

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) 3753/MB/C-IV/2018

Under section 9 of the Insolvency &
Bankruptcy Code, 2016

In the matter of

M/s Malharshanti Enterprises,
A sole proprietorship concern represented
by its proprietor, Mr Sunil Pande
...Operational Creditor
Versus

CAN Enterprises Private Limited
[CIN: U70102MH2009PTC195720]
... Corporate Debtor

Order pronounced on 27.01.2020

Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Mr Zaid Ansari a/w Mr Bilal
Qureshi, Mr. Mangesh R
Kokare i/b Zaid Ansari &
Associates, Advocates

For the Corporate Debtor : Mr Nishit Dhruva a/w Ms Faiza
Dhanani i/b MDP & Partners,
Advocates

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (“IBC”) by **M/s Malharshanti Enterprises ("the Operational Creditor")**, a sole proprietorship concern represented by its Proprietor Mr. Sunil Pande, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **CAN Enterprises Private Limited ("the Corporate Debtor")**.
2. The Corporate Debtor is a private company limited by shares and incorporated on 11.09.2009 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its CIN is U70102MH2009PTC195720. Its registered office is at Flat No.103/C, Thosar House, Hanuman Cross Road No.1, Near Shivleela Hotel, Vile Parle (E), Mumbai 400 057, within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹94,64,770.00 (Rupees ninety-four lakh sixty-four thousand seven hundred and seventy only) as principal and ₹68,66,919.00 (Rupees sixty-eight lakh sixty-six thousand nine hundred and nineteen only) as interest as on 22.08.2018, which is

stated to be the date of default [*page 5, Part IV-Particulars of Operational Debt*].

4. Mr Zaid Ansari, Learned Counsel, submitted that the case of the Operational Creditor is as follows: -

(a) The Operational Creditor is engaged in the business of the construction of buildings. The Corporate Debtor hired the services of the Operational Creditor by a Work Order dated 25.05.2014 (“**Work Order**”) for General Civil Works for a proposed residential building having stilt+6 upper floors known as “**Rose Villa**” on CTS Nos.725, 725/1, 725/2 of Village Ambivali at Caeser Road, Andheri (West), Mumbai 400 058. The Work Order is placed as **Exhibit ‘7’** at p.56 of the Petition. The gross value of the Work Order was ₹2,54,60,567/-;

(b) The Operational Creditor carried out the work to the complete satisfaction of the Corporate Debtor;

(c) Pursuant to this, a total of twenty invoices between 18.07.2014 and 06.11.2015 (both dates inclusive) were raised, which have been placed on record at pp.69-105;

(d) The Corporate Debtor then requested for additional works to be performed by the Operational Creditor. For such additional works, the Operational Creditor was to raise additional invoices. Accordingly, a total of five invoices were raised for

such additional work, four of them dated 28.12.2015 corresponding to measurement sheets submitted on 24.06.2015, 01.09.2015, 20.10.2015 and 03.12.2015, and the fifth one on 02.01.2016. The sum of these five additional invoices works out to ₹38,63,840/-. The details of the bills have been tabulated at p.47 of the petition;

- (e) The first Work Order dated 25.05.2014 itself came to be amended on 30.01.2015;
- (f) During the subsistence of the work carried out by the Operational Creditor at the instance of the Corporate Debtor, the Corporate Debtor through its architect, caused drawings of the building to be revised on three different occasions on 15.07.2014 (p.572 of the petition), 13.03.2015 (p.573 of the petition) and 17.11.2015 (p.261 of the petition);
- (g) The quality of the works and the additional works carried out by the Operational Creditor was in conformity with the industry standards. No objection whatsoever was taken by the Corporate Debtor at the relevant time. A Structural Stability Report dated 13.08.2014 has been issued by Structural Consultant authorised by Municipal Corporation of Greater Mumbai, wherein it has been certified that the structure of 'Rosa Villa' up to Plinth Level is safe and stable for the purpose for which it is intended (p.549 of the petition);

