IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-519/(ND)/2021

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s. K. S. Venkatraman and Co. Pvt. Ltd.
Registered office at:
Flat No. 3, Ground Floor, Thiruthipally Terrace,
Old Door No. 20, New Door No. 31, North Avenue,
Srinagar Colony, Saidapet, Chennai 600 015

...Applicant/Operational Creditor

Versus

SAK Buildtech Pvt. Ltd.
Registered office at:
A-1/83, First Floor,
Safdarjung Enclave,
New Delhi 110029

...Respondent/Corporate Debtor

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:35:35 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:16:39 +05'30'

Coram

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)
SHRI. RAHUL BHATNAGAR, Hon'ble Member (Technical)

Counsel for Applicant: Mr. Pawan Bhushan
Counsel for Respondent: Mr. Padmaja Kaul/ Mr. Yugank Goel/Mr. Vikas Maini

ORDER

Per PSN PRASAD (HON'BLE MEMBER, JUDICIAL)

Date: 19th July, 2022

1. This is an application filed by the Applicant M/s K.S. Venkataraman and Co. Pvt. Ltd. seeking to initiate Corporate Insolvency Resolution Process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code') of the Respondent SAK Buildtech Pvt. Ltd. for the alleged default on the part of the Respondent in clearing the debt of Rs. 28,14,754 (Rupees Twenty-Eight Lakh Fourteen Thousand Seven Hundred and Fifty-Four), as alleged by the Applicant. This Application was filed on 13.04.2021. The details of transactions leading to the

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:36:05 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:17:25 +05'30'

filing of this application as averred by the Applicant/Operational Creditor are as follows:

i. That the Corporate Debtor had issued a notice inviting Tender on 14.07.2014 for Civil Works in Mercure Hotel at Site No. C.P. 8, Oragadam, Survey No. 23P, 24P, 25P, Kachipuram District, Sriperambudur Taluk, Chennai. The Operational Creditor participated and won the bid. The Corporate Debtor issued a Letter of Intent on 17.10. 2014 and the Operational Creditor accepted the same.

ii. That the Operational Creditor entered into a Civil Work Agreement with the Corporate Debtor. Certain pertinent clauses of the Notice issued by the Corporate Debtor include:

- Clause 3.1: the contractor (i.e; the Corporate Debtor herein) shall pay a sum of Rs. 10,32,70,048 (Rupees Ten Crore Thirty-Two Lakh Seventy Thousand and Forty-Eight) to the workers (i.e; Operational Creditors herein) in case of satisfactory work in the manner prescribed by Schedule II. The contractor shall not be liable to pay any additional amount over and

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:36:16 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:17:59 +05'30'

above the Contract Price unless otherwise stated in the agreement.

- Schedule II Clause 1.ii. – Running Bill: The contractor shall submit the monthly running account bill for the work in the previous month. Ad hoc payment @50% of the bill value of the running bill shall be released within 15 working days after reaching the employer/owner. The remaining amount shall be released within 3 days of the submission of the bill to PMC. The value of each bill should be at least 7.5% of the contract value. Bill payments as under –
    - (i) 95% amount shall be released on Pro Rata basis in RA Bills
    - (ii) 5% retention money to be paid as per Retention Money Clause
- Schedule II Clause 1.iii – A deduction shall be made against each of the RA Bill at the rate of 5% of the value certified by Project Manager (Retention Money) which amount shall be released as 1% cash

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:36:27 +05'30'
RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:18:29 +05'30'

retention to be released after one year from virtual completion and 4% against Bank guarantee (2.5% valid till first 6 months and 1.5% valid for next 6 months).

iii. That under the said Civil Works Agreement, a sum equal to 5% of the Running Account Bill raised by the Operational Creditor shall be retained by the Corporate Debtor (Retention Money). Under Schedule II to the Civil Works Agreement, the retention money was to be released to the Operational Creditor in the following manner:

