IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

IA(IBC)No.102/JPR/2022
& CP No. (IB)- 48/9/JPR/2019

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

IN THE MATTER OF:

M/S INTERARCH BUILDING PRODUCTS PVT. LTD.
Farm No. 8, Khasra no. 56/23/2,
Dera Mandi Road, Mandi Village,
Tehsil Mehrauli, New Delhi- 11047

...Operational Creditor

VERSUS

M/S SYMPHONIA & GRAPHICUS PVT. LTD.
Regd. Office at: 36/37, Moji Colony, Malviya Nagar, Jaipur - 302017 (Raj.)

Also, at:
36 & 37, S & G Towers- 6th to 9th Floor, Calgary Road, Malviya Nagar, Jaipur- 302017 (Raj.)

...Corporate Debtor

FOR PETITIONER (S)	:	Charu Sangwan, Adv.
FOR RESPONDENT (S)	:	Sandeep Taneja, Adv. Naresh Kr. Sejvani, Adv.

Order Pronounced On: 20.04.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

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1. This Application has been filed by the M/s Interarch Building Products Pvt. Ltd. ('Operational Creditor'/'Applicant') to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Symphonia & Graphicus Pvt. Ltd. ('Corporate Debtor'), under Section 9 of the Insolvency and Bankruptcy Code ('IBC'/'Code'), 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 alleging a default of Rs. 5,75,10,643/- (Rupees Five Crore Seventy-Five Lakh Ten Thousand Six Hundred and Forty-Three Only).

2. The Applicant namely M/s Interarch Building Products Pvt Ltd., bearing CIN No. U45201DL1983PTC017029, earlier known as 'Luxalon Buildings Products Private Limited' has filed this Application through Mr. Vinod Gupta, who is duly authorised vide Power of Attorney dated 27.06.2014, annexed with the Application as Annexure-13.

3. The Corporate Debtor is a Private Company incorporated on 01.12.2006 bearing CIN No. U74300RJ2006PTC055771 having registered office at Plot No. 36/37, Moji Colony, Malviya Nagar, Jaipur- 302017. The details of the transactions leading to the filing of this application averred by the Applicant are as follows:

   3.1 The Applicant has submitted that the Applicant on being approached by the Corporate Debtor, entered into business with the Corporate Debtor for supply of pre-engineered structures and its erection for

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Rajasthan State Warehousing Corporation ('RSWC') at 3 different sites in the State of Rajasthan. Accordingly, work orders and corresponding supply orders dated 10.11.2017 were issued, the details of which are as follows:

i. At Gharsana, Rajasthan, the supply and work order was issued vide order no. S&G/2017-2018/152 and 153,

ii. At Raising Nagar Rajasthan, the supply and work issued vide order no. S&G/2017-2018/154 and 155 and

iii. At Prahladpur, Rajasthan, the supply and work issued vide order no. S&G/2017-2018/156 and 157.

3.2 Subsequently, the Corporate Debtor amended the original supply and work order bearing no. 156 & 157 on 22.12.2017 revising the quantities and prices of the materials required at the work sites. Thereafter, on 17.01.2018 the Corporate Debtor amended the work and supply orders issued for all the three sites. The Operational Creditor on 05.10.2018 preferred an e-mail informing the Corporate Debtor that as per the terms and conditions of the work orders and amended work orders, the Operational Creditor had supplied the materials and executed/completed the entire work orders.

3.3 The Operational Creditor on several occasions had sent various letters dated 20.11.2018, 07.12.2018, 31.12.2018, 14.01.2019 and 18.01.2019 requesting the Corporate Debtor to release the

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outstanding amount, however the Corporate Debtor failed to clear the outstanding dues of Rs. 5,75,10,643/- (Five Crores Seventy-Five Lakhs Ten Thousand Six Hundred and Forty-Three Only) which fell due on 25.09.2018.

3.4 Further pursuant to the letter dated 20.11.2018 and 07.12.2018, the Applicant has alleged that the Corporate Debtor vide letter dated 20.12.2018 acknowledged the dues and assured the Applicant that the Corporate Debtor will reconcile the account statement and pay the outstanding balance.

