S. No. 1

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON **22.04.2022** AT **10:30 AM** THROUGH VIDEO CONFERENCE

CP (IB) No. 209/9/HDB/2019
U/s. 9 of IBC, 2016

IN THE MATTER OF:

S N I Infratech Pvt Ltd ... **Operational Creditor**

Vs

KMC Constructions Ltd ... **Corporate Debtor**

CORAM

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this CP is allowed. The Corporate Debtor is put under CIRP as per the terms and conditions mentioned in the order.

MEMBER(T) **MEMBER(J)**

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NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH-1

CP (IB) No. 209/9/HDB/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

M/s. S.N.I.Infratech Private Limited
504, Kriti Mahal, 19, Rajendra Place,
New Delhi- 110008.

... Operational Creditor

AND

M/s. K.M.C Constructions Limited
Door No: 1-80/40/SP/58-65,
Shilpa Homes Layout,
Gachibowli, Hyderabad-500 032,
Telangana.

... Corporate Debtor

Date of Order: 22.04.2022

Coram:

Hon'ble Dr. N.V.Ramakrishna Badarinath, Hon'ble Member (Judicial)

Hon'ble Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)

Appearance:

For Petitioner: Shri.K.Siddharth Rao, Counsel.

For Respondent: Shri S.Ravi, Senior Counsel assisted by

Mr,G.V.B.Santhosh Kumar and other Counsels.

PER: BENCH

1) The present petition is filed by S.N.I Infratech Private Limited, operational creditor herein under Section 9 of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Corporate Insolvency Resolution Process against M/s.K.M.C Constructions Limited, Corporate debtor herein., for total debt of Rs.39,36,103.48/- constituting of Principal amount being Rs. 31,74,277/- with interest @ 24% per annum being a sum of Rs.7,61,826.48/-.

2) **BREIF AVERMENTS IN PETITION ARE AS FOLLOWS:**

a) The operational creditor/Operational Creditor is a small scale industry located at New Delhi. The scope of the Operational Creditor's business involves in manufacture and supply of construction material and equipment. Besides manufacturing, the Operational Creditor has a well-organized contracting division where it undertakes various road related works such as laying Mastic Asphalt/ APP Membrane as protective coating on roofs and bridge decks, laying Thermoplastic Road Marking Paints, installation of Road Sign Boards and Road Furniture etc.

b) The respondent/corporate debtor placed various work orders and purchase orders with the Operational Creditor for its Delhi Jaipur Highway Project. Copies of purchase order dated 06.12.2016 and 21.04.2017 are annexed to the petition as **Annexure-A.** Pursuant to the purchase order the Operational Creditor laid the thermos plastic paint as per the terms and specifications of the Respondent and accordingly raised invoices. Copies of invoices dated 18.09.2017 are annexed to the petition as **Annexure-B**.

c) However, respondent deferred the payment of outstanding amount of Rs.31,74,277/-. Thus the Operational Creditor gave several verbal and written reminders to the respondent for payment of outstanding dues. Copy of the reminder dated 16.03.2018 served by the Operational Creditor to the respondent is annexed as **Annexure-C** to the petition.

d) Meanwhile, the Company named Pink City Expressway Ltd., made a false allegations of defects against the material supplied and services rendered by the Operational Creditor vide its letter dated 14.09.2018. In response to the letter dated 14.09.2018, Operational Creditor vide its reply dated 17.09.2018 stated that the Operational Creditor never carried any work for the Pink City Expressway Ltd., it has only executed orders for the respondent. Thus, it is no more concerned to the transactions carried out between the Operational Creditor and the respondent.

e) The Operational Creditor thus issued demand notice to the respondent dated 02.11.2018 under the provisions of the I&B Code, 2016 through registered post. Copy of the demand notice is annexed to the petition as **Annexure-E.**

f) Thereafter, the respondent in retort to the demand notice sent its belated reply vide letter dated 23.11.2018, by refuting the outstanding dues without any reasoning. Therefore, the demand notice remains undisputed till date. Thus Operational Creditor has filed this Application for initiating CIRP against the corporate debtor for payment of outstanding dues.

