

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH-V**

**Company Petition (IB)No.269/ND/2020**

**In the matter of:**

**The Insolvency and Bankruptcy Code, 2016**

**AND**

**In the matter of:**

**Section 9 of the Insolvency and Bankruptcy Code, 2016 read with  
Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating  
Authority) Rules, 2016**

**AND**

**In the matter of :**

**Future Power Technologies Private Limited  
Through its Director Sushil God,  
Having registered office at  
M-12 sector 11 Noida Gautam Budha Nagar,  
Uttar Pradesh-201301  
Email id:-goelsval23 gmail.com**

**...Operational  
Creditor/Applicant**

**Vs.**

**SMR Entertainment Private Limited  
Through its Director  
Having registered office at  
2284/14, Baghichi Ragnath Sadar Thana Road,  
Delhi-110006  
Email id:-smr.entertainment@gmail.com  
Debtor**

**...Corporate**

**ORDER DELIVERED ON: 07.01.2021**

**CORAM :**

**Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)  
Sh. Kapal Kumar Vohra, Hon'ble Member (Technical)**

**For the Applicant/ Operational Creditor: Adv. Prasouk Jain and Adv.  
Rabiya Thakur**

**For the Respondent/ Corporate Debtor: Mr. Amber Sachdeva**



**ORDER**

**AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL**

1. The present application is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/ operational creditor, i.e. "**Future Power Technologies Pvt. Ltd.**" for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company "**SMR Entertainment Pvt. Ltd.**".
2. Facts of application in short is that the Operation Creditor is engaged in various activities including supply of set-top boxes at wholesale prices and the corporate debtor is engaged in sale and/or installation of retail of the set-top boxes. The Corporate Debtor is a Multi System Operator and deals with multiple cable companies for which set-top boxes are purchased by distributors and ultimately sold to local cable operators, who further sells them to the buyers/ clients.
3. In furtherance of the business arrangement between the Corporate Debtor and the Operational Creditor, the Corporate Debtor had placed orders for supplying set-top boxes to the Operational Creditor. The Operational Creditor for completing the orders of the Corporate Debtor purchased set-top boxes from various manufactures like Surbhi Satcom Pvt. Ltd, S-Curious Research and Technologies Pvt., Delcable Pvt. Ltd.
4. Further, once the orders placed by the Operational Creditor were complete and ready, the set top boxes were arranged to be delivered to the Corporate Debtor by the Operational Creditor. On the completion of delivery, the following invoices were raised by the Operational Creditor against the said goods: -



Invoice No.	Invoice Date	Invoice Amount (in Rs.)	Pending Amount	Compounded Interest @ 18% per annum till 18.11.2019	Total Amount
Future/I718/01	12.05.2017	15,52,920	15,52,920	4,44,406	19,97,326
Future/1718/03	10.06.2017	5,48,658	5,48,658	1,47,793	6,96,451
Future/1718/04	03.06.2017	5,48,658	5,48,658	1,50,007	6,98,665
Future/1718/05	03.10.2017	5,54,600	5,54,600	1,13,622	6,68,222
	TOTAL	32,04,836	32,04,836	7,05,921	40,60,664

5. Further, no payments were received against the aforesaid invoices by the Operational Creditor. Therefore, the Operational Creditor sent various telephonic reminders to the Corporate Debtor stating that the payments have been outstanding, thereby requesting for payment along with 18% interest. However, the Corporate Debtor failed to clear the outstanding amount.
6. The Operational Creditor had supplied a total of 2974 Set-top boxes for a total of Rs. 32,04,836/-.
7. A meeting dated 03.08.2019 between the operation creditor and the corporate debtor was held in the registered office of the Operational Creditor in the first week of August 2019. The Corporate debtor undertook to clear the outstanding amount against the invoices within a



period of 1 year along with interest @18% p.a. compounded annually by making monthly instalments. It was also decided that the Corporate Debtor will draft and share a MOU (Memorandum of Understanding) in which, he would undertake to pay the pending debt and would also provide a schedule to release the said payment. But the Corporate Debtor failed to share the said MOU.