- (h) The Architect of the Corporate Debtor has approved in writing the constructions undertaken by the Operational Creditor *vide* independent reports prepared on 09.08.2014 (stilt slab/first slab), 01.10.2014 (second slab), 11.10.2014 (third slab), 04.11.2014 (fourth slab), 19.11.2014 (fifth slab), 13.03.2015 (sixth slab) and 14.04.2015 (seven slab). Occupation certificate has been issued by Municipal Corporation of Greater Mumbai on 07.09.2016 (p.569 of the petition). Further, the Corporate Debtor has applied for vertical extension of this building, which points to the structural stability and quality of construction carried out by the Operational Creditor.
- (i) The Operational Creditor has handed over the project duly completed on 19.11.2015 after demobilising labour and equipment from the site;
- (j) The Corporate Debtor has been irregular in making payments to the Operational Creditor. The last part payment was made by the Corporate Debtor on 29.09.2015.
5. The Operational Creditor issued legal notice dated 29.03.2017 to the Corporate Debtor (pp 135-141 of the petition). There was no response to this legal notice.
6. Thereafter, the Operational Creditor issued Demand Notice dated 02.12.2017 under the IBC claiming a sum of ₹1,94,62,148/- from the Corporate Debtor. The Demand Notice also included certain

amounts claimed towards damages (pp.234-237 of the petition). This Demand Notice has been duly served on the Corporate Debtor on 04.12.2017.

7. The Corporate Debtor replied to this Demand Notice on 13.12.2017, which is placed at pp.241-243 of the petition. In the reply, the Corporate Debtor has stated that the Operational Creditor has been paid in full for the additional work carried out by them and therefore, they reject any amount claimed in the demand notice. The Corporate Debtor raised the issue of substandard work for the first time in the reply to the Demand Notice (para 3 at p.241 of the petition).
8. Thereafter, Company Petition (IB) No. 1823 (MB)/2017 was filed against the Corporate Debtor on 28.12.2017. At this stage, the Operational Creditor noticed certain errors in the Demand Notice, which were repeated in the Petition. The error concerned the amount received by the Operational Creditor from the Corporate Debtor. The Corporate Debtor filed its affidavit in reply to this petition wherein the Corporate Debtor *inter alia* made a counter claim of ₹30,18,856/- against the Operational Creditor for the first time. This petition was permitted to be withdrawn by the Operational Creditor with liberty *vide* order dated 13.03.2018 (order at p.454 of the petition).
9. On the same day, *i.e.*, 13.03.2018, the Corporate Debtor issued a legal notice to the Operational Creditor demanding a sum of

₹30,18,856/- from the Operational Creditor. The Corporate Debtor, *vide* notice dated 10.04.2018 (p.468-474 of the petition), also invoked the arbitration clause contained in the work order of 25.05.2014 (p.64 of the petition). The Operational Creditor claim that this is with a view to raising the bogey of a dispute to escape from the clutches of the IBC. The said legal notice is at pp.455-464 of the petition. Learned Counsel for the Operational Creditor submits that there have been no steps towards constitution of the Arbitral Tribunal in this regard.

10. The second Demand Notice following the withdrawal of the earlier petition bearing CP (IB) No.1823/2017 was sent on 23.08.2018 to the Corporate Debtor after correcting the computational errors committed during the previous round of litigation. The said Demand Notice dated 23.08.2018 was received by the Corporate Debtor on 28.08.2018 (p.478 of the petition).
11. The Corporate Debtor addressed a reply dated 03.09.2018 to the second Demand Notice dated 23.08.2018, which is at pp.478-487 of the petition. In that reply also, the counter claim of ₹30,18,856/- was raised.
12. Thereafter, the present petition bearing CP (IB) No.3753/2018 was filed.
13. The invoices have been placed at pp. 68-119 of the petition. Bank statements are also attached as **Exhibit '10'** at pp.117-135. The

total debt due and payable to the Operational Creditor is ₹1,63,31,689.00 (Rupees one crore sixty-three lakh thirty-one thousand six hundred and eighty-nine only), as mentioned at p.5 of the Petition.

14. Mr Nishit Dhruva, Learned Counsel appeared on behalf of the Corporate Debtor and made his submissions.
15. In its reply dated 02.03.2019, the Corporate Debtor has set up the following defence: -
 - (a) The Corporate Debtor submitted that the Demand Notice dated 23.08.2018, issued by the Petitioner and received by the Corporate Debtor on 28.08.2018, is already disputed by the Corporate Debtor *vide* its 'Notice of Dispute'/reply dated 03.09.2018 which categorically states that the alleged claim of the Petitioner is not payable, and it is disputed. The Corporate Debtor further submitted that a 'dispute' was adequately raised by the Corporate Debtor and the present petition is liable to be rejected *ab initio* under section 9(5)(ii)(d) of the Code (para 6 of the Affidavit in Reply on behalf of the Corporate Debtor at p.2);
 - (b) The Operational Creditor in his email dated 04.12.2014 (annexed at p.111 of the petition) has accepted that electricity charges have been paid by the Corporate Debtor on behalf of the Operational Creditor. However, the Operational Creditor

has failed to give the equivalent credit in respect of the monies paid by the Corporate Debtor on behalf of the Operational Creditor in respect of the electricity charges to the extent of ₹5,87,150/- in the present petition (para 11 of the Affidavit in Reply on behalf of the Corporate Debtor at p.4);