- 1% of the total money retained – to be released after one year of the Virtual Competition
- 4% of the total money – to be released against a Bank Guarantee

iv. That as per the Civil Works Agreement, RA Bills were raised on various dates. The Corporate Debtor had made payments retaining 5% of the amount mentioned in the RA Bills. A sum of Rs. 33,43, 856 (thirty-three lakhs forty three thousand eight hundred fifty six) was retained by

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:36:38 +05'30'
RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:19:00 +05'30'

the Corporate Debtor payable to the Operational Creditor after a period of one year from the date of Virtual Competition.

v. That the Corporate Debtor issued another Notice inviting Tender on 24.06.2016 for the External Development Works at the Mercure Hotel, Site No. C.P. 8, Orgadam, Survey No. 23P, 74P, 25P Kachipuram District, Sriperambudur Taluk, Chennai. The Operational Creditor participated and won the bid.

vi. That the Corporate Debtor entered into an External Development Works Agreement (EDW Agreement) dated 29.09.2016 with the Operational Creditor. The following Retention Clause was a part of the Agreement:

- Schedule II Clause 1.iii – A deduction shall be made against each of the RA Bill at the rate of 5% of the value certified by Project Manager (Retention Money) which amount shall be released as 1% cash retention to be released after one year from virtual completion and 4% against Bank Guarantee (2.5% valid till first 6 months and 1.5% valid for next 6 months).

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:36:53 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:19:31 +05'30'

vii. That as per the EWD Agreement the Operational Creditor had raised RA Bills of Rs. 25,43,669 and as per the said agreement the Corporate Debtor was to retain 5% of the RA Bill amount raised. The Corporate Debtor retained Rs. 4,24,337 that was payable to the Operational Creditor after a period of one year from the date of Virtual Completion.

viii. That on 12.09.2016 the Corporate Debtor had requested the Operational Creditor to perform certain additional works in the Project i.e. for IPS Flooring, Shahbad Stone Laying and also external plastering work. The Operational Creditor completed this work by 03.03.2017.

ix. That the Operational Creditor had completed all the work and on 14.05.2016 issued a Virtual Completion Certificate along with handling over documents and manuals. This was admitted by the Corporate Debtor on the same day. A Practical Completion and Handling Over Certificate was issued on 03.03.2017 and the Operational Creditor completed the snag work on 25.04.2017.

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:37:06 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:20:02 +05'30'

x. That although a period of one year from the virtual completion lapsed on 14.05.2017, the Operational Creditor is yet to receive the above-mentioned Retention Money under both Civil Works Agreement and EDW Agreement.

xi. The Operational Creditor issued a letter on 16.05.2017 requesting the Corporate Debtor to pay a sum of Rs. 49,01,533. The Corporate Debtor admitted that this amount was due and all the work had been completed by the Operational Creditor.

xii. That under both the agreements the Corporate Debtor is liable to pay the Operational Creditor the retained amounts immediately after a period of one year from the date of virtual completion i.e. 14.05.2017.

xiii. That the Operational Creditor continuously followed up for the dues as per the Agreement, but the full dues were not paid.

xiv. That on 27.02.2018 when a representative from the Operational Creditor approached the Corporate Debtor a sum of 10,00,000 was paid as a part payment for the

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:39:14 +05'30'
RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:20:35 +05'30'

retention money. The Corporate Debtor informed the representative that the balance amount would be paid within a few weeks.

xv. That on 06.08.2018 there was a reconciliation of accounts and it was mutually agreed that the total principal amount due as on date as per the above said two agreements was Rs. 21,43,685.

xvi. That on 20.08.2018 a sum of Rs. 5,00,000 was paid for the partial discharge of debt and this was the last payment made by the Corporate Debtor. As on date the principal outstanding amount to be paid by the Corporate Debtor excluding interest is 16,43,685.

xvii. That the Operational Creditor issued repeated reminders to the Corporate Debtor, however, these have been ignored by the Corporate Debtor. On 12.03.2019 the Operational Creditor issued a letter as a final reminder for the dues. However, this was also ignored by the Corporate Debtor.

xviii. That the principal amount due from the Corporate Debtor is 16,43,685.

