IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ

CP (IB) No.354/ALD/2018

In the matter of:
An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:
Embee Software Pvt. Ltd. ...*Operational Creditor*

Versus

Spartainfotech Solutions Pvt. Ltd. ...*Corporate Debtor*

And

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Virendra Kumar Gupta	:	Member (Technical)

Appearances (through video conference):

For Operational Creditor:	:	Sh. Rahul Agarwal, Advocate Sh. Shubham Agarwal, Advocate Sh. Lzafeer Ahmad, Advocate
For Corporate Debtor :		Sh. Rajiv Virmani, Advocate Sh. Rishi Vohra, Advocate

Order reserved on 12.04.2022

Order pronounced on: 23.05.2022

ORDER

Per: Virendra Kumar Gupta, Member (Technical)

1. Through this Application the Operational Creditor is seeking initiation of CIRP proceedings against the Corporate Debtor under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter "IBC, 2016).

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Facts of the case

2. The facts, in brief, are that the Corporate Debtor placed a purchase order dated 24.11.2015 on the Operational Creditor who is a reseller of "Microsoft Products/Services". In pursuance thereto, an agreement was entered into which was effective from 25.02.2016. As per the terms and conditions of this agreement the Operational Creditor was to supply Software and License for a period of three years to the Corporate Debtor who was to further supply the same to the approved Government institutions. Invoices were raised periodically based upon actual uses which have been duly received, acknowledged and accepted by the Corporate Debtor. Such invoices have been raised for the period starting from 21.03.2016 till 25.06.2018. The Corporate Debtor made various payments. Further, the Corporate Debtor also raised a debit note for 5% of invoice amount as commission or implementation charges.

3. It is also claimed that the Corporate Debtor had withheld 10% of the amount of invoices as Tax at Source (TDS) at the rate of 10%, however, the same was not deposited with the Government nor any certificate in the specified form was issued. Accordingly, it is claimed that such amount still remains due and payable. It is also stated in the application that after 27th March, 2018, the Corporate Debtor stopped making payments. The outstanding amount as on that date stand at Rs.1,65,50,890.92/-.

Contentions on behalf of the Operational Creditor

4. The learned counsel appearing on behalf of the Operational Creditor after narrating the facts, in brief, stated that the Corporate Debtor itself in an email dated 27.03.2018 had admitted and assured to clear outstanding amount in respect of the invoices raised up to 13.02.2018. It was also claimed that the amount of Tax Deducted at Source (TDS) not deposited, hence the same was also an outstanding debt which was due and payable by the Corporate Debtor.

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5. The learned counsel further submitted that several reminders had been sent to the Corporate Debtor but the Corporate Debtor did not make the payment. It is also claimed that the several text messages were exchanged through WhatsApp also with Mr. Rishi Tandon, being a business head of the Corporate Debtor. On this basis it is claimed that there was clear cut admission of liability by the Corporate Debtor, however, on one or other pretext the Corporate Debtor did not make the payment.

6. The learned counsel submitted that in these circumstances demand notice under Section 8 of IBC was delivered on 28.08.2018. In the said notice, in addition to the principal amount, interest was also claimed. A reply to the demand notice was made on 06.09.2018 which was received by the Operational Creditor on 10.09.2018. In said reply, the learned counsel pointed out that neither existence of dispute was alleged nor it was shown that the said debt was not due or legally payable or it had already been paid.

7. The learned counsel, in support of these claims, drew our attention to the copy of invoices, calculation-sheet of payment made and outstanding amount of liability. Our attention was drawn to page 55 of the petition to show that final amount upto 13/02.2018 after TDS to be paid was ₹3,29,62,258.19/-. He drew our attention to page 44 which contained a mail received from the Accounts Department of the Corporate Debtor to one of the employees of the Operational Creditor on 27th March, 2018 wherein a commitment had been made to make an outstanding payment by the end of evening of that date. Our attention was also drawn to a mail written by the Operational Creditor wherein following issues were raised.

   i. That the margin of Corporate Debtor could not be considered at 5%, hence, the Corporate Debtor was requested to give fresh calculation by calculating the margin at the rate of 3%.
   ii. Tax Deducted at Source (TDS) had not been deposited and hence, this issue was also be required to be cleared.

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iii. In respect of one invoice, it was claimed that commission on that had been made already paid to one Multiverse at the beginning of this agreement and, hence, it could not be paid now.

iv. A sum of ₹5,63,172/- was wrongly withheld by the Corporate Debtor for the reason that it was the failure of the Corporate Debtor to satisfy its client.