- (c) The Corporate Debtor has also paid MVAT to the tune of ₹2,28,716/- on behalf of the Operational Creditor for which credit has not been given (para 12 of the Affidavit in Reply on behalf of the Corporate Debtor at pp.4-5);
- (d) The Operational Creditor has also paid the sum of ₹26,41,727/- towards purchase of various material like gypsum, sand and cement from third parties for which also credit has not been given by the Operational Creditor (para 13 of the Affidavit in Reply on behalf of the Corporate Debtor at p.5);
- (e) The Operational creditor has also not given credit of TDS amounting to ₹2,00,602/- (para 14 of the Affidavit in Reply on behalf of the Corporate Debtor at p.5);
- (f) The Operational Creditor has not provided services to the tune of ₹20,17,000/- towards material testing reports, insurance policies, safety measures, labour law compliances, scaffolding, anti-termite treatment, water-proofing work etc (para 15 of the Affidavit in Reply on behalf of the Corporate Debtor at p.6);

- (g) The total contract value was inclusive of cost of all preparatory and incidental work except those that were specifically excluded in terms of clause 1.02 (p.58 of the petition) of the work order dated 25.05.2014 [para 23(c) of the Affidavit in Reply on behalf of the Corporate Debtor at p.8];
- (h) The Operational Creditor was supposed to complete the work on or before 31.03.2015, failing which the petitioner was liable to pay liquidated damages to the Corporate Debtor [para 23(g) of the Affidavit in Reply on behalf of the Corporate Debtor at p.9];
- (i) The Corporate Debtor states that on 05.10.2015 (at p.202/Vol-I) the Operational Creditor addressed an email to the Corporate Debtor, *inter alia* seeking a further extension of ten days to complete the work. It is pertinent to note that the Operational Creditor has extended the time unilaterally by merely informing to the Corporate Debtor without obtaining extension of time in writing from the Engineer-in-Charge violating Clause 23.02 of the Work Order. The Corporate Debtor have paid ₹5,00,000/- as mutually agreed upon in the letter dated 15.09.2015 (At page 252/Vol-II) [para (iv) of the Written Submission on behalf of the Corporate Debtor at p.6];
- (j) The Corporate Debtor states that on 08.03.2018 in the said petition, an Affidavit-in-Reply was filed (at page 287/Vol-II) on the grounds that the Petition was not maintainable, in view

of the fact that full and final payment was already made to the Operational Creditor and that a dispute had already been raised. Further, the petition was not maintainable as damages are not covered under the provision of the IBC (At Page 454/Vol-II) [para (viii) of the Written Submissions on behalf of the Corporate Debtor at p.7];

- (k) The Corporate Debtor further states that any claim for any purported 'additional work' is maintainable only as per Clause 20.02 of the said Work Order and only if (a) there is any deviation/revision in the drawings; (b) such estimate of claim is mutually agreed upon in advance; and (c) invoicing (with necessary proof of costs) is made at cost of actual material and labour+15% . As for the purported additional work claimed by the Operational Creditor; (a) there was no deviation/revision in drawings; (b) there was no mutual understanding/agreement as to such Claims between the parties; (c) invoicing was not made as per requisite manner (i.e. cost + 15%) nor substantiated/proved the costs of material and labour (para 34 of the Affidavit in Reply on behalf of the Corporate Debtor at p.20 of the Reply);
- (l) The Corporate Debtor stated that the purported additional work performed by the Operational Creditor is nothing but rectification of several defects (such as re-plastering etc.) carried out by the Operational Creditor, which the Operational

Creditor was obliged to carry out within its scope of work under the Work Order. The Corporate Debtor also submitted that this can also be seen from a bare perusal of the Architect Reports (at pp.418-426 and pp.554-559 of the Petition) wherein it has been categorically observed by the Architect that during the course of execution of the work, the Operational Creditor was not following instructions and there were too many errors/defects/leakages which required to be rectified by the Operational Creditor [para 35 at p.20 of the Reply].