xix. That the first default occurred on 14.05.2017 when the Agreement fell due. Although payments were made the Corporate Debtor failed to pay the outstanding amount. Despite repeated reminders regarding the payment of the outstanding dues there has been no response from the Corporate Debtor.

xx. That constrained by the adamant attitude of the Corporate Debtor, the Operational Creditor issued a Demand Notice under S. 8 of Insolvency and Bankruptcy Code, 2016 on 23.10.2019 by speed post and courier to the registered office of the Corporate Debtor and further by way of email to the registered email address of the Corporate Debtor. but the Operational Creditor did not receive any reply from the Corporate Debtor to the said demand notice within 10 days.

xxi. That the said behavior of the Corporate Debtor is extremely unethical and wrongful. The Corporate Debtor has grossly defaulted in making payment of the outstanding dues, amounting to INR 28,14,754 /-

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:39:42 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:21:45 +05'30'

(Rupees Twenty-Eight Lakh Fourteen Thousand Seven Hundred and Fifty-Four only) of the Operational Creditor and therefore, the Applicant has filed the present application under section 9 of the Insolvency and Bankruptcy Code, 2016 to initiate the Corporate Insolvency Resolution Process of the Respondent.

xxii. That the corporate debtor has allegedly not disputed the factum of receipt of demand notice from the operational creditor

2. In compliance of Section 9(3)(b) of the Insolvency and Bankruptcy Code, 2016, the Operational Creditor has filed affidavit dated 24.08.2021 stating that no notice of any pre-existing dispute has been received by the Applicant from the Corporate Debtor relating to the dispute of the un-paid Operational Debt. The Operational Creditor has also stated in the said affidavit that there is no pending arbitration or court proceeding before any court or tribunal relating to the dispute of the un-paid Operational Debt.

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:39:58 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:22:20 +05'30'

3. On the other hand, the Corporate Debtor has argued that the contentions and allegations made by the Operational Creditor are false and incorrect.

4. Further, the Corporate Debtor argues that the Application filed by the Operational Creditor fails to the meet the requirement of the minimum threshold provided under Section 4 of the Code.

4.1. Section 4 of the Insolvency and Bankruptcy Code says:

This Part shall apply to matters relating to insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

4.2. The Corporate Debtor lists down the notification of no. S. O. 1205(E) dated 24 March 2020 (Notification), issued by the Ministry of Corporate Affairs (MCA) enhancing the minimum amount of default from INR 1,00,000/- (Indian Rupees One Lakh Only) to INR 1,00,00,000/- (Indian Rupees One Crore).. The Corporate Debtor argued that the Application is hit by Section 4 of the Code read with the above-mentioned

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:40:14 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:22:55 +05'30'

Notification as the alleged amount of debt due is less than INR 1 crore and hence, the Application is not maintainable.

4.3. The Corporate Debtor lists down the case of the Hon'ble National Company Law Appellant Tribunal (Hon'ble NCLAT) vide its judgment dated 25 October, 2021, passed in Company Appeal AT) (Ins.) No. 813 of 2021, titled as *Jumbo Papers Products Vs. Hanaraj Agrofresh Private Limited,* wherein it was held that the threshold limit, as enhanced by the MCA wide the Notification, will be applicable to all applications filed under sections 7 or 9 of the Code on or after 24 March, 2020, even if the debt in default relates to a period earlier than 24 March, 2020.

5. The Corporate Debtor argued that there is pre-existing dispute prior to the issuance of the demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016, and that it has suffered losses due to deficiency in services by the operational creditor and that thereby the Corporate Debtor has a counterclaim claim of INR 19.95 crores against the Operational Creditor. The Corporate Debtor mentions that issues regarding non-delivery or delay of supply were raised, however to no avail. Hence, the dispute. Further, the respondent company had to spend an additional cost of Rs. 68,45,000/- for renewal of its license, due to non-delivery of drawing.

6. The Corporate Debtor argued that during the period of 2014-17, various RA bills were raised by the Applicant towards the civil works and the external development works and the Company made regular payments from time to time after retaining 5% of the amount of each RA bill, in accordance with the provisions of the CWA and the EDWA, respectively.