8. Further, the Operational Creditor sent reminder vide emails dated 03.08.2019 and 08.08.2019 to the Corporate Debtor with respect to the aforesaid meeting and requested Corporate debtor for a schedule of payment within a defined time frame. The Operational Creditor also requested the Corporate Debtor to share the draft MOU, as discussed in their meeting, as a confirmation of their intent to pay the dues. However, the draft of MOU was not shared or executed between the parties.
9. Demand notice dated 19.11.2019 u/s 8 of Insolvency and Bankruptcy Code, 2016 was issued via email to the Corporate Debtor demanding the payment for unpaid invoices.
10. The Corporate Debtor responded to the said demand notice on 01.12.2019 accepting that the Operational Creditor had transferred the amount on the date mentioned by Operational Creditor and stated that the Operational Creditor entered into a share-holder agreement and became the partner of 40% share in the Company and the corporate debtor have suffered a huge loss since 2017.
11. Thereafter, the Operational Creditor sent a rejoinder dated 23.12.2019 to the aforesaid reply dated 01.12.2019 of the Corporate Debtor, wherein it was clarified that some discussions/ drafts did occur between the Corporate Debtor but no understanding was reached and no agreement was entered into between parties.
12. The amount claimed to be default is Rs. 40,60,664/- including compound interest charged @18% P.a. calculated till 18.11.2019, out of which Rs. 32,04,836/- is the principal amount and Rs. 7,05,921/- is the interest amount.



13. The Corporate debtor contended the following in its reply dated 06.06.2019:
- i. An agreement dated 29.07.2017 was entered between the Applicant and the Respondent, by virtue of which, Mr. Sushil God (Director of Applicant Company) and Ms. Ruby Jain became shareholders and jointly gained ownership of 40% shares of the Respondent Company, M/s SMR Entertainment Pvt. Ltd. Agreement came into being on 01.04.2017, which was signed between the on 19.08.2017.
  - ii. The Applicant herein is not an operational creditor of the Respondent. The Applicant has suppressed material facts regarding his ownership of 40% shares in the respondent company vide agreement dated 03.09.2017. The Applicant is making submissions contrary to the arrangement agreed between the Applicant and the Respondent herein, in order to gain undue advantage over the Respondent amid/enjoy unjust enrichment. It is submitted that Agreement came into being on 01.04.2017, which was signed between the on 03.09.2017.
  - iii. It was mutually and expressly agreed vide the agreement dated 03.09.2017 that DTH services shall be exclusively performed under the Company Name of the Respondent. It is pertinent to mention here that the Applicant herein has raised false invoices for the purchase of the Set-Top Boxes in the name of the Applicant Company, whereas the order for the said 2974 Set-Top Boxes was placed in the name of the Respondent, and therefore, the averment that the Applicant had placed orders for the supply of set-top boxes in its individual capacity is incorrect and false. It is further submitted that it was part of their agreement where they were supposed to contribute 40% in the business.
  - iv. No document has been produced by or on behalf of the Applicant suggesting that the Respondent had engaged the Applicant, for availing its services for ordering the Set Top Boxes, i.e. the transaction which is the subject herein. Further, upon a bare



perusal of the agreement dated 03.09.2017, it is clear that the Applicant and Respondent have entered into a shareholding agreement, with the proposed share pattern as follows which came into being on 01.04.2017:

Sr. No	Share Holder	No. of Shares	%ge ownership
1.	1st Part	268000.00	60%
2.	2nd Part	178700.00	40%
	Total	446700.00	100%

- v. The Applicant has raised the present claim for placing orders for supplying Set-Top Boxes to the Respondent from various manufacturers. However, the Respondent has already made payments to the manufactures as mentioned by the Applicant against it at different times.