3) **BREIF AVERMENTS IN THE COUNTER**

a) It is averred that KMC Constructions Limited/Corporate debtor is an infrastructure Company, started its operations in the year 1970 in the state of Andhra Pradesh. The detailed Company Profile is filed as Document No.2 to the Counter.

b) It is averred that corporate debtor has awarded sub-contract work to the operational creditor with some specifications. During the execution of work, corporate debtor has observed several defects and lapses and the same was brought to the notice of the operational creditor verbally.

c) It is averred that since it is NHAI Project, it requires certain standards prescribed by the NHAI, thus corporate debtor has appointed an external agency by name M/s.Engineering Training Testing and Calibration Laboratory (E.T.T.L) for certification of the works done by the operational creditor. Subsequently, the external agency has commenced the inspection/test on 07.02.2017 and completed the test on 14.02.2017 and thus submitted the test report on 14.04.2017 vide their report no's JP/ETTL/16-17/TE-8577540205-1 and JP/ETTL/16-17/TE-8577540205-2, stating that

" THE SAMPLE DOES NOT CONFIRM THE MORTH CLAUSE 803-40 WITH RESPECT TO ABOVE TEST"

" THE SAMPLE DOES NOT CONFIRM THE MORTH TABLE 800-10 WITH RESPECT TO ABOVE TEST".

The copies of the reports are annexed as Document No.3 to the Counter.

d) Thus corporate debtor addressed a letter dated 14.09.2018 mentioning various defects in road marking, including supply of Defective

Thermoplastic Paint materials as pointed out by the external agency (ETTL). Further requested the operational creditor to discuss and rectify the defects in consultation with the corporate debtor's representative Mr.L.R.Singh/Naresh Kumar, in default the same shall be recovered from the operational creditor.

e) It is averred that the operational creditor instead of rectifying the defects always insisted for payment. In view of the refusal to rectify the defects, the corporate debtor in order to meet requirements of NHAI, with no other option for rectification of defects, corporate debtor appointed M/s. G R Infra Projects Limited, which incurred an amount of Rs.47,76,780/-. The details of defects, lapses in the work executed by the operational creditor is enclosed herewith as **Document No.4** to the counter.

f) It is further submitted that operational creditor has not submitted the substantial material documents to prove its claim nor submitted any material paper evidencing the existence of alleged debt of Rs.31,74,277/-. This petition is filed by the operational creditor on the ground that the corporate debtor owes Rs.31,74,277/- under five heads as mentioned below:

- With regard to the first claim of Rs.4,75,651/- towards labour charges for laying thermoplastic Road Marking Paint, under two bills dated 18.09.2017 (Rs.4,52,856.92 and Rs.22,794/-) , it is submitted that an amount of Rs.4,52,263/- only is certified by the corporate debtor and the balance amount of Rs.22,794/- was rejected by the corporate debtor on the ground that the invoice is not certified by the corporate debtor.

- Second claim is of Rs. 9,63,685/- towards VAT payment made by the operational creditor. It is submitted that the purchase order no's dated 06.12.2016 and 21.04.2017, Clause No.2 **Under the head "Rate"** Providing and laying charges@ Rs.60.75 per square area are inclusive of all applicable taxes if any. In view of the said Clause the corporate debtor is not able to pay any amount including VAT amount of Rs.9,63,685/-.
- Third claim is of Rs.4,02,801/- towards Income Tax deducted at source. It is submitted that corporate debtor already remitted the tax deducted at source, against the payments made to the operational creditor, except an amount of Rs.8,905/- deducted on Invoice dated 18.09.2017. Copy of proof of remittance of Form 16A are filed along with the counter as **Document No.5.** In view of the remittance of the TDS amount to the Income Tax Department , the claim of Rs.4,02,801/- to be rejected.
- Fourth Claim of the operational creditor is an amount of Rs.8,91,543/- towards retention money deducted.
- Fifth Claim of the operational creditor is an amount of Rs.1,70,204/- towards labour cess deducted not reimbursed. It is submitted that operational creditor has not furnished any proof of payment of Provident Fund, ESI etc., for the labour engaged at the site, to the concern authorities. It is averred that to avoid unwarranted liability on the corporate debtor and for want of

compliance of the labour laws by the operational creditor an amount of Rs.1, 70,204/- withheld. On receipt of proof of payment the amount will be reimbursed.