7. The Corporate Debtor argues that, subsequently, the Applicant issued a letter dated 16 May, 2017, to the Company, thereby, demanding payment of a sum of INR 49,01,533 (Indian Rupees Forty-Nine-Lakh One Thousand Five Hundred and Thirty-Three Only) towards retention money. Thereafter, pending a reconciliation exercise, the Company, in good faith, made payment of an amount of INR 10,00,000/- (Indian Rupees Ten Lakh Only) to the Applicant on 27 February, 2018.

8. Pursuant to a detailed reconciliation exercise carried out by both the parties, it was agreed by the parties that as on 6 August, 2018, the total amount payable towards retention money was INR

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:41:38 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:25:05 +05'30'

21,43,685/- (Indian Rupees Twenty-One Lakh Forty-Three Thousand Six Hundred and Eighty-Five Only), which is also clearly reflected in the emails exchanged between the parties on the aforesaid date.

9. In the meanwhile, on 25 January, 2018, the Corporate Debtor addressed an email to the Operational Creditor thereby informing the Operational Creditor that the BOH flooring area with the Shahbad stone was in a bad condition as the top layer of the stone was coming out and floor also had grinding marks due to which the operations team of the Corporate Debtor was unable to take over the floor.

10. The Corporate Debtor argues that by way of the aforesaid email, the Company requested the Applicant to send its technical person to the site and remedy the aforesaid issue. As no response to the said email was received from the Operational Creditor, the Corporate Debtor addressed a reminder email dated 3 February, 2018 to the Operational Creditor.

11. The Operational Creditor finally responded to the above emails of the Corporate Debtor on 5 February, 2018, wherein the Operational Creditor, while acknowledging the fact that there was a defect in the work executed by it, agreed to take up the above-mentioned rectification work with respect to the flooring issue and also sought payment of its alleged outstanding does. The Corporate Debtor responded to the Operational Creditor email on the same date (5 February, 2018), thereby, again highlighting the aforesaid flooring issue and requested the Company to address the same immediately. The Corporate Debtor argues that the aforesaid issues remained unresolved.

12. On 3rd March, 2018, the Corporate Debtor addressed an email to the Operational Creditor again apprising it regarding the flooring issue. In response, the Operational Creditor addressed an email dated 13 March, 2018, informing the Corporate Debtor that a representative of the Operational Creditor would be visiting the site on 15 March, 2018 to inspect the flooring issue.

13. The Corporate Debtor argues that pursuant to the aforesaid visit, the Applicant addressed an email dated 19 March, 2018, thereby *malafidely* stating that the floor polishing issues as highlighted by the Corporate Debtor, were allegedly not due to any fault of the Applicant and attempted to blame the Company for the same. The Operational Creditor also stated that the said

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:42:12 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:26:25 +05'30'

issues could be resolved by re-polishing the floor with proper technique at INR 25 per sq ft plus CIST. The Corporate Debtor argues that such correspondence itself shows that there was a dispute between the parties with respect to the works carried out by the Operational Creditor and thus the Application is liable to be dismissed on this ground alone.

14. The Corporate Debtor responded to the aforesaid email on 29 March, 2018, thereby, clearly informing the Operational Creditor that on perusal of item wise descriptions provided by the Operational Creditor it was clear that the same explicitly included polishing of the floor stone as well. The Corporate Debtor further state that the floor stone had not been polished and only grinding was done which had left marks on the floor. Thus, the Corporate Debtor questioned the Operational Creditor's proposal for charging additional amounts for polishing the floor stone when the same formed part of the scope of work under the CWA and again requested the Applicant to have the floor stone polished.

15. The Operational Creditor vide its email dated 30 March, 2018, inter alia, stated that it would be willing to get the floor stone polished subject to payment of 90% of the alleged outstanding

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:42:33 +05'30'
RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:27:10 +05'30'

dues and the balance 10% may be paid after completion of such work, thereby, acknowledging the fact that the payments were linked to the completion of works under the CWA and the EDWA.