Company	Payment Made by Respondent
Delcable Pvt Ltd.	2,48,927.00
Surbhi Satcom Pvt Ltd.	2,04,340.00

14. We have heard the Ld. Counsels for the applicant and the respondent.
15. Ld. Counsel for the applicant submitted that the applicant is an Operational Creditor and he has supplied the 2974 set top boxes for an total amount of Rs. 3204836/- and accordingly, the applicant raised four invoices dated 12.05.2017, 03.06.2017, 10.06.2017 and 03.10.2017.
16. He further submitted that the Corporate Debtor fails to make the payment. He further submitted that before filing an application under Section 9 of the IBC, he delivered the demand notice as required under Section 8 of the IBC, the said demand notice was duly delivered on 22.11.2019 and the reply was received from the Corporate Debtor on 01.12.2019, in which no dispute has been raised rather the Corporate

Debtor claimed that the applicant is a partner of 40% shares and in that capacity, he shall be liable to bear the loss in the ratio of 60:40.

17. He further submitted that the Operational Creditor again sent the rejoinder to the reply on 23.12.2019 and he further submitted that in para 3 of the rejoinder, he specifically mentioned this fact that "That it is clarified that some discussions/drafts did occur with our client to enter into a shareholding agreement, however the same was never materialised and your client is put to strict proof to prove the contrary."
18. He further submitted that the applicant has also enclosed a certificate issued by the Branch Manager, PNB confirmation regarding the non-credit of the amount which is at page 107 of the application.
19. The respondent by filing the reply has enclosed the agreement dated 29.07.2017 but that document is not signed and that is the reason, the applicant in its rejoinder raised the issue although the talk was going on but that has not been finalised, so, the contention of the Corporate Debtor that they entered into an agreement is false.
20. On the other hand, Ld. Counsel appeared from the Corporate Debtor submitted that in response to the demand notice, the Corporate Debtor sent a reply within a period prescribed under the law and raised the issue that the applicant is a partner of the Corporate Debtor and on the basis of that Ld. Counsel further submitted that the applicant is not an Operational Creditor.
21. He further submitted that vide agreement dated 29.07.2017 w.e.f. 01.04.2017, both the applicant as well as the Corporate Debtor are liable to share the loss in the ratio of 60:40, hence there is no outstanding dues which can be treated as operational debt under the IBC and he also referred the agreement enclosed by the applicant with its reply and on the basis of that Ld. Counsel for the Corporate Debtor submitted that the present application is not maintainable.
22. In the light of the submissions raised on behalf of the parties, we consider the averments made in the application and reply as well as the documents enclosed with the application and reply filed by the respective parties and we notice that in its reply to the demand notice,



the respondent/Corporate Debtor has not denied this fact that the invoices were raised rather the contention of the respondent was that the operational creditor and corporate debtor was entered into an agreement dated 29.07.2017 and as per the agreement and as per Clause D, the distribution of income and losses of the agreement, are liable to be shared in the ratio of 60:40 and it is also claimed in the reply that the company had suffered huge losses in the year 2017 and we further notice that at page 104 of the application, the applicant had sent the rejoinder to the reply to the demand notice, in which, it is clearly mentioned in the para 3 of the rejoinder that "That it is clarified that some discussions drafts did occur with our client to enter into a shareholding agreement, however the same never materialised and your client is put to strict proof to prove the contrary."

23. At this juncture, we would like to refer the documents enclosed by the respondent/Corporate Debtor with its reply which is at page 12 as Annexure R1, the Corporate Debtor has enclosed the true copy of the agreement and on perusal of the same, we notice that this agreement is not signed by any of the parties. In other words, it is unsigned document and on the basis of this document only the Corporate Debtor claimed that the Corporate Debtor has entered into an agreement with the Operational Creditor and as per Clause D, the distribution of income and losses would be in the ratio of 60:40 except this document, the Corporate Debtor has not produced any other document to show that any agreement was entered between the parties and we further notice that in course of hearing, Ld. Counsel for the Corporate Debtor has not produced any law to show that a reliance can be placed upon the unsigned document. When we shall consider this document along with the rejoinder to the reply to the demand notice sent by the Operational Creditor to the Corporate Debtor then we are of the considered view that the applicant has rightly denied this fact that any agreement was entered in between the parties, of course, a talk was going on between the two but the same was not materialised.