8. There is other correspondence between the Operational Creditor and Corporate Debtor whereby, a Corporate Debtor had accepted the fact of dues and in particular our attention was drawn to mail received from Mr. Ravinder Chandra being **AVP- Sales & Operations Group of Sparta** the Corporate Debtor wherein it was stated that all dues of the Operational Creditor would be cleared on or before 20th June, 2018.

9. The learned counsel further contended that even if three disputes raised by the Operational Creditor in its email dated 27th March, 2018 were ignored then also the amount of TDS which had been deducted but not paid was sufficient to admit this application as on that point there could not be any dispute.

10. The learned counsel further submitted that unless there was a pre-existing dispute and where the liability is admitted then a mere dispute in relation to quantum of dues or counter-claim made by the Corporate Debtor would not prevent this Adjudicating Authority from initiating CIRP against such Corporate Debtor particularly where undisputed amount was more than threshold limit. For this proposition, the learned counsel relied on the judicial decisions:

    i. *Pedersen Consultants India Pvt. Ltd. Vs. Nitesh Estates Ltd. [C.A. (AT) No. 720/2018* para 8,9,10,12] where it was held 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.

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ii. *J. Technologies India Ltd. Vs. Jura IT Solutions Pvt. Ltd. [C.A. (AT) (Insolvency) No. 378/2018 para 4,5]* where it was held, when no dispute to quality or quantum of goods/service has been raised and when the dispute raised only relates to quantum of payment but liability is admitted, such dispute of quantum does not fall within meaning of pre-existing dispute.

iii. *Deepak Gupta v. Ved Contracts Pvt. Ltd. [C.A. (AT) (Insolvency) No.1262/2019 para 3]* where relying on *Innoventive* it was held that even if amount is disputed or payable and is found to be more than Rs.1,00,000/-, the application under Section 9 is to be admitted.

iv. *M/s. Manipal Media Network Ltd. V. M/s. Vishwakshara Media Pvt. Ltd .[C.A. (AT) (Insolvency) No. 369/2020 para 18,19, 23]* where it was held that after raising of invoice, when C.D. has promised to makepayment, such admission amounts to acceptance of liability and that it is not for the NCLT to determine the exact amount of default.

v. *Yogesh Baliram Vargantwar v. Vighnarta Health [C.A. (AT) (Insolvency) No. 479/2019 para 6,8,9]*- Claim by C.D. on account of different transaction/breach cannot be subject of S.9 and S.9 is maintainable even if amount not crystallised.

<u>Arguments of the learned counsel for the Corporate Debtor.</u>

11. The learned counsel for the Corporate Debtor made a plea that demand notice issued and delivered by the Corporate Debtor on 28.08.2018 and the present application had been filed on 04.10.2018. Whereas, the right to issue demand notice as well as to file the present application could accrue only after 2 December 2018, hence, it was a premature application. Thus, this application was liable to be dismissed on this ground only.

12. Thereafter, the learned counsel pleaded that as per the conditions mentioned in the purchase order the payment had to be made to the Operational Creditor on bi-annual basis 50% payment had to be made on submission of invoice and after

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receipt of email from *"Microsoft"*. The balance 50% payment had to be made to the Operational Creditor on expiry of first six months and none of these conditions had been met by the Operational Creditor. In this regard, the Bench posed a question to the learned counsel that whether payments made earlier had been made only after receipt of email from the *"Microsoft"* to which the learned counsel could not give a satisfactory reply. However, the learned counsel for the Operational Creditor clearly stated that in the past also without receipt of such a mail, hence, by conduct of the parties, this condition stood waived.

13. Learned counsel further contended that the calculation sheet provided at page 410 of the petition was a self-serving document and entry made therein were concocted which was apparent from the document itself. In support of this claim, the learned counsel stated that the invoice dated 31.03.2017 had shown the due date of payment on 06.03.2007 which was 25 days prior to the issuance of bills.

14. The learned counsel on the basis of order of the Hon'ble NCLAT in the case of ***"Kodeboyina Srinivas Krishna Vs. PVM Innvensys Pvt. Ltd"*** wherein it was held that it was mandatory to mention date of default in absolutely an unambiguous term, submitted that in the present matter, the date of default has been mentioned ranging from 2016 to 2018 which was vague and contrary to law, hence, for this reason also, the application liable to be dismissed.