- The sixth claim of operational creditor is an amount of Rs.2,70,393/- towards payment held for the works executed.

g) It is further submitted that operational creditor is claiming interest of about Rs.7,61,826.48/- which is @24% PA. It is pertinent to note that there is no interest clause agreed between the parties or there is no mention of payment of interest in the purchase orders issued by the corporate debtor nor the documents filed by the operational creditor. In the absence of interest clause, the same cannot be claimed.

h) Further submitted that there is no specific mention of date of default, so the present petition itself is not maintainable.

i) It is further submitted that corporate debtor is a going concern with projects worth more than Rs.5000 crores on hand and its turnover exceeded Rs.1400 crores for the year ended 31.03.2018. These facts and figures are proved and evidenced that the corporate debtor is not insolvent or Bankrupt, so as to attract the provisions of the Insolvency and Bankruptcy Code, 2016.

j) In the light of above submissions if the petition is admitted then the IBC professional will take over activities of the corporate debtor which will be against the principles of the privity of contract and by virtue of the Judicial order the contracts will be rendered in nullity causing stoppage of work and will put to huge losses. Therefore the

Hon'ble Tribunal while examining the prayer needs to balance the equities between the parties.

k) Thus, corporate debtor prayed the Hon'ble Tribunal to reject the Company Petition with exemplary costs.

4) **REJOINDER FILED BY THE OPERATIONAL CREDITOR**

a) It is averred by the operational creditor that counter affidavit filed by the corporate debtor evinces lack of interest in paying the dues. In the current factual matrix it is clear that corporate debtor is unable to pay its dues and is attempting to create a dispute, so as to escape the clutches of law.

b) It is averred that corporate debtor is evading its responsibilities to make payment due to its financial ill-health and is merely portraying a fictional image to continue its business.

c) It is averred that corporate debtor was never intimated about the defects and lapses and further stated that the copies which are annexed as Document No.3 of paragraph 10 in the counter affidavit is completely incorrect. The addition of "proportion of Constituents Composition should ideally be 100% but instead in the report it comes out to be 88.4% which proves that the report is misleading.

d) It is averred that operational creditor had given the sample for testing to "Standard Testing Laboratory, New Delhi" which submitted its report on 04.01.2017, for thermoplastic paint and glass beads and both the reports were confirming to the quality standards. Copy of the same is annexed as Annexure-1 to the Rejoinder.

e) It is averred that the Hon'ble NCLAT in the matter of Ahluwalia Contracts (India) Ltd. V. Raheja Developers Limited Company Appeal (AT)(Insolvency) No.703 of 2018 has held that the dispute must be raised prior to the demand notice. In the current factual matrix it is prima facie a situation of afterthought and evading payments due to the operational creditor.

f) It is further averred that the work assigned to the operational creditor was completed in the year 2016-17. However, a mere perusal of the Clause 11 of the purchase order annexed is clearly indicating that the warranty period was only for one year. Hence, any attempts to raise questions on the quality of work being provided thereafter was beyond the scope of dispute. True Copy of the purchase order dated 02.06.2015 for the construction of Highway is hereby being annexed as **Annexure-3.**

g) It is averred by the operational creditor that the corporate debtor had denied in payment in his counter with regard :