16. We have heard the arguments of both sides and perused the records. The Corporate Debtor has stated that the claim of the Operational Creditor is not valid, on the following grounds: -
 - (a) All the work relating to general civil work (including additional work, if any) are covered within the Contact Value of ₹2,31,25,100/- + VAT and service tax] as per Clause 2.02.03 and 2.040;
 - (b) The Operational Creditor has never performed any work which is excluded from the scope of work under Clause 1.02;
 - (c) There was no deviation or revision in the drawings by the Corporate Debtor;
 - (d) No 'additional cost' for any work was ever agreed by the Corporate Debtor. Further, 'Additional cost' has not been

- properly substantiated or invoiced by the Operational Creditor;
- (e) The 'Contract Value' is explicitly fixed (and without any scope for escalation) under Clause 2.03;
 - (f) There is a pre-existing dispute prior to the various Demand Notices issued which is evident from the legal notice dated 13.03.2018, notice invoking Arbitration dated 10.04.2018;
 - (g) The Operational Creditor did not comply with Guarantee certificate for anti-termite work as per clause 21.12 of the Work Order;
 - (h) The Operational Creditor did not submit the report of the Engineer in charge as per clause 11 of the Work Order.
 - (i) Insurance policy not taken as required under Clause 14 of the Work Order;
 - (j) ESIC and PF obligation not complied with as required under Clause 16 of the Work Order.
17. We have heard the arguments of both sides at length and perused the documents placed on record.
18. The issues that arise for determination in the present Company Petition are the following: -

- (a) Whether the invocation of the arbitration clause between the withdrawal of the first petition *vide* order dated 13.03.2018 and the issue of the second demand notice dated 23.08.2018 to the Corporate Debtor should be treated as “pre-existing dispute” within the meaning of section 5(6) of the IBC;
- (b) If the answer to the above is “No” then whether there is a debt due and payable by the Corporate Debtor in favour of the Operational Creditor; and
- (c) Whether there is a default of the Operational Debt due and payable by the Corporate Debtor in favour of the Operational Creditor;

The issues are answered *ad seriatim* in the subsequent paragraphs.

Issue No.1: Whether the invocation of the arbitration clause between the withdrawal of the first petition vide order dated 13.03.2018 and the issue of the second demand notice dated 23.08.2018 to the Corporate Debtor should be treated as “pre-existing dispute” within the meaning of section 5(6) of the IBC.

19. The Learned Counsel for the Operational Creditor has submitted that no dispute was brought to the notice of Operational Creditor prior to the issue of the first demand notice on 02.12.2017, which was duly served on the Corporate Debtor on 04.12.2017. The first sign of dispute was raised for the first time in Reply dated 13.12.2017 to the demand notice of 02.12.2017.

20. Further, the Corporate Debtor took advantage of the order dated 13.03.2018 dismissing the first Company Petition bearing CP (IB) No.1823/2017 as withdrawn with liberty, to invoke the arbitration clause contained in the work order dated 25.05.2014. Thereafter, when the second demand notice was issued on 23.08.2018, the Corporate Debtor replied by stating that since arbitration has already been invoked, the same constitutes “*pre-existing dispute*” within the meaning of section 5(6).
21. The Learned Counsel for the Operational Creditor submits that this cannot be treated as the “*pre-existing dispute*” within the meaning of section 5(6) of the IBC. In this regard, he places reliance on the judgment of the Hon’ble National Company Law Appellate Tribunal (NCLAT) in *Dinesh Gupta vs Hajura Singh Bhim Singh & another*,¹ wherein it has been held as follows: -
- “6. On hearing the parties, as we find that there was no dispute in existence prior to the 1st demand notice issued under section 8(1) of the I&B Code and the Corporate Debtor disputed the claim about quality only after issuance of 1st demand notice, therefore, after withdrawal of 1st application under section 9 on technical grounds and issuance of fresh demand notice, the application under section 9 filed by Respondent was maintainable.”
22. Applying the ratio laid down by the Hon’ble NCLAT in *Dinesh Gupta (supra)*, we hold that to satisfy the criterion of “pre-existing

¹ Company Appeal (AT) (Insolvency) No.99/2018, decided on 16.07.2018

dispute,” the same shall have to be raised prior to the issue of the first demand notice under the IBC, and not later.