15. The learned counsel further contended that the WhatsApp chat/ messages were exchanged between the parties prior to the last invoice raised by the Operational Creditor, hence, the same cannot be the basis for admission of the application filed by the Operational Creditor.

16. It was further claimed that as per the Operational Creditor itself 22 invoices had been raised however of invoice dated 21.03.2016 placed at 31 of the petition, invoice dated 31.03.2017 at page 35 of the petition and invoice dated 27.09.2017 at page 42 of the petition did not bear any acknowledgment of Corporate Debtor and, hence, these invoices were frivolous and concocted.

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17. As regard to interest claimed by the Operational Creditor, it was stated such claim was not made on the basis of any contractual agreement between the parties, hence, Corporate Debtor was not liable to pay interest.

18. The learned counsel also submitted that there were so many disputes between the parties and prior to the issue of notice of demand under Section 8, hence, having regard to the decision of the Hon'ble Supreme Court in the Case of ***"Mobilox Innovation Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd 2018 1 SSC, Civil Appeal No. 9405 of 2017"*** the present petition was liable to be dismissed.

19. It was also claimed that the Corporate Debtor was acting on behalf of the Ministry of HRD Government of India whilst charging commission @ 5% and, therefore, the Corporate Debtor never utilized the services provided by the Operational Creditor and, consequently, the outstanding amount could not be considered as operational debt. For this proposition, he reliance in the case of ***"Embee Software Pvt. Ltd. Vs. M/s Solicon Pvt. Ltd. MANU/NL/0657/2019 passed by the Hon'ble NCLAT***". In this regard, it was further claimed that Ministry of HRD Government of India had never been made a party to the present petition.

20. The learned counsel further claimed that there were certain instances of poaching of the client directly by Operational Creditor who did not, thus, adhered to teaming agreement. Further, the Operational Creditor did not bring these facts in the petition filed under Section 9 also, hence, for the reason of non-disclosure and concealment of eminent facts, this application was liable to be dismissed.

<u>Rejoinder on behalf of the Operational Creditor.</u>

21. In the Rejoinder, the learned counsel for the Operational Creditor submitted that no documents whatsoever had been brought on record as regard to existence of dispute neither in the reply nor even reply to the demand notice. Hence, these claims were frivolous and an afterthought, thus, liable to be rejected. For this proposition, the learned counsel placed reliance on the decision ***"Mobilox***

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Innovation Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd 2018 1 SSC, Civil Appeal No. 9405 of 2017"

22. In this regard, it was further claimed that purported notice of dispute was issued by the Corporate Debtor on 27.09.2018 nearly a month of the demand notice dated 28.08.2018 issued by the Operational Creditor and, therefore, the same could not qualify to fall within the definition of notice of dispute. The learned counsel further claimed that the liability of the Corporate Debtor was established by the undisputed, uncontroverted and contemporaneous records and the Corporate Debtor was merely trying to create a fiction of dispute regarding the quantum of amount due, hence, such contention was liable to be rejected.

23. As regard to the claim regarding breach of teaming agreement, it was categorically pointed out that such dispute, if any, could not be a constraint to admit an application filed under Section 9 as such claims had no bearing thereon. It was specifically pointed out that the Corporate Debtor in its reply to the mail sent by the Operational Creditor on 11.10.2018 had accepted the conciliation notice and that was sufficient to show the fact of admission of liability on the part of the Corporate Debtor. Further, this also established the fact that there were no pre-existing disputes.

24. As regard to the claim made by that the demand notice had been issued by the lawyer, it was submitted that this plea was not sustainable in view of the decision of the Hon'ble Supreme Court in the case of **"*Macquarie Bank Limited vs Shilpi Cable Technologies Ltd".***

25. As regard to the claim of interest, it was submitted that the interest was claimed in accordance with the terms and conditions of invoice, and non-charging interest in earlier period cannot result into a situation whereby the Operational Creditor could not be considered to have lost its right to claim interest subsequently in case of delay of payment.

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26. The learned counsel also submitted that the decision of the Hon'ble NCLT Mumbai Bench in the case of ***CP(IB) 2277(MB)/2019 "Embee Software Pvt. Ltd. Vs. Kumar Urban Development Pvt. Ltd."*** relied on by the Corporate Debtor was not applicable to the facts of the case as in that case no invoices were brought on record and there was no acknowledgment of the Corporate Debtor, whereas in the present case there was an agreement invoices were raised and acknowledged.