- to the first claim the amount of Rs.22,794/- is a component of the same work contract and had no basis for rejection, but was rejected to create a dispute.
- to the second claim it is averred that the clause 9 of the purchase order refers that the " rates mentioned above are inclusive of material cost, transportation, application charges and inclusive of all the taxes VAT declaration for subcontractor under Rajastan/Haryana VAT act shall be given by KMC". Thus KMC was to protect the operational creditor against such implications of the tax law or to have reimbursed. Corporate debtor failed to reimburse and thus liability falls squarely upon corporate debtor.
- to third claim the corporate debtor had not remitted the tax deducted at source against the payments made to the operational

creditor. The operational creditor had submitted its Income tax return on 16.10.2016 based on Income Tax form 26AS updated on 04.10.2016 and the TDS certificate is received. For non-receipt of Form 26AS by KMC, the operational creditor could not claim the benefit of income tax deducted by the corporate debtor. The true copies of the 26AS dated 04.10.2016 and 08.08.2019 evincing non-payment of TDS in the year 2016 and belated payment in the year 209 are annexed as **Annexure-4.**

h) Further the operational creditor submits that there is no pre-existing dispute between the parties. The operational creditor states that goods supplied in the year 2016 and the e-mail relied upon by the corporate debtor is ten months after the last supply of the goods. Hence, this e-mail is an afterthought and was addressed to the issues pertaining to the quality of the road. Thus there is no relevance for the transaction between the operational creditor and the corporate debtor.

i). Therefore, prayed the Tribunal to pass an order to repay the amount of Rs.31,74,277/- or to pass an order to place the corporate debtor under CIRP.

5) In the light of the contest as mentioned above, the following points are framed for consideration by this Adjudicating Authority:

1. Whether the documentary evidence furnished with application shows that the aforesaid operational debt is due and payable and has not yet been paid by the corporate debtor?
2. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of demand notice of the unpaid operational debt in relation to such dispute?

6) We have heard Shri. K.Siddharth Rao , Ld. Counsel for the Petitioner and Shri S.Ravi, Learned Senior Counsel assisted by Shri. G.V.B.Santhosh

Kumar, for the respondent, perused the record, written submissions and the case law.

Point. 1.

Whether the documentary evidence furnished with application shows that the aforesaid operational debt is due and payable and has not yet been paid by the corporate debtor?

7) At the very outset, we may state herein that in order to arrive at a just and proper finding on the above points we aptly to refer and rely on the following illuminating rulings of Hon'ble Supreme Court of India, on the legal aspects of sections 7 and 9 of I&B Code 2016;

(i). M/s Innoventive Industries Vs. ICICI Bank & another in Civil Appeal Nos.8337-8338 of 2017.

(ii) Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited,

(1) In re, M/s Innoventive Industries, supra, Hon'ble Supreme Court of India, held that;

"The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under 71 Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e., before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

"On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

(2).Inre, Mobilox Innovations Private Limited(supra), Hon'ble Supreme Court of India, has held that;

"It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We 72 have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise."

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application"

(3). In the same ruling, it has been also that,

"Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"

*"**If any one of the aforesaid conditions is lacking, the application would have to be rejected.**" (Emphasis is ours).*

8) Learned Counsel for the Applicant would submit that as per the application and the demand notice dated 02.11.2018 the subject operational debt pertains to the purchase orders dated 16.12.2016 and 21.04.2017 issued by the Corporate Debtor, in favor of the Operational Creditor, which is evident from the copies of these two purchase orders besides the invoices raised in respect of the work done under these two purchase orders, which have been filed. According to the Learned Counsel, the demand notice dated 02.11.2018 issued by the operational creditor demanding payment of the operational debt due and payable for the work carried out under the purchase orders dated 16.12.2016 and 21.04.2017, was not responded within ten day of the receipt by the corporate debtor. However, we find from the record one more purchase order dated 02.06.2015 issued by the Corporate Debtor in favor of the applicant also has been filed by the Applicant.

9) Learned counsel for the applicant would further contend that the operational debt claimed as due and payable under the purchase orders dated 16.12.2016 and 21.04.2017 of a sum of Rs.31,74,277/-, consists of labor charges for laying thermoplastic road marking paint, VAT Deposited by the Applicant in respect of contract work as subcontractor, Income Tax deducted at source but not deposited, retention money deducted by the Respondent, Labor Cess and the payments withheld by the Respondent towards the Applicant invoices.