23. In this view of the matter, the invocation of the arbitration clause by the Corporate Debtor between 13.03.2018 (*when the first Company Petition bearing CP (IB) No.1823/2017 was dismissed as withdrawn with liberty*), and 23.08.2018 (*when the second demand notice came to be issued by the Operational Creditor to the Corporate Debtor*), is of no consequence and cannot be treated as “pre-existing dispute” within the meaning of section 5(6) of the IBC.

Issue No.2: Whether there is a debt due and payable by the Corporate Debtor in favour of the Operational Creditor

24. The Corporate Debtor has argued that any claim for any purported 'additional work' is maintainable only as per Clause 20.02 of the said Work Order and only if – (a) there is any deviation/revision in the drawings; (b) such estimate of claim is mutually agreed upon in advance; and (c) invoicing (with necessary proof of costs) is made at cost of actual material and labour+15%. As for the purported additional work claimed by the Operational Creditor, there was no deviation or revision in drawings and there was no mutual understanding as to such Claims between the parties. Further, the invoicing was not made as per requisite manner nor have the costs of material and labour substantiated.
25. The Learned Counsel for the Corporate Debtor placed heavy reliance on an email dated 29.06.2015 addressed by the

Operational Creditor to the Corporate Debtor, wherein it has been stated as follows: -

“Dear Sir,

Please ask Lift Vendor to start work inside the shaft as we have completed required Civil Works.

We have already started fixing plywood to avoid stagnation of rainwater on floors thus restricting mosquito breeding.

We as a team have carried out inspection of all flats on 28th June. Regarding please note our observations:

(a) No leakage observed on 4th, 5th and 6th Floor;

As we have already treated slabs at the time of concreting. Even then we will treat 4th, 5th and 6th Floor.

(b) Maximum trouble is on 1st and 2nd floor only and that too on West Side due to heavy rains.”

Presently our focus is on the enhancement of performance of the works carried out till date. And we have started clearing floor slab and procuring required chemicals. We will review status of works by weekend and will be in a position to think of revised schedule. Thus we will update by weekend.

Thanking you,

Yours faithfully,

For Malharshanti Enterprises

Sunil Pande”

The Learned Counsel pointed out that the sentence, “*maximum trouble is on 1st and 2nd floor only and that on west side due to heavy rain. Presently our focus is on enhancement of the works carried out till date*” is sufficient to point to the fact that the Operational Creditor’s work was not found satisfactory. Further, there was great delay in completion of the works and also the works were defective in nature which had to be rectified time and again by the Operational Creditor. He has also referred to the reports of the Architects placed at pp.418-426 and pp.554-559 of the petition in this regard.

26. We have perused the reports of the Architects placed at pp.418-426 and pp.554-559 of the Petition. In all of these pages, the Architects have noted their observations. Apart from the observations, the Architects have mostly noted that the work has been found “okay.” Therefore, upon reading them, we are of the view that none of them can be elevated from the status of “Observations” to the status of “Dispute.”
27. Further, the Learned Counsel for the Corporate Debtor has stressed that there was considerable delay on the part of the Operational Creditor to complete the work, and those reasons are attributable completely to the Operational Creditor. The Corporate Debtor has incurred costs and suffered losses since it could not claim input credit of service tax and also had to pay interest to its financiers to the tune of ₹1.30 crore on 31.03.2015,

₹2.04 crore on 31.03.2016 and ₹2.34 crore on 31.03.2017, and also had to pay higher rent and other expenses.

28. The claim of the Corporate Debtor as to losses suffered, is not supported by any material on record. Further, even if the Corporate Debtor has a counter-claim, the same should be properly adjudicated by a proper judicial forum before it can be claimed against the Operational Creditor. Therefore, this argument does not commend itself to us and we reject the same.
29. The Learned Counsel for the Operational Creditor has specifically pointed out during the course of arguments, and also drawn our attention to the specific averment in the Rejoinder to the effect that apart from invoking the arbitration clause on the same day when the 1st Company Petition bearing CP (IB) No.1823/2017, no legal remedies have been pursued by the Corporate Debtor to this date against the Operational Creditor. Therefore, Counsel for the Operational Creditor submitted that the bogey of “dispute” has been raised only with a view to getting out of the clutches of the IBC.
30. We find merit in this argument, since we find from the records that after the invocation of the arbitration clause, nothing has been done in the matter by the Corporate Debtor either to seek appointment of an arbitrator with mutual consent of the parties or to approach the Hon’ble High Court under the Arbitration & Conciliation Act, 1996, for appointment of an arbitrator.