3.5 Finally, the Applicant issued a demand notice dated 04.01.2019 which was sent on 06.02.2019 and the same was received by the Corporate Debtor on 09.02.2019, to which no reply or any dispute was raised within stipulated time.

3.6 The aforementioned details as reflected in Part IV of the Application are as follows:

PART IV

PARTICULARS OF OPERATIONAL DEBT

1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	Total amount of debt due: I. Rs.5,75,10,643/- (Rupees Five Crore Seventy-Five Lakhs Ten Thousand Six Hundred and Forty-Three Only) II. Along with 18% interest w.e.f. 25.09.2018.

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2.	Amount claimed to be in default and the date on which the default occurred.	Rs.5,75,10,643/- along with interest @ 18% per annum w.e.f. 25.09.2018 (when the default occurred).

4. The Applicant filed an Additional Affidavit to bring certain documents on record vide Diary No. 383/2019 dated 05.03.2019. The Applicant has annexed a letter dated 01.03.2019 preferred by the Corporate Debtor wherein the Corporate Debtor has submitted that as per the work order, neither supplies were done on time nor work was completed on time. The said letter was received by e-mail and replied to by the Applicant vide letter dated 02.03.2019. Thereafter, the Corporate Debtor reciprocated vide e-mail dated 04.03.2019. The said communications have been annexed with this Additional Affidavit.

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply vide Dairy No. 636/2019 dated 12.04.2019 stating as follows:

   5.1 The Corporate Debtor has submitted that the State Government undertaking namely RSWC awarded the tender to the Corporate Debtor to build-up the various warehouses at Raisinghnagar & Gharsana for the purpose of storage of post-harvest of agricultural produce. To carry out such tender the Corporate Debtor engaged the Applicant and allotted various Purchase Order No. 152 to 157 for preparation of Fabricated Drawing, Procurement and Manufacturing & Supply of Pre-Engineered Structure & its Erection Work.

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5.2 The essence of Purchase Orders was timely supply & execution of work. Therefore, the timelines within which such building structures were to be delivered were specifically & categorially mentioned in the terms and conditions of the Purchase Work Orders. In addition to the above, penalty clauses in case of the any default were also stipulated in the aforementioned terms and conditions. The Corporate Debtor has further relied on the relevant extracts of the purchase orders which is reproduced as hereunder:

> ***"Penalty on delay in work***
> *The main intention of giving work to Interarch despite not being L1 is because of the commitment given about completing work in time with best quality. Therefore, we at S&G expect in words and spirit to receive the quality & work completion as per time schedule mentioned in this work order.*
> *Incase we do not receive the same than not only it will be a big professional disappointment but will also mean deduction of 15% from the value of remaining work from preceding stages on its time schedule vs. progress basis.*
>
> ***Payment Conditions***
> *All the payments will be done by S&G strictly as per stages mentioned in this supply order. The stages mentioned will neither be broken nor the payment of next stage will be released in case if supply mentioned in its prior stage is still pending."*

5.3 It was also submitted that in order to complete the assigned job in time bound manner, the Applicant took an undertaking on affidavit to abide by the time limit and words and spirit of the purchase orders. Further the time schedules have been tabulated by the Corporate Debtor in the Reply.

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5.4 The Corporate Debtor further contended that since the beginning of the project the Operational Creditor has not only failed to adhere to timelines as stipulated in the purchase order but also failed to abide by their commitments and sought extension for timelines as many as or more than 6 times. The Corporate Debtor is completing the same at its own cost to ensure adherence to the tender conditions. Moreover, the Applicant has failed to provide the ESI and PF related challans/documents for which the concerned department has already served notices to the Corporate Debtor. Further most of the work executed is leaved with snags, glitches and short-comings which on continued basis require instalments/realignments and extra work for its pure quality.