10) Learned counsel for the Applicant basing on the purchase orders, the invoices, and the demand notice supra, vehemently contended that the Corporate Debtor failed in discharging the debt within 10 days of receipt of demand notice, as such the application is liable to be admitted. Learned Counsel also contended that the corporate debtor never raised any dispute as regards the work carried out by the operational creditor under the aforementioned purchase orders. In so far as the letter dated 14.09.2018 addressed by the Corporate Debtor to M/s. Shaloo Udyog and the response letter dated 17.09.2018 by the corporate debtor, Learned counsel would contend that the letter dated 14.09.2018 relates to the work of "Pink City Express Way Limited", which work the applicant never carried out. As regards the work that was carried out by the operational creditor under the purchase orders Dated 16.12.2016 and 21.04.2017 no defects were ever pointed out by the Corporate Debtor. In this context Learned Counsel invited our attention to the terms and conditions contained in the purchase orders dated 02.06.2015,16.12.2016 and 21.04.2017, and submitted firstly that, the work relating to purchase order dated 02.06.2015 is not the subject matter of the present claim, however, even assuming that the same to be part of the subject claim without admitting, Learned Counsel would contend that the said purchase order dated 02.06.2015 provides for warranty of one year from the date of certification which warranty period already has lapsed, and the corporate debtor has not raised any dispute regarding the work done, either during or after the warranty period before the operational creditor. In this context Learned Counsel

referred to the letter dated 14.09.2018 and submitted that the same was addressed to M/s.Shaloo Udyog but not to the operational creditor, hence according to the learned counsel the so called plea of raising defects in the work carried out by the operational creditor prior to the receipt of the demand notice is incorrect and is an afterthought and is unsustainable.

11) Nextly, Learned Counsel reiterating the contentions that the amount due under these purchase orders alone is the subject debt emphatically contended that as per the terms of the purchase orders dated 06.12.2016 and 21.04.2017 supply of material in respect of the work to be carried out under the above purchase orders, since not within the scope of the Corporate Debtor the so called complaints/dispute under the letter dated 14.09.2018 pertains to the quality of material the same cannot be attributed to the work done by the operational creditor under the purchase orders dated 06.12.2016 and 24.12.2017. According to the Learned Counsel after receipt of demand notice the corporate debtor has been trying to take shelter under the letter dated 14.09.2018 which has nothing to do with purchase orders dated 06.12.2016 and 21.04.2017.

12) Therefore, according to the learned counsel in the absence of any pre-existing dispute, non-payment of the amount due in respect of the work executed under the purchase order's dated 06.12.2016 and 24.12.2017 being exfacie clear from the record produced by the operational creditor, it is fit case to put the corporate debtor into CIRP.

13) Per contra, Learned Senior Counsel, Shri S.Ravi, appearing for the Corporate Debtor at the outset would contend that, the Operational Creditor is not entitled for any amount much less the amount claimed as due and payable, in as much as the operational debt claimed as due and payable has been disputed by the Operational Creditor, in as much as the Corporate Debtor under the letter dated 14.09.2018 has also raised a dispute as to the quality of the work done by the Operational Creditor under the purchase orders placed on the Corporate Debtor, prior to the receipt of the demand notice by the corporate debtor as such the application as filed is not maintainable and is liable to be dismissed.

14) Learned Senior Counsel also invited our attention to the reply letter dated 17.09.2018, where under the Operational Creditor had stated that "however, considering the fact that the payment is outstanding for quite some time we hope you would appreciate our position right perspective and get released payment first and there after ask for rectification" submitted that the Operational Creditor has categorically admitted the defects and also has undertaken for rectification as such pre-existing dispute stands admitted and established.

15) Thus, placing reliance on the letter date 14.09.2018 and reply letter dated 17.09.2018, besides the test reports of the external agency M/s. Engineering Training Testing and Calibration Laboratory(E.T.T.L) dated 14.04.2017, Learned Senior Counsel strongly contended that a 'pre existing' dispute as to the quality of the work done by the operational creditor since stands established in this case, the application is liable to be dismissed.