<u>Conclusion</u>

27. We have considered the submissions made by both sides and material on record. It is noted that the Operational Creditor is authorized reseller of Microsoft Products. Whereas, the Corporate Debtor is a Government partner and authorized to obtain such services on behalf of the Government from the Microsoft Reseller i.e. Operational Creditor. The Corporate Debtor, in this capacity, has placed purchase order with the Operational Creditor. As per the terms and conditions of this purchase order, payment was to be received by the Corporate Debtor from end client i.e. **National Board Accreditation** on whose behalf the Corporate Debtor has obtained supply of Software and Services. The Corporate Debtor has also been part of an enterprise agreement for Government partners which is being termed as primary contact. In this agreement, name of Reseller i.e. Operational Creditor has also been mentioned' (refer at page 401 and 402 of application).

28. Thus, the claim made by the Corporate Debtor it has not obtained any service from the Operational Creditor cannot be sustained as Corporate Debtor is an intermediary in the provision of service by the reseller to the Government partner. In fact, the Corporate Debtor has been authorized by the NBA, hence, the amount due by it to the Operational Creditor cannot be categorized as an operational debt within the meaning of provision of Section 5 (21) of IBC, 2016.

29. Further, the Corporate Debtor has placed reliance on the decision of the Hon'ble NCLAT in the case of ***"Embee Software Pvt. Ltd. Vs. M/s SoliconPvt. Ltd.."***

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However, in view of subsequent decision of the Hon'ble Supreme Court in the case of "***M/s Consolidated Construction Consortium Limited Vs.M/s Hitro Energy Solutions Private Limited",*** this decision of Hon'ble NCLAT would not help the cause of the Corporate Debtor as in the aforesaid case, the Hon'ble Supreme Court has given a wider meaning to the term operational debt and even an advance given by recipient of the service has beenconsidered as operational debt.

30. The relevant findings by the Hon'ble Supreme Court are reproduced as under;-

> **43.** *First, Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of PART D 38 goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver ofgoods or services from the corporate debtor. Finally, the judgment of this Court in Pioneer Urban (supra), in comparing allottees in real estate projects to operationalcreditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the*

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decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.

***44.** In Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd.27, a three-judge Bench of this Court purposively interpreted Section 21(2) of the IBC in order to understand who should be excluded from the CoC due to their being a "related party". The Court held: 27 (2021) 3 SCC 475 PART D 39 "99. Accepting the submission of Mr Viswanathan would allow the statutory provision to be defeated by a related party of a corporate debtor creating commercial contrivances which have the effect of denuding its status as a related party, by the time that the CIRP is initiated. The true test for determining whether the exclusion in the first proviso to Section 21(2) applies must be formulated in a manner which would advance the object and purpose of the statute and not lead to its provisions being defeated by disingenuous strategies. […] 104. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a "related party" before the corporate debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors." Thus, the Court struck a balance between the text of the statute and the purpose which it sought to achieve by excluding those related party financial creditors who ceased to be related parties only in order to circumvent the exclusion under the first proviso to Section 21(2).*

***45.** Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for*

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the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favour of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.

46. *In doing so, we are cognizant of the observations of this Court in judgments such as Swiss Ribbons (supra), that IBC proceedings should not become recovery proceedings. However, in the present case, the dispute is not in relation to the quality of the services provided by the Proprietary Concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project.*

31. The learned counsel for the Corporate Debtor has also claimed that it has paid entire amount which was due, hence, nothing remains payable. In this regard, Corporate Debtor has referred to an email dated 27th March, 2018 whereby calculation sheet of transaction between the Operational Creditor and the Corporate Debtor as per 21.03.2016 and 13.02.2018 were attached. In the said calculation sheet the Operational Creditor has also mentioned the amount of TDS 79,43,298.52 which has been reduced by Operational Creditor the total outstanding amount payable by the Corporate Debtor. It is admitted fact that this amount has neither been deposited with the Government nor paid by the Corporate Debtor to the Operational Creditor. Thus, to say that all the outstanding payment had been made by the Corporate Debtor gets rejected merely for this reason. Apart from this, fact it is noted that the statement shows dues only upto 13.02.2018 whereas invoices for service have rendered subsequently have also been raised for those services/supplies and, therefore, this contention of the Corporate Debtor is devoid of any merits,

32. As regard the claim made by the Corporate Debtor that it had deducted margin/implementation charge at the rate of 10% as the same was payable by the Operational Creditor, however, no documentary evidence to this effect has been brought on record. Hence, this claim is also devoid of merits, hence,

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rejected. Consequently, the Corporate Debtor is found to be responsible to make this payment.