5.5 The Corporate Debtor has also raised maintainability objections against the petition. The Corporate Debtor has further reproduced a list of E-mails which were exchanged between the parties. The same is reiterated below:

I. E-mail dated 22.12.2017 preferred to Vikas Kaushal (Operational Creditor) by Corporate Debtor stating the acceptance of revised delivery and erection schedule.

II. E-mail dated 22.01.2018 preferred to Vikas Kaushal (Operational Creditor) by Corporate Debtor asking to ensure immediate dispatches as per the approved quality standards.

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III. Two E-mails dated 07.02.2018 preferred to Avdhesh Kumar Chaturvedi and Arvind Nanda (Operational Creditor) by Corporate Debtor informing the importance of time line and milestone in project and the subsequent delay caused due to delay in deploying resources on time.

IV. E-mail dated 07.04.2018 to Vikas Kaushal (Operational Creditor) by Corporate Debtor mentioning that Gharsana Building is not in a position to be handed over as certain work is still going on.

V. E-mail dated 18.04.2018 to Avdhesh Kumar Chaurvedi and Arvind Nanda (Operational Creditor) by Corporate Debtor stating that it is not possible to organize visits for partially completed work of sites.

VI. E-mail dated 19.04.2018 to Avdhesh Kumar Chaurvedi and Arvind Nanda (Operational Creditor) by Corporate Debtor requesting to deploy required resources as per the 6th revision of completion date.

VII. E-mail dated 03.07.2018 to the Akshay Singh (Corporate Debtor) from Vikas Kaushal (Operational Creditor) stating that the word of both the Raisinghnagar and Gharsana sites will be completed by 15.07.2018.

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VIII. E-mail dated 03.07.2018 preferred by Vikas Kaushal (Operational Creditor) to Anurag Mishra (Corporate Debtor) mentioning that completion of work at Raisinghnagar and Gharsana Site was delayed as the workers left site without final completion and the same will be completed by 15th July (paint work) and one week thereafter (for other alignment work). Also, the Applicant requested release of certain payment of the same.

5.6 The Corporate Debtor has contended that there was existence of dispute prior to the issuance of Demand Notice under the provisions of the Code. Plethora of points have been mentioned to substantiate the same, the relevant part of which states that there were issues/discrepancies/observations informed to the Operational Creditor from time to time latest by way of an E-mail dated 02.03.2019, most of the work executed in short-comings which were duly informed with a reply letter dated 01.03.2019, contingent penalties to be imposed by RSWC on account of delay caused by the Operational Creditor etc. Further, the Corporate Debtor has relied on a set of judgments stating that in case of existence of dispute prior to issuance of Demand Notice, the application under Section 9 of the Code is not maintainable.

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5.7 The Corporate Debtor has further submitted that the contents of the power of attorney dated 27.06.2014 shows that the same is not in conformity with the Court. It does not specifically authorize for initiation of CIRP against the Corporate Debtor. Hence, in the absence of valid board resolution for authorization, the present application becomes futile.

6. The applicant filed an IA bearing IA No.144/JPR/2019 seeking condonation of delay of 8 days in filing the rejoinder to the reply. The said IA came to be allowed vide order dated 30.05.2019. The Applicant has filed the rejoinder stating the following:

6.1 The applicant submitted that the rejoinder is being filed by Mr. Vinod Gupta who is the authorized representative of the applicant duly authorized vide power of attorney dated 27.06.2014. The said power of attorney was executed by the Chief Executive Officer of the Operational Creditor who was further authorized by the Board of Directors vide resolution dated 27.06.2014. Therefore, the authority given to Mr. Vinod Gupta is valid. For caution, a resolution of ratification has also been passed by the Company on 02.05.2019 which is duly annexed with the said rejoinder at page 29 whereby all acts done by Mr. Vinod Gupta including filing, signing, executing the petition under Section 9 of IBC were ratified.