16) In the light of the context as aforementioned, we have carefully perused the pleadings and the documents filed by both sides. A perusal of Application and demand notice dated 02.11.2018 makes it clear that the subject debt pertains to the work carried out under the purchase orders dated 06.12.16 and 21.04.2017. The invoices dated 18.09.2017 raised by the Operational Creditor also pertain to the said work, as is evident from the description of the work in the invoices. In so far as the invoice dated 02.06.2015 is concerned it can be said that the same is not in respect of the purchase orders dated 06.12.2016 and 21.04.2017, as the description of work therein state work of "pile foundation" and "open foundation", which is not the work under the purchase order dated 06.12.2016 and 21.04.2017.

17) In so far as the submission of the Learned Senior Counsel that Corporate Debtor has raised a dispute under letter dated 14.09.2018 which letter no doubt is prior in point of time to the demand notice issued on 02.11.2018, where under certain defects in the work done were pointed out besides in the reply sent by the operational creditor dated 17.09.2018 the operational creditor admitted the defects. We further refers to the ruling of the Hon'ble Supreme Court of India, in re, ***Mobilox***, supra has held that,

It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application" (Emphasis is ours).

18) In the back drop of the above legal frame, we have carefully examined the contentions put forth by the Learned Counsels for parties more particularly with reference to the letter dated 14.09.2018, and we are of the firm view that the plea of pre-existing "dispute" is not a patently feeble legal argument besides an assertion of fact unsupported by evidence. Our reasons for the above conclusion are as below:

(a) The very subject matter of letter dated 14.09.2018 is the Purchase order bearing No. JOKMCRJ/201506/00001 dated 02.06.2015, which purchase order is not the claim either under the demand notice or under the present application.

(b) More over the letter dated 14.09.2018 was addressed to the M/s. Shaloo Udogy and not to the Corporate Debtor. I

(c) n the rejoinder filed by Operational Creditor it has been specifically pointed out that M/s. Shaloo Udogy is a sole proprietary concern and has independently existence, no effort has been made by the Cop rate Debtor to clarify the same.

(d) The reply letter dated 17.09.2018 by the operational creditor was addressed to Secretary M/s.Pink City Expressway Ltd but not to the Operational Creditor. The Operational Creditor has emphatically denied carrying out any work for M/s.Pink City Expressway Ltd.

(e) The operational creditor in its reply dated 17.09.2018 while stating that that 'payment be released first and thereafter should ask for rectification the operational creditor' further stated that **"we shall depute our representative for joint and rectify wherever and whatever failure is mentioned."** However, the corporate debtor has not taken any steps for carrying out joint inspection in order to identity the defects so as to enable free housing carrying out by corporate debtor. Therefore, in the light of our discussions and taking into consideration the submissions made by both sides, we are satisfied that the applicant has established the existence of operational debt which is due and payable by the Corporate Debtor and the Corporate Debtor defaulted in payment. Further, we hold that there is no acceptable piece of evidence of existence of a pre-existing dispute prior to the issuance of demand notice and the defense is nothing but a moon shine, hence we hold that it is a fit case to put Corporate Debtor into CIRP.

19) Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions: -

(A) Corporate Debtor, M/s KMC Constructions limited is admitted in Corporate Insolvency Resolution Process under section 9 of the Insolvency & Bankruptcy Code, 2016,

(B) The Bench hereby prohibits 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; transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(C) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

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

(E)That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(F)That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

(G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

(H) Accordingly, this Tribunal appoints Shri Shri Alok Kumar Agarwal having registration No. IBBI/IPA-001/IP-IP00059/2017-2018/10137 Residing at 605, Suncity Business Tower, Golf Course Road, Sector 54, Gurugram, Haryana 122002 , email : alok@insolvencyservices.in as IRP. The aforesaid IRP has no disciplinary proceedings pending against him. Proposed IRP filed Form-B issued by the Institute of Insolvency Professional. The Authorisation for Assignment is valid upto 22.10.2022. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended.

Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.]

(I) The petitioner is directed to pay a sum of Rs.1,00,000/- (Rupees one lac only) to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

17. Accordingly, this Petition is admitted.

22/04/2022

Veera Brahma Rao Arekapudi
Member Technical

Dr. N.V.Ramakrishna Badarinath
Member Judicial

Pavani