16. The Corporate Debtor argues that despite the above-mentioned repeated requests of the Corporate Debtor to complete the works under the CWA and rectify the issues with the floor stone, he deliberately refused to do the same and instead continuously kept demanding the alleged outstanding amounts.

17. The Corporate Debtor vide its email dated 4 April, 2018 yet again reminded the Operational Creditor of the pending floor stone polishing issue which remained unresolved. In response, the Operational Creditor vide its email dated 6 April, 2018, inter alia, yet again arbitrarily and *malafidely* stated that the polishing work would be taken up after payment of its alleged outstanding dues.

18. The Corporate Debtor argues that as the issue with regard to polishing of the floor stone continued to remain unresolved, it issued another reminder email dated 2 May, 2018 to the Operational Creditor. The Operational Creditor responded, vide its email of even date, thereby, suggesting a phone call between

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:43:01 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:27:49 +05'30'

the parties to discuss the floor polishing issue as well as the alleged outstanding does. Pursuant to such discussion, the Corporate Debtor addressed an email dated 21 May, 2018 to the Corporate Debtor and again arbitrarily stated that it would be willing to polish the floor stone if the Corporate Debtor paid the alleged balance outstanding amounts.

19. Acceding to the repeated demands of the Operational Creditor and believing its assurances to be true, the Corporate Debtor argues that it made another payment of an amount of INR 5,00,000- (Indian Rupees Five Lakh Only) to the Applicant on 20 August, 2018.

20. Thereafter, on 31 August, 2018, the Corporate Debtor addressed another email to the Operational Creditor, wherein Corporate Debtor referred to its email dated 29 March, 2018 and clearly informed that the balance payment of INR 16,43,685/- (Indian Rupees Sixteen Lakh Forty-Three Thousand Six Hundred and Eighty-Five Only) would be released to the Operational Creditor only once the remaining work with respect to the polishing of the floor stone was completed by the Applicant.

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:43:24 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:28:31 +05'30'

21. That the Operational Creditor failed to finish the polishing work of the floor stone, the Corporate Debtor again mailed the Operational Creditor on 12 November, 2018, thereby, inter alia, reiterating its earlier request for completion of the work. The Corporate Debtor further clearly informed the Applicant that it would clear the balance payments once the work was completed by the Operational Creditor. However, the aforesaid work remains incomplete even as on date.

22. The Corporate Debtor relied on Hon'ble Supreme Court's decision in *Mobilox Innovations Private Limited PS. Kirusa Software Private Limited (2018) 1 SCC 353*, wherein it was held that *"once the Applicant has filed an application, which was otherwise complete, the Adjudicating Authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Applicant or there was a record of dispute in the information utility. It was clear that such notice must bring to the notice of the Applicant the existence of a dispute or the fact that a suit or arbitration proceeding relating to a dispute was pending between the parties. Therefore, all that the adjudicating Authority was to see at this stage was whether there was a plausible*

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:43:47 +05'30'
RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:29:13 +05'30'

contention which requires further investigation and that the dispute was not a patently feeble legal argument or an assertion of fact warranted by evidence. It was important to separate the grain from the chaff and to reject a spurious defence which was mere bluster. However, in doing so, the Court did not need to be satisfied that the defence was likely to succeed. The Court did not at this stage examine the merits of the dispute. So long as a dispute truly exists in fact and was not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application."

23. The Corporate Debtor argues that there existed a pre-existing dispute between the Corporate Debtor and the Operational Creditor and the application has only been filed by the Operational Creditor to arm twist the Company into making completely arbitrary and illegal payments to the Operational Creditor.

24. The Corporate Debtor argued that the terms of the CWA and/or the EDWA neither contemplate not contain any provision which entitles the Operational Creditor to claim any interest on any overdue amounts payable by the Corporate Debtor to the Operational Creditor. Therefore, the act of Operational Creditor of arbitrarily charging interest @ 15% PA. (amounting to INR 11.71,069/-) on the alleged outstanding amount of INR 16,43,685/-(which in any case is in dispute). despite there being no provision for the same, is baseless. Further, the Corporate Debtor argues that even if interest was payable such a claim would at best be only maintainable in a civil court/arbitration and not before this Hon'ble Tribunal.