31. The third limb of the argument of the Learned Counsel for the Corporate Debtor is that all the work carried out by the Operational Creditor fell within the scope of the work entrusted to him in terms of the Work Order dated 25.05.2014. He drew our attention to *Clause 1.0.1-Scope of Work* in the said Work Order, which reads as follows: -

“1.01. The scope of work shall comprise of all General Civil Works for the proposed residential building having stilt + 6 upper floors, as defined by the developer and the construction drawings issued.”

He also drew our attention to the exclusions contained in clause 1.02, which reads as follows: -

“Your scope of work excludes the following works:

- (a) All finishing works.*
- (b) Installation of lifts.*
- (c) Plumbing, electrical and fire-fighting works.*
- (d) Mahanagar Gas Ltd.*
- (e) MTNL”*

32. The Learned Counsel for the Corporate Debtor states that the Contract Value was inclusive of any and every ‘incidental, consequential or indirect work’ that may be required to be made for proper completion of work, except those explicitly excluded under clause 1.02 of the Work Contract. Hence, the question of raising any invoice for the ‘additional work’ does not arise. Further, it was the result of faulty work on the part of the

Operational Creditor that the said work required rectification and hence, it is the Operational Creditor who is responsible and liable to bear the costs of the said works.

33. In the reply dated 13.12.2017 to the first Demand Notice dated 02.12.2017 issued by the Operational Creditor, the Corporate Debtor has stated as follows in the unnumbered second paragraph at p.330 of the Petition:

“We totally deny and dispute that any amount is due to you by us as alleged in the demand notice dated December 2, 2017 by you. We hereby further state that you have suppressed material fact in the notice and agreement dated September 25, 2015 arrived at between yourself and us whereby you were paid in full for the additional work carried out by you, but you have yet again failed and neglected complete the entire work even after been paid in full for the same (sic).”

34. There is an inherent contradiction in the stand taken by the Corporate Debtor. While on the one hand, the Corporate Debtor has taken the stand that the “additional work” carried out by the Operational Creditor was well within the scope of work as enumerated in **Clause 1.0.1- Scope of Work** of the Work Order, on the other hand in the reply dated 13.12.2017 to the first demand notice to the Corporate Debtor has taken the stand that the Operational Creditor has been paid in full for the additional work carried out by it. If indeed the Corporate Debtor believe that the scope of work included everything except those excluded under

clause 1.02 of the Work Order, then there was no need to take the stand in the reply dated 13.12.2017 that the Operational Creditor was paid in full for the additional work carried out.

35. Looking at the documents placed on record it appears to us that the drawings in respect of the work to be completed in terms of the work order were repeatedly changed at least on three different occasions as seen from the documents placed at pp.572, 573 and 261 of the petition. This issue has also been highlighted *vide* email dated 16.11.2015 (at p.259, Vol.II of the Petition) addressed by the Operational Creditor to the Corporate Debtor, in which the last para reads as follows: -

“Presently, whatever work is going on is additions and alterations and we don’t see end to it for sample the Watchman Cabin Work, Breaking of PCC in Stilt, Lift Lintel Bottom Level etc. So as we have completed work mentioned in our scope of work we are demobilizing on 19th November 2015 and two boys will attend your requirements. The remaining bills will be submitted at the earliest.”

36. It is also seen from the records that no objection or demurrer of any kind has been taken by the Corporate Debtor regarding the work performed by the Operational Creditor. Though the Corporate Debtor has claimed that the work was of sub-standard quality, it is seen that the architect appointed by the Corporate Debtor has in fact certified the work done by the Operational Creditor *vide* reports prepared on 09.08.2014 (p.418 of the

petition), 01.10.2014 (p.419 of the petition), 11.10.2014 (p.420 of the petition), 04.11.2014 (pp.421-422 of the petition), 19.11.2014 (p.423 of the petition), 17.03.2015 (pp.424-425 of the petition) and 14.04.2015 (p.426 of the petition).