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6.2 The applicant has contended that the dispute expressed by the Corporate Debtor cannot be categorised as a dispute within the meaning of Section 5(6) of the Code. The applicant relied on the judgment of the Hon'ble Supreme Court in the matter of *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353*. It was further submitted that the Corporate Debtor failed to comply with the timelines adhered under the statute and did not raise any dispute within 10 days of the receipt of the demand notice sent by the Operational Creditor under Section 8 of the Code.

6.3 The applicant has submitted that the time extensions were itself given by the Corporate Debtor, therefore, it cannot be said that the time was the essence of the contract. Further, vide report dated 03.10.2018 pertaining to Raisinghnagar site and E-mail dated 05.10.2018, the Corporate Debtor has specifically accepted the fact that Applicant has completed all points and the alignments is done as per the requirements. Further, there was no response to the E-mail dated 05.10.2018 regarding Gharsana site requesting the Corporate Debtor to let the Operational Creditor know if there is any observation on report of the aforementioned site. One more thing that shows that time was never the essence of this contract is the act of amending the supply orders and work orders on 22.12.2017 and 17.01.2018 which were originally issued by the Corporate Debtor on

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10.11.2017. The revised timeline was specifically accepted by the Corporate Debtor vide E-mail dated 22.12.2017 and thus the amendments were accepted.

6.4 The Corporate Debtor has at the first instance agreed to the extension of timelines and approved the entire work done by the Operational Creditor but afterwards the Corporate Debtor has denied the liability to make the outstanding payment on the pretext of delay. This is clear violation of the principal of law which states that a person cannot be allowed to approbate and reprobate at the same time. No party can accept and reject the same instruments and a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled to on the footing that it is valid and then turn around and say it is void for the purpose of securing of some other advantage. The objections raised by the Corporate Debtor regarding the delay stands waived off by its categorical acceptance of the Pre-Fabricated structure on 05.10.2018 and 03.10.2018.

6.5 The Applicant has pointed out that the Corporate Debtor in order to avail the tender from RSWC has portrayed its association with the Applicant as a Joint Venture. The said detail was brought in the knowledge of the Applicant vide letter dated 22.02.2019 issued by

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Rajasthan State Road Development and Construction Corporation Limited.

6.6 On the point of penalty clause and deduction, the applicant has submitted that no deduction whatsoever was ever made by RSWC as is evident from the reply given by the Corporation to the RTI filed by the Applicant company. In point No. 3.5 it is categorically stated that there are no records regarding the levy of any penalty or deduction made by the RSWC on the Corporate Debtor due to delay in execution of Pre-engineering Structure. Copy of RTI has been annexed as Annexure-D to this rejoinder. Hence, any attempt to retain the amount due on account of penalties is an unjust enrichment which cannot be permitted.

6.7 The Corporate Debtor has relied on selective provisions of the purchase order but failed to reproduce that *"clear work front after compacted and level ground in or around the building will be provided at site for free movement of men and machinery during the execution at site"*. The same has not been done as is evident from the various E-mails produced on record. The Corporate Debtor also failed to made advance and supply payments in time. Moreover, the Applicant has relied on email dated 06.02.2018, 07.02.2018 and 15.02.2018, wherein the Corporate Debtor was asked to complete the surface compaction work, to provide compacted surface road so that

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subsequent work can be carried out by the Applicant, to prove that the Corporate Debtor himself failed to discharge his contractual obligations timely. Thus, having failed to comply with the contractual provisions itself, the Corporate Debtor cannot state that time was the essence of the contract and consequently, no liability attaches towards the applicant.

6.8 The applicant has pointed out that the pre-fabricated structure, which had to be prepared by the applicant under works and supply orders was only a small part of the tender awarded by the RSWC and all the remaining work i.e. roofing etc. had to be done by the Corporate Debtor itself. Having accepted the pre-fabricated structure, on 05.10.2018 and 03.10.2018, it does not lie in the mouth of the Corporate Debtor to raise the issue which stands fully waived off. Also, from the E-mails annexed by the Corporate Debtor pertaining to a period prior to 05.10.2018, it is evident that there was no E-mail alleging delay after the said date.