24. For the reasons discussed above, in the absence of any valid document, which was duly signed by both the parties, the contention of the Corporate Debtor that the applicant is a partner in the firm of the Corporate Debtor on the basis of agreement dated 29.07.2017, in our considered view is not liable to be accepted. Hence we are unable to accept the contention of the Corporate debtor that the amount which the applicant has claimed is not covered under the definition of operational debt and the applicant is not an Operational Creditor rather we are of the considered view that in view of the definition contained under Section 5(21) of the IBC, the claim of the applicant comes under the heading of supply of goods, therefore, the amount which the applicant has claimed is an operational debt and the applicant is an Operational Creditor, Hence, I find and hold that the applicant is a Operational Creditor and the amount which the applicant has claimed is an operational debt under the IBC. Except this, the Corporate Debtor has not raised any other ground and no where the Corporate Debtor has claimed that the amount which the applicant has claimed has already been paid. So under such circumstances, at this juncture, we would like to refer Section 8 and 9 of the IBC, 2016 and the same are quoted below: -

**Section 8**

***(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or 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, if any , and 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 repayment 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 repayment of the operational debt in respect of which the default has occurred.

### Section 9

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor by the corporate debtor, if available; and

(d) such other information as may be specified.

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and



(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the



**applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.**

**(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.**

25. Mere plain reading of the provisions shows that under Section 8 of the IBBI Code on the occurrence of default, the Operational Creditor at first is required to deliver the demand notice of unpaid Operational debt or *copy of an invoice demanding payment of the amount involved in the default to the corporate debtor* and the Corporate Debtor is required to bring to the notice of the Operational Creditor existence of the disputes and the payment of or other unpaid Operational Debt within a period of 10 days of the receipt of the demand notice.

26. Whereas Section 9 of the IBC Code 2016 says that after the expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment under Section 1 (A) & Section 8, if the Operational Creditor do not receive the payment from the Corporate Debtor or notice of the dispute has not been raised by the Corporate Debtor then the Operational Creditor may file an application before the Adjudicating Authority.

27. When we consider these two provisions together than it can be said that CIRP can only be initiated by filing an application under Section 9 of the IBC Code, 2016, whereas the Section 8 lays down a provision which cast a duty upon the Operational Creditor to deliver a demand notice before taking any action under Section 9 of the IBC Code 2016.

28. Under such circumstances, in view of Section 9(5)(1) the Adjudicating Authority to see that the application is complete and there is no payment of the unpaid operational debt, the invoice or notice for payment to the corporate debt has been delivered by the operational creditor but no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and if these are established by the



Operational Creditor then Adjudicating Authority has no option but to admit the application.

29. Now, in the light of the provisions, when we consider the case in hand then we find that it has been established by the Operational Creditor that there is no payment of unpaid operational debt and invoice or notice for payment to the corporate debt has been delivered by the operational creditor to the corporate debtor, but no notice of dispute has been received by the operational creditor within 10 days from the receipt of demand notice or there is no record of dispute in the information utility.

30. Therefore in view of Section 9(5)(1) of IBC, we inclined to admit this application.

31. Accordingly, we **ADMIT** this application and initiate Corporate Insolvency Resolution Processes against the Corporate Debtor/respondent. Since the applicant has not proposed the name of the IRP therefore, we appoint Mr. Kailash Chandra Jain, Registration No. IBBI/IPA-001/IP-P01573/2018-2019/12407, Email- [sasd32@yahoo.com](mailto:sasd32@yahoo.com), Mobile No. 9810037365 as IRP. A moratorium in terms of Section 14 of the IBC, 2016 shall come into **effect forthwith staying**: -

1. (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 debt or 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;*



*(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.*

**Further:**

*(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*

*(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*

*(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

*Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.*

32. Operational Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs and IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

33. Registry is directed to communicate the order with the IRP as well both the parties.

*-Sd-*

**K. K. Vohra**  
**(Member Technical)**

*-Sd-*

**Abni Ranjan Kumar Sinha**  
**(Member Judicial)**