37. We observe therefrom that no major objections have been pointed out in these reports by the architect with reference to any substantive parameters such as measurements of the work done, its structural stability or any deviation from the norms. While some minor observations have indeed been made in these reports, we do not consider them to be of such major import as to regard the whole work carried out by the Operational Creditor as “substandard” in nature as the Corporate Debtor has claimed.
38. The Corporate Debtor has taken the stand in Part-E at p.21 of the its Written Submissions that there was “*deemed abandonment of the project by the petitioner.*” In support of this contention, the Corporate Debtor has relied on the letter dated 16.11.2015 (at p.259, Vol.II of the Petition) wherein it has been stated that “*we are demobilizing on 19th November 2015 and two boys will attend your requirements.*” We do not regard this letter dated 16.11.2015 (at p.259, Vol.II of the Petition) to be indicative of “abandonment” of the project. However, even if this argument is assumed to be true, the Corporate Debtor has not written a single letter or email objecting to such “abandonment.” The work order stood from 25.05.2014 till its completion and site being handed over on

19.11.2015. There was ample time and opportunity on the part of the Corporate Debtor to cancel the work order in case the work was deemed to be substandard. This was not done. Even after demobilisation by the Operational Creditor from the work site, this aspect of “abandonment” has never ever been raised by the Corporate Debtor with the Operational Creditor. Further, it is also observed from the records that the site was duly handed over by the Operational Creditor to the Corporate Debtor on 19.11.2015 with due notice. Therefore, it is difficult for us to hold that there was any “deemed abandonment” of the project by the Operational Creditor.

Issue No.3: Whether there is a default of the Operational Debt due and payable by the Corporate Debtor in favour of the Operational Creditor.

39. In the first demand notice dated 02.12.2017, the Operational Creditor raised demand for payment of a sum of ₹1,94,62,148/-. In the reply of the Corporate Debtor to this Demand Notice, there is only a proforma denial of the said amount, which led to the filing of the first company petition bearing CP (IB) No.1823/2017.
40. After the withdrawal of the said CP (IB) No.1823/2017 on 13.03.2018 and before the issue of the second Demand Notice on 23.08.2018, the Corporate Debtor issued a legal notice dated 13.03.2018 to the Operational Creditor demanding payment of a sum of ₹30,18,856/-.

41. The defence of the Corporate Debtor that it had to spend additional sums to complete the project is not substantiated by anything on record. Further, we have already held that there was no cancellation of the contract on the part of the Corporate Debtor, nor was there an “abandonment” of the project by the Operational Creditor. On the other hand, there was a proper handing over of the work site by the Operational Creditor to the Corporate Debtor with due notice about demobilisation of personnel *vide* letter dated 16.11.2015 (at p.259, Vol.II of the Petition). If at all the Corporate Debtor had to spend additional sums to complete the project as claimed, this would have found a mention in the reply to the first Demand Notice. Therefore, it appears that this stand is only an afterthought post withdrawal of the first company petition bearing CP (IB) No.1823/2017 to paper over the cracks in its defence.
42. In view of the differing stands taken by the Corporate Debtor in reply to the first Demand Notice and petition and the second Demand Notice and petition, the counter-claim raised by the Corporate Debtor against the Operational Creditor does not seem to hold water. This is further reinforced by the fact that after the invocation of the arbitration clause on 13.08.2018, there has been no effort to get along with the proceedings in the matter as per materials placed on record.

43. Therefore, the device of attempting to invoke the arbitration clause in the Work Order on the very day that the petition came to be dismissed with liberty by the Adjudicating Authority, can only be seen as a last-ditch effort to stave off the proceedings under section 9 of the IBC by claiming that the second petition cannot be admitted because it is blighted by the “pre-existing dispute.” Therefore, the reliance on the judgment of the Hon’ble Supreme Court dated 21.09.2017 in *Mobilox Innovations Private Limited vs Kirusa Software Private Limited* does not help the cause of the Corporate Debtor.

44. The Learned Counsel for the Corporate Debtor has, apart from the judgment in *Mobilox*, relied on the following judgments: -

(a) Judgment dated 14.08.2018 passed by the Hon’ble Supreme Court in *K Kishan vs Vijay Nirman Company Private Limited*, for the proposition that an application under section 8 must be rejected if notice of a dispute has been received by the operational creditor.

However, that was a case where the petition under section 9 of the IBC came to be filed on 14.07.2017 after the filing of a petition under section 34 of the Arbitration & Conciliation Act, 1996. Therefore, the ratio of that judgment is clearly not applicable to the facts of the present case.

- (b) Judgment dated 01.02.2018 passed by the National Company Law Tribunal, Mumbai Bench, in CP (IB) No.1297/2017 in the matter of *Swastic Enterprises vs. Gammon India Limited*, for the proposition that where the principal amount of debt has admittedly been paid and duly accepted by the Petitioner and the claim of interest remained unsubstantiated in the absence of cogent evidence, the “Operational Debt” in question remained unascertainable, the petition under section 9 is not maintainable.