7. The Corporate Debtor moved a Sur-rejoinder vide Diary No. 1029/2019 wherein the following has been contended:

7.1 It is an admitted position in the present manner that the person who had filed this application was not competent because such attorney was given much prior to the enactment of this Code. It is only after the filing of the reply that meeting of Board of Directors was held

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and thereby a board resolution was passed authorizing and ratifying the acts and deeds done before. By way of the rejoinder, the Applicant is attempting to ratify such a significant defect. Therefore, it is noted that the petition was filed in the capacity of power of attorney holder whereas the present rejoinder has been filed in the capacity of the authorized representative which is in accordance with the provisions of the Code.

7.2 The delay caused in replying to the demand notice received under Section 8 will not in any manner erase or wipe out the existence of disputes and facts on record. The Corporate Debtor relies relied on the judgment of the Hon'ble Supreme Court in *Surendra Trading Company Vs. Juggilal Kamlapat Jute Mills Compny Limited & Ors.* and judgment of Hon'ble NCLAT in *P.K. Ores Private Ltd. Vs. Tractors India Private Ltd.* to substantiate that the timelines prescribed under the IBC, 2016 are directory in nature and not mandatory.

7.3 With respect to the tender, the Corporate Debtor has submitted that the Applicant themselves provided their solvency certificates through their bankers to RSRDC and various other documents.

8. Thereafter, the Corporate Debtor also preferred an Additional Affidavit vide Diary No. 1905/2019 dated 13.09.2019 wherein it has been averred that work orders and supply orders were issued on 10.11.2017;

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subsequently amended on 22.12.2017 and 17.01.2018, revising the quantity and value of the contract. Moreover, the Corporate Debtor states that there is no relationship of creditor and debtor between the parties herein as the Applicant and Debtor together submitted the proposal to the bid document as a consortium with the Corporate Debtor as the lead member. A MOU was entered into between the parties herein specifying their respective rights and obligations as consortium members to submit bids. The bid was jointly submitted to RSWC for the purpose of undertaking the planning, designing and execution of modern warehousing facilities with pre-engineered structure at RaisinghNagar and Gharsana in Rajasthan. The said Affidavit was replied to by the Applicant vide Diary No. 2001/2019 dated 20.09.2019 mentioning that the third site of Prahaladpur was separate from the tender and was awarded by the Corporate Debtor to the Applicant for personal work.

9. The Corporate Debtor filed an application bearing number *IA(IBC)No.102/JPR/2022* seeking to place on record certain additional documents. The Copy of the order dated 11.08.2020 passed by the Hon'ble High Court of Rajasthan, Copy of Statement of Counter Claim filed by the RSWC, Compensation and termination notices and copy of email communication are annexed to prove that the RSWC had imposed fines on the Applicant, terminated the tender etc. The Applicant has raised

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objections to the filing of this Additional Affidavit vide Reply filed via Diary No. 3330/2022 dated 11.11.2022.

10. The Corporate Debtor preferred an Affidavit vide Diary No. 3388/2022 dated 17.11.2022 attaching the Statement of Claim filed before the Arbitration Tribunal. The Applicant filed reply to the affidavit stating that the said affidavit has been filed at a belated stage.

11. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply, rejoinder, written submissions and the documents enclosed with the application.

12. Before we delve in the matter at hand it is important to refer to the ingredients which have to be satisfied for the present matter to be admitted under Section 9 of the Code. In *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited*, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows: -

> *"34. 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 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 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?*

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If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

13. Therefore, to initiate CIRP in the present matter the conditions have to be satisfied. At this juncture it is also important to quote the judgment of the Hon'ble Supreme Court in *M/s S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Limited*, which reads as follows:

> *"32. ……… On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed."*

14. In view of provisions specified under the Code read with the judicial pronouncements laying down the essential ingredients of Section 9, the questions posed before us in the present matter are categorised as follows:

    A. Whether there exists an Operational Debt between the parties to the case which has become due and payable?

    B. Whether there exists a dispute between the parties prior to issuance of demand notice?

15. First, we examine the Work Orders which were issued by the Corporate Debtor to the Operational Creditor. It is an admitted fact that the Work

