. The Registry shall also communicate this order to ROC, Hyderabad for updating the status of Corporate Debtor in MCA Website.
30. The detailed address of the IRP is as follows:-

    Mr.Chillale Rajesh
    IBBI/IPA-001/IP-P00699/2017-2018/11226
    B-421, Western Plaza,
    O. U. Colony, H. S. Dagra ,
    Golconda , Hyderabad,
    Telangana , 500008
    chillalerajesh@yahoo.co.in

31. The present Petition bearing *CP(IB) No. 450/9/HDB/2019* is hereby admitted.

05.02.2020

Dr.BINOD KUMAR SINHA
MEMBER TECHNICAL

K.ANANTHA PADMANABHA SWAMY
MEMBER JUDICIAL

SRAVAN & SANTI