25. The Corporate Debtor argues that an application for CIRP is not proceedings for recovery of dues of creditors. The objective of the Code is reorganisation and resolution of a corporate debtor. The Corporate Debtor laid reliance on the judgement of the Hon'ble Supreme Court in the matter titled as *M/s. Reliance Asset Reconstruction Company Limited v. M/s. Hotel Pooja International Private Limited (2021) SCC Online SC 289*, wherein the Hon'ble Court has held "*as held by this Court in Mobilox Innovations (P) Lad v. Kirusa Software (P) Ltd., the IBC is not intended to be a substitute to a recovery forum.*" Reliance was further placed on *Transmission Corpn. of AP. Ltd. v. Equipment Conductors & Cables Ltd case,* wherein this Court followed its earlier judgment in *Mobilox Innovations (P) Ltd.* and observed, "*In* *a recent judgment of this Court in Mobilox Innovations (P) Lad. v. Kirusa Software (P) Ltd., this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked....".*

26. It is the counter-argument of the Operational Creditor that the argument of the Corporate Debtor that the Application filed by the Operational Creditor is not maintainable is a result of erroneous interpretation of the notification dated 24.03.2020 issued by the Ministry of Corporate Affairs. The Operational Creditor argues that the notification dated 24.03.2020 cannot as a matter of law operate retrospectively. Even Section 4 of the Code does not empower the Central Government to change the minimum amount of default with retrospective effect. It has also been held by the Hon'ble Supreme Court of India that once a default occurs, Article 137 of the Limitation Act, 1963 prescribes a period of three years as the period of limitation to institute proceedings under Section 7 or Section 9.

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:45:49 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:31:24 +05'30'

27. The Operational Creditor argued that the Corporate Debtor's reliance on the Hon'ble NCLAT in Company Appeal (AT) (Ins.) 813 of 2021 titled *Jumbo Papers Products v. Hansraj Agrofresh Pvt. Ltd.* is misplaced for the following reasons:

a. The facts in the present case are different as the Notice under Section 8 was sent prior to 24.03.2020. However, in Jumbo Papers case, the demand notice under Section 8 of the Code was only issued on 12.06.2020 (after the date of the notification). Further, the Hon'ble NCLAT did not have an occasion to consider the matter in a scenario where the notice was issue prior to 24.03.2020.

b. The Judgment of the NCLAT dated 25.10.2021 is currently pending in an Appeal before the Hon'ble Supreme Court of India in Civil Appeal No. 7032 of 2021.

28. The Operational Creditor also placed reliance on the judgement of the Tribunal in *BLS Polymers Ltd. v. RMS Power Solutions Pvt. Ltd.* held that the Notification dated 24.03.2020 is prospective in nature.

29. The Operational Creditor argued that the Corporate Debtor erroneously claimed that there is a pre-existing dispute between

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:46:38 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:32:09 +05'30'

the parties despite admitting: (a) The reconciliation of the outstanding amount on 06.08.2018 (b) Part payment of the outstanding amount on 20.08.2015. That the Corporate Debtor has failed to understand the meaning of "dispute under the Code. The Definition of Dispute contemplates the existence of some proceedings regarding the dispute. In the present case, there is neither a suit, nor arbitration proceedings and there is an express email acknowledging and agreeing to the outstanding amount payable. Further, the Operational Creditor argued that no notice of dispute has been raised by the Corporate Debtor despite receiving the notice under Section 8 on 30.07.2019.

30. The Operation Creditor placed reliance on the judgement of *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd, (2018) 1 SCC 35* in which the Hon'ble Supreme Court of India held that, *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)(ii)(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..."*

31. The Operational Creditor argues that the Corporate Debtor did not send any notice of Dispute to the Operational Creditor. On the other hand, the debt was admitted in writing.

32. Under the Civil Works Agreement dated 25 November, 2014, the Civil Works stood completed on 14.05.2016. Further, the Corporate Debtor acknowledged with a handwritten notation on the letter dated 16.05.2017 that the work had been completed. It was also acknowledged that the retention money under the agreement would be returned to the Operational Creditor after one year of the date of virtual completion (This was as per Schedule II of the Civil Works Agreement dated 25 November 2014).