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Orders which first issued on 10.11.2017 by the Corporate Debtor were amended on 22.12.2017 and 17.01.2018 wherein the quantities and price of the materials was revised. The work orders issued at the first instance included the following clause:

> "***Penalty on delay in work***
> *The main intention of giving work to Interarch despite not being L1 is because of the commitment given about completing work in time with best quality. Therefore, we at S&G expect in words & spirit to receive quality & work completion as per time schedule mentioned in this work order.*
> *Incase if we do not receive the same than not only it will be a big professional disappointment but will also mean deduction of 15% from the value of remaining work from preceding stages on its time schedule vs progress basis.*
> *Clear work front (compacted & levelled ground) in & around the building will be provided at site for free movement of men & machinery during execution at site."*

The work order issued initially contain the said penalty clause. Along with the same, a time schedule is also mentioned specifying the date of completion of a particular stage. Thereafter, amended supply orders were issued wherein quantities and price of the materials to be supplied was revised. It is clear that in absence of any clause specifying the payment details and penalties, the clauses mentioned in the earlier order shall be read as applicable in the amended work orders as well.

16. It is apparent that the Corporate Debtor placed work orders with the Applicant. The Operational Creditor was required to complete certain work within the time stipulated in the work orders. Furthermore, it has been submitted by the Applicant that the Corporate Debtor was

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informed vide various e-mails that work has been completed. Owing to the definition of Operational Creditor, it is clear that the contention of the Corporate Debtor that Operational Creditor is not a creditor in relation to Raisinghnagar & Gharsana site as both the parties herein participated in the consortium is not tenable in law. The Applicant falls within the ambit of an Operational Creditor as the amount which is being sought by the Applicant is within the sphere of Operational Debt.

17. The Demand Notice issued under Section 8 of the Code on 04.01.2019 was replied to by the Corporate Debtor vide letter dated 02.03.2019 which was placed before us vide Additional Affidavit filed by the Applicant. It is ostensible that the said demand notice was not replied to by the Corporate Debtor within 10 days but it is noted that in absence of a reply to the demand notice bringing forth an existing dispute, the Adjudicating Authority has to ensure that no dispute existed between the parties from the documents perused before it. The Corporate Debtor has relied on certain e-mails to state that there existed a dispute between the parties to the case before the issuance of the demand notice. Certain correspondence was exchanged between the parties which are being referred to below to understand the answer to the question i.e. whether there was existence of dispute between the parties before issuance of Demand Notice under Section 8 of the Code.

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18. The Applicant on 22.12.2017 had preferred an e-mail to the Corporate Debtor wherein it stated the following:

> *"...Further to our discussion regarding completion dates, kindly consider the following revision:*
> *Completion of Building A at both location will be 15th March for building C at both location will be 20th march.*
> *Building B at both locations will be completed by 20th April..."*

The Corporate Debtor replied to the Applicant vide e-mail dated 22.12.2017 stating the following:

> *"...Revised delivery and erection schedule is accepted. Please note that this schedule has to be strictly followed as per the timeline suggested by you.*
> *Due to the delay from our work order dates, we have failed in our commitment to our client, which has already resulted in losses and embarrassment. I hope there will not be any further delay in promised schedule. We have to be in constant touch to ensure the delivery on time.*
> *Looking for your cooperation and timely completion of the project."*

19. Subsequent communications exchanged between the Applicant and the Corporate Debtor is being reiterated for reference as below:

From the Corporate Debtor to the Applicant on 22.01.2018-

> *"...Please ensure immediate dispatches as per approved quality standards for our warehousing projects.*
> *you are well aware that we have not done plant inspection prior to dispatches before also, for almost 20 buildings supplied to us by interarch, for various warehousing projects in Rajasthan, Including the latest one at prahladpura. The dispatches for Raisinghnagar & Gharsana were to be stated from 20th of January. It is quite strange & clearly shows "time buying tactics" on receiving mail for plant inspection on 20th January. If the material was to be dispatched on 20th of January & in a extra ordinary case if you wanted to receive a waiver for plant inspection than the mail for the same should have come to us latest by 17th January.*