33. One contention which has been raised by the Corporate Debtor is that there was violation of certain conditions of teaming agreement. As per Operational Creditor, this agreement expired on its last validity date and no further extensions were made. In this regard, we also take note of the fact that extension of this agreement has been claimed by the Corporate Debtor on the basis of mutual agreement, however, no documentary evidence to this effect has been brought on record. Here, we think it is pertinent to mention that the Operational Creditor appears to have directly entered into some business with another Government entity which has resulted into non-payment of outstanding dues of the Operational Creditor. In any case, such dispute is independent and is not connected with these invoices raised by the Operational Creditor. Hence, we need not to go into that this aspect. Further, the said defense cannot be considered as an instance of pre-existing dispute in regard to the transactions entered into by the between the parties under purchase order dated 24.11.2015 and enterprise agreement entered by and between them on 25^{th} February, 2016.

34. Another contention which has been taken by the Corporate Debtor is that the default period has been mentioned from 2016 to 2018, however, we find that the Operational Creditor has given details of every invoice which was due and payable, hence, such nomenclature cannot be considered as vague or ambiguous. Therefore, the decision relied on by the Corporate Debtor which is also distinguishable on facts is not applicable.

35. As regard to the interest claim, it is noted that all invoices carry 15 days' grace period and it is mentioned therein that if the payment is made after such period, it will attract interest at the rate of 24% per annum. Though on earlier occasions for delays, no interest has been charged but as evident from the email produced by the Operational Creditor, subsequently the interest has been charged as operational debtor intentionally did not release its payment even after giving so

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many assurances. Thus, the contractual light, in this regard, has been invoked on account of intentional non-performance by the Corporate Debtor. Thus, in our view such charging of interest cannot be objected as there exists a legal provision which has been exercised by the Operational Creditor due to change in circumstances subsequently.

36. The Corporate Debtor has also made a claim that it was liable to release the payment only after a receipt the payment from the end client and for this proposition reliance has been placed on the purchase order clause i.e. the payment will be made on the Name of "Spartainfotech Solutions Pvt. Ltd". This clause nowhere says that the payment shall be made by the Corporate Debtor after receipt of payment by the Corporate Debtor from the end client as it only means that the invoice will be raised by the Corporate Debtor on the end client, as the Corporate Debtor is a Government partner/authorized intermediary of such Government institution and payment thereof shall be made to Corporate Debtor.

37. As regard to contention that application was pre-mature, we take note of the correspondences exchange by and between the parties on 20th June, 2018 wherein, the Corporate Debtor has categorically stated that due to delay in receipt of payment from their clients that the payments due to the Operational Creditor could not be made and which shall be cleared as soon as such payment is received. We are unable to understand as to how this claim made by Corporate Debtor can be sustained in view of this correspondence which clearly shows that the Corporate Debtor wanted to make the payment which had already fallen due in terms of arrangement between them. Further, no documentary evidence has been brought on record to show that in the past, payments were made only on this basis as claimed. As observed earlier that the payment was made even without receipt of any email from Microsoft.

38. As regard to claim of TDS as nature of deduction of 10% by the Corporate Debtor, we find that both the parties are at variance i.e. the Operational Creditor

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is claiming that this amount represented tax deducted at source which had not been deposited by the Corporate Debtor whereas the Corporate Debtor claims that said deduction was made towards implementation charges at the rate of 10%. In this regard, from the perusal of invoices provided by the Operational Creditor it is noted that there is stamp on all invoices that TDS was not applicable in view of the one notification of the Income Tax Department. Thus, on the first blush, it lends some credence to the claims made by the Corporate Debtor. However, when we look at page 55 of the paper book which showed details of final amount to be paid in respect of invoices raised from 21.03.2016 till 13.02.2018, we note that this statement has been relied by the Corporate Debtor to claim that all an outstanding sum i.e. Rs.3,29,62,258.19/- had been paid. The said figure has been worked out in the same statement after considering TDS amount of ₹79,43,398,52/-at the rate of 10%. This statement has been relied on by the Corporate Debtor itself as stated earlier. Further in the purchase order, copy of which has been placed at page no. 359 and 360 it has been clearly mentioned that "All Government taxes and levies shall as applicable at time of delivery" and therefore, subject notification **i.e. No.21 of 2012 [F. No. 142/10/2012- SO (IPL)] S.O. 1353(E),** 13.06.2012 could be made part of the purchase order itself and no explanation has been given for this situation.