In the present case, the claim of the Operational Creditor is not restricted to interest alone, but rather is a claim for payment for additional works carried out. We have already held in para 34 *supra* that there are inherent contradictions in the stand of the Corporate Debtor as to the so-called “additional works.” Therefore, suffice it to say here that the claim in the present petition is not on account of interest alone, and therefore, the judgment of this Bench in *Swastic Enterprises* is not of any help to the Corporate Debtor.

- (c) Judgment dated 18.04.2017 in CP (IB) No.8/2016 of the NCLT, Chandigarh Bench in the matter of *Wanbury Limited vs. Panacea Biotech Limited*, for the proposition that the interest cannot be determined by the Tribunal. As we have already stated in regard to the judgment in *Swastic Enterprises*, since

this is not a claim for “interest” alone, this judgment is also of no help to the Corporate Debtor.

- (d) Common Judgment dated 01.03.2017 passed by the NCLT Principal Bench in CP(IB) No.7/2017 in the matter of *M/s One Coat Plaster vs. Ambience Private Limited* and CP (IB) No.8/2017 the matter of *M/s Shivam Construction Company vs. Ambience Private Limited*, for the proposition that a dispute could be proved by showing that a suit has been filed or arbitration is pending.

However, in view of the decision of the Hon’ble NCLAT in *Dinesh Gupta (supra)*, that such suit or arbitration should be pending prior to the issue of the first demand notice and not later, this judgment does not help the cause of the Corporate Debtor.

- (e) Judgment dated 08.05.2017 in CP (IB) No.76/2017 passed by the NCLT New Delhi Bench in the matter of *Design Worx Infrastructure India Private Limited vs. Premier Restaurant Private Limited* for the proposition that the terminology “dispute” cannot be given a rigid interpretation or be limited to pendency of a suit or an arbitration proceeding.

In view of the fact that the Hon’ble Supreme Court has interpreted the scope of the term “dispute” in *Mobilox*, and having considered the response of the Corporate Debtor in

great detail, we are of the view that the issues raised by the Corporate Debtor do not fall within the broad contours of the term “dispute” as interpreted by the Hon’ble Supreme Court.

- (f) Judgment dated 28.04.2017 in CP (IB) No.43/2017 by the NCLT Principal Bench, in the matter of *Eviro International Corporation vs. Gold Plus Glass Industry Limited*, and Judgment dated 02.03.2017 in CP (IB) No.3/2017 by the NCLT Principal Bench, in the matter of *Philips India Limited vs. Goodwill Hospital and Research Centre Limited*, regarding “dispute.”

Again, the facts of those matters are not in *pari materia* with the present case, and so the ratio of those judgments do not apply.

45. The application made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.
46. The Operational Creditor has proposed the name of Mr Jitendra Kumar Yadav [Reg. No.IBBI/IPA-003/IP-00022/2017-18/10169], as the Interim Resolution Professional of the Corporate

Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration, which is placed at pp.659-660 of the Petition.

47. It is, accordingly, hereby ordered as follows: -

- (a) The petition bearing **CP (IB) 3753/MB/C-IV/2018** filed by **M/s Malharshanti Enterprises**, a sole proprietorship concern represented by its proprietor, Mr Sunil Pande, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **CAN Enterprises Private Limited [CIN: U70102MH2009PTC195720]**, the Corporate Debtor, is **admitted**.
- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
 - (i) 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;

- (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 (Sarfaesi) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium,-
- (i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (ii) The provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating

Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) **Mr Jitendra Kumar Yadav [Reg. No. IBBI/IPA-003/IP-00022/2017-18/10169]**, having address at No.11, Singh House (2nd Floor), No.23, Ambalal Doshi Marg, Beside BSE Building, Fort, Mumbai 400001 [email: jitendra.yadav0712@gmail.com, Mobile: +91 9699024004], is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP/RP shall carry out his functions as contemplated under sections 15, 17, 18, 19, 20 and 21 of the IBC. The IRP/RP shall file periodical progress reports with this Adjudicating Authority.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in

terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

- (h) The Operational Creditor shall deposit a sum of Rs.3,00,000/- (Rupees three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately.
- (j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

27.01.2020

Sd/-

RAJASEKHAR V.K.
Member (Judicial)