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This is also to remind you that the date of receiving for cold form material as well as its rolling forming machine for purlins at Raisinghnagar & Gharsana site was 10th of January. Till date we have not received any of the committed material or machine at raisinghnagar & gharsana site. Please ensure to do the needful on most urgent basis. Incase if you see that you will not be able to comply with commitments done to us than please inform in writing so that we can make our own arrangements, Because our clients are Govt. departments & the work received by us is through tenders where more than 10 cr of rupees of ours are deposited as EMD & S.D. Incase of delay we will come under heavy penalty from the deposited amount..."

From the Operational Creditor to the Corporate Debtor on 07.02.2018-

"...Never it has happened on several sites completed before, that only one place is identified to unload material. First of all more than enough delay has been tolerated in deliveries of material. The inspection of complete material on site by principle client is already due. This is high time your company should understand the important of time line & milestone in a project. Now we will be left with no option other than implementing the LD clause & your delay tactics on site would the reason for it..."

From the Corporate Debtor to the Operational Creditor on 26.03.2018-

"...All the required support has been extended to you, the work that was suppose to be completed by your team in last fortnight is still due & we can not delay or stop our work to facilitate cover up for your delayed work. all this would have not happened inn case if you would have deployed resources on time & started work on time..."

From the Corporate Debtor to the Operational Creditor on 07.04.2018-

"...With reference to your mail dated 26th March, this is to bring to your notice that Gharsana Building A still not in position to be handed over as alignment, rack angle, etc. work is still going (today is 7th April)
Raisinghnagar Building A & C, even purlins are not fixed (all material is not available at site) and still have no date for the completion.
Canopy, girt etc. is still going at its own pace without any time schedule and completion date.

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We have had so many discussions and promises about the work completion and material delivery, but none have been adhered to.
Could you please look into it urgently..."

Reply from the Operational Creditor to the Corporate Debtor on 07.04.2018-

"... Refer your email and concerns, we regret the inconvenience caused.
We are discussing the handing over schedule for ongoing building A of Gharsana and building A&C of Raisinghnagar.
We will recert with status update ASAP..."

From the Corporate Debtor to the Operational Creditor on 18.04.2018 -

"...It is not possible to organise visits for partially completed work of sites.
Please deploy necessary resources to complete all erection work at Raisinghnagar & Gharsana..."

From the Operational Creditor to the Corporate Debtor on 03.07.2018-

"...Refer our discussion, we have taken us the activity of Painting of cold form sections on buildings at both Raisingnagar and Gharsana sites and this work will be completed by 15th of July.
We are also doing Roofing and wall structure alignment at site and the same will be completed simultaneously within a week after that..."

Again, from the Operational Creditor to the Corporate Debtor on 03.07.2018-

"...Regarding completion of work at Raisingnagar and Gharsana site, we wish to keep you informed that the execution of work has been delayed from our end as workers left the site without final completion and handing over the buildings.
As discussed we have mobilised the site again and will complete the balance painting of Cold from sections by 15th July and all other alighnment of roof and wall structure in one week thereafter.
In view of the above We request you to kindly help us by releasing some amount of payments for the same..."

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20. We see from the e-mails produced before us that even though the Corporate Debtor is time and again requesting the Applicant to adhere to time line, nowhere has it been revealed that after the completion of work, the Corporate Debtor will not be making payment towards the work done or there is defect in the work already undertaken by the Applicant. It seems that the Corporate Debtor has taken the defence of dispute just to avoid making payment against the work which was undertaken and completed by the Applicant. The conduct of the Corporate Debtor in first extending the time limit and thereafter not making the payment after the completion of the work seems flawed.