33. After the issuance of the completion certificate and the efflux of one year thereafter - which was duly acknowledged by the Corporate Debtor, the performance of the contract stood completed. The only remaining part of the performance of the contract was the payment of the retention money. The Operational Creditor argued that the exchange of emails

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:47:33 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:33:56 +05'30'

regarding floor work between the two parties is subsequent to the completion of the contract and these relate to subsequent events, where the Applicant agreed to help the Respondent.

34. Pursuant to the order dated 19.04.2022 the Operational Creditor argued the following:

38.1. That the Notification dated 24.03.2020 is prospective in nature.

38.2. That since the Notification increases the minimum threshold of a default, prospectively in this context means that the revised threshold can only apply to any default that takes place after 24.03.2020.

38.3. That the period of limitation applicable to any default that takes place under the Code is governed by Article 137 of the Limitation Act, 1963 and commences from the date of default when the right to sue accrues.

38.4. Once the right to sue has accrued under the Code, the right can only be taken away by an amendment to the Code itself. A notification by the Central Government under Section 4 cannot take away a right conferred by the Statute.

38.5. That Section 8 of the Code contemplates a statutory notice where the principal amount of default has to be crystallized.

Once this debt is crystallized prior to the Notification dated 24.03.2020, the threshold limit prior to 24.03.2020 ought to apply for any application filed within the statutorily prescribed limitation period.

35. The Corporate Debtor argues in further response the following:

39.1. That since the Notification increases the minimum. threshold of a default, enhanced the minimum amount of default from INR 1,00,000/- to INR 1,00,00,000/- with effect from 24 March 2020 and the Application was filed on 13 April, 2021, i.e. after a period of approximately two (2) years from the date of issuance of the Demand Notice and after a period of more than one (1) year from the Notification, it was not maintainable as the alleged amount of default is only to the tune of INR 28,14,754/-, which is evidently much lower than the threshold amount of INR 1,00,00,000/-, as per the Notification.

36. We have gone through the documents filed by the Operational Creditor and heard the arguments made by the counsel of the Operational Creditor.

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:49:12 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:35:39 +05'30'

37. In the light of the above said facts and after giving careful consideration to the entire matter, hearing the arguments of the learned counsel for the Operational Creditor and upon appreciation of the documents placed on record to substantiate the claims, this Adjudicating Authority is of the view that there is a pre-existing dispute. As per the records shown by the Corporate Debtor, the work of the Operational Creditor has not been satisfactory despite repeated requests for rectification by the Corporate Debtor. Infact, the issue of polishing of the stone floor has remained unresolved. It appears that the Operational Creditor is using this forum as a recovery mechanism for retention money which is not the purpose or intention of the IBC 2016. This has been held by the Hon'ble Supreme Court in cases such as Parker Hannifin India Pvt. Ltd. v. Prowess International Pvt. Ltd., 2017 SCC Online NCLT 11998 (para 17) and M/s Kuntal Construction Pvt. Ltd. v. M/s Bharat Hotels Ltd. in Company Appeal (AT) (Insolvency) No. 542 of 2020 (para 18). Additionally, the threshold requirement for debt default given under S. 4 of the Insolvency and Bankruptcy Code 2016 is not satisfied in this case. It has been held by the

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:49:48 +05'30'

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:36:30 +05'30'

Company Appeal AT) (Ins.) No. 813 of 2021, titled as Jumbo Papers Products Vs. Hanaraj Agrofresh Private Limited that it is the date of filing of application for initiation of Corporate Insolvency Resolution Process (CIRP) that matters to determine that if a case at hand will be determined as per the enhanced default limit of INR 1 Crore brought about *vide* the notification dated 24.03.2020. Hence, this Tribunal **dismisses** this application.

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.07.19 17:37:22 +05'30'

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.07.19 16:50:22 +05'30'

(P.S.N. PRASAD)
MEMBER (JUDICIAL)