39. Further all these calculations are upto 13.02.2018 and considering the fact that services have been rendered in subsequent period which are much more than the threshold amount, this aspect does not effect consideration of this application on merits.

40. In this regard, we have also gone through the purchase order as well asenterprise agreement and find that there is no mention as regard to implementation charges to be paid to the Corporate Debtor in both. In the enterprise agreement it is very clear that in case the Government partner i.e. Corporate Debtor in the present case, not being a reseller of Microsoft, hence, the terms and conditions regarding prices of products and professional services

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between the Government partner i.e. Corporate Debtor and this reseller i.e. Operational Creditor were to be determined by agreement between them and Microsoft is not a party to such agreement.

41. As regard to services provided by the Operational Creditor, the sole basis is the purchase order issued by the Corporate Debtor dated 24th November, 2015 and no other agreement or understanding has been brought on record by the Corporate Debtor to substantiate its claims of 10% implementation charges being payable to it. Even in the email dated 27.03.2018 the claim made by the Operational Creditor "Spartainfotech Solutions Pvt. Ltd**"** margin at 5% was not possible at all and it is observed that fresh sheets considering the same such rate at 3%. This email also does not refer to any liability of Operational Creditor to pay implementation charges at the rate of 10% as claimed by the Corporate Debtor.

42. Thus, considering above facts, this claim of the Corporate Debtor is also rejected.

43. As regard to the reliance placed by the Corporate Debtor on the decision of NCLT Mumbai Bench in the case ***"Embee Software Pvt. Ltd. Vs. M/s Solicon Pvt. Ltd. MANU/NL/0657/2019*** *passed by the Hon'ble NCLAT*" find that there was categorical finding that there was no reply to the demand notice by the Corporate Debtor in that case and there was no record of invoice having been acknowledged by the Corporate Debtor whereas in the present case reply to the demand notice has also been filed wherein no such claims have been made. Further, all invoices except three invoices which have been claimed to have not been acknowledged. These are dated 21.03.2016, 31.03.2017 & 27.09.2017, out of these three invoices, two invoices i.e. invoice no. 21.03.2016 and 27.09.2017 are mentioned in the calculation statement (at page 55) provided by the Operational Creditor to the Corporate Debtor which has been duly acknowledged by the Corporate Debtor and payment of these invoices have also

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been made. Thus, to this extent, such claim made by Corporate Debtor is devoid of merits.

44. As regard to the invoice at page 35 of the petition we find that the invoice value is of ₹38,87,532/-. Even assuming for the moment that the amount of this invoice is to be excluded, in our view, there will not be any impact on the admissibility of this application that the remaining outstanding undisputed amount would still more than the threshold limit. Thus, this contention raised by the Corporate Debtor is also of no help to the cause of the Corporate Debtor. This application is otherwise complete and complies with all requirements of IBC, 2016 read with IBBI (Application to Adjudicating Authority) Rules, 2016.

45. The name of the IRP has not been proposed as it is not mandatory in the case of an application filed under Section 9 of IBC of 2016. We shall appoint an eligible Insolvency Professional as IRP from list of approved Insolvency Professional provided to us by IBBI.

46. Accordingly, this application is admitted on the following terms and conditions:

ORDER

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor **Spartainfotech Solutions Pvt. Ltd.** is hereby admitted.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) This Adjudicating Authority hereby appoints Mr. Parag Singhal [Reg No. IBBI/IPA-001/IP-P-02127/2020-2021/13322], having address at 002-B, Eldeco Apartment, Sector-4, Vaishali, Ghaziabad, Uttar Pradesh 201010 [email: sparagca@yahoo.co.in], to act as the IRP under Section 13(1)(c) of the Code.

iv) The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under

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Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

v) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following :-

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 Securitization 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.

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

vii) 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.

viii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

ix) 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 the 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.

x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xi) The Operational Creditor/Applicant is directed to deposit ₹2,00,000/- (Rupees two lakh only) with the IRP appointed hereinabove within two

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weeks from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

47. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the IRP and the jurisdictional Registrar of Companies by Speed Post as well as through email.

48. List the matter on 25.07.2022 for filing of the progress report.

49. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Rajasekhar V K
Digitally signed by Rajasekhar V K
Date: 2022.05.23 18:41:55 +05'30'

—Sd—

Virendra Kumar Gupta
Member (Technical)

Rajasekhar V.K.
Member (Judicial)