21. It is apparent that there was a penalty clause in the work orders which read that in case the Corporate Debtor does not receive the work done, it would amount to deduction of 15% from the value of remaining work from preceding stages on its time schedule vs. progress basis. Plain reading of the clause would construe that the Corporate Debtor can impose penalty from the date the work was scheduled to be completed as per the revised timeline till the date the work was actually completed. There appears to be no plausible explanation as to why the Corporate Debtor has not imposed penalty on the Applicant for alleged delay in work. There is not doubt that the Applicant had undertook on affidavit to complete the work on time but it is to be kept in mind that the Corporate Debtor had freely accepted the revised timeline again and again. The dispute as alleged by

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the Corporate Debtor is clearly a moonshine defence to avoid making payment against the work which has been availed and duly executed by the Applicant.

22. If there exists genuine dispute between the parties before the issuance of demand notice, the Application under Section 9 cannot be admitted but in the present case, the dispute has been referred to by the Corporate Debtor after the Applicant has sought for the payment for the work undertaken and thereby is completed. Moreover, it is observed that from the numerous e-mails exchanged between the parties to the case, nowhere the Corporate Debtor has raised the point that if the work will not be completed on time, no payment will be made. The conduct of the Corporate Debtor seems acquisitive as at first as the Corporate Debtor was time and again asking the Applicant to complete the work at the earliest and when the time came to honour its dues, the letters of the Applicant were ignored blatantly.

23. Some delay was caused by the Applicant in adhering to the timeline as is visible from the e-mails but it is also perceived that the Corporate Debtor had failed to provide compacted surface road to allow the Applicant proper movement at site for completion of the remaining work. The same is corroborated from the arbitration claim which was preferred by the Corporate Debtor against RSWC. Therefore, the second question which was before us is answered in negative, the defence of

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existence of dispute is clearly a moonshine defence to dodge the claim of the Applicant, which cannot be sustained.

24. The letter dated 20.12.2018 issued by the Corporate Debtor to the Applicant reads, *"This has reference to the above work orders, invoices and account statement for supply & erection of Pre-engineered Structure at Raisinghnagar & Gharsana for above-mentioned Supply & Erection Jobs. Our Team for installation of Roofing & wall cladding are under mobilization at site now and we will call you for a meeting preferable in fourth week of January 2019 and will reconcile the account statement for balance payment confirmation subsequently after our meeting at site."*. The contents of the letter nowhere reflect the shortcomings in the work undertaken by the Applicant as alleged by the Corporate Debtor.

25. It has very well been established that under Section 9 of the Code, to initiate CIRP proceedings, the Applicant is required to prove that the debt is due, it has not been paid and the debt is an undisputed debt. The dispute alleged by the Corporate Debtor cannot be a way to get out of making the payment for the work undertaken by the other party. Correspondence between the parties is general proof of dispute in matters pertaining to Section 9 of the Code, whereas in the present matter, the mails exchanged between the parties have been produced to

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create an excuse for not making the payment to the Applicant against the work availed thereto.

26. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP') but it is not obliged to do so. In the instant case, the Operational Creditor has not proposed that any person may be appointed as IRP. Hence, this bench can appoint the RP from the pool of RPs empanelled with the IBBI.

27. In view of this Ms. Pratibha Khandelwal, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-002/IP-N00031/2016-17/10068 (email: cspratibhak@gmail.com; mobile no.+91 9928325945), is hereby appointed as the IRP. The said IRP is directed to file her written consent to act as a resolution professional in Form-2 provided under Rule 9 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.

28. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.

29. Consequences of initiation of CIRP shall be inter-alia as follows:

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28.1 The IRP appointed by the Adjudicating Authority, Ms. Pratibha Khandelwal, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by her under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.

28.2 Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.

28.3 The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray her expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended,

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shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

28.4 In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

30. Accordingly, CP No. (IB)-48/9/JPR/2019 is admitted. In view of the foregoing pending applications, if any, shall stand disposed off.

31. The Registry is directed immediately to send a soft copy of the instant Application along with this order to the RP nominated herein on his e-mail id.

Sd/-

DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

Sd/-

PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER