IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT - II

C.P.(IB)-36(MB)/2022

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

In the matter of

Mauli Enterprises

Address for Registered Office: Flat No. 1105, Nakshatra Building, Vijay Park, Kasarwadawli, G.B. Road, Thane(W)-400615.

…Operational Creditor

Vs

Vijay Suraksha Realty LLP

Having Registered Office at: 205, Marine Chamber, 43 New Marine Line,601, Mumbai, 400020.

…Corporate Debtor

Order delivered on: 23.12.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Nausher Kohli, Counsel

For the Corporate Debtor : Mr. Shyam Kapadia, Counsel

ORDER

Per- Justice P.N. Deshmukh (Retd.), Member Judicial

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Mauli Enterprises a partnership firm (for brevity 'Operational Creditor') through its Partner, Mr. Jaywant Shesherao for initiating Insolvency Resolution Process (CIRP) against Vijay Suraksha Realty LLP (for brevity 'Corporate Debtor') for default in repaying Principal amount of **₹1,63,60,780** together with interest of **₹79,48,165**, aggregating to **₹2,43,08,945** as on 02.02.2018.

2. On reading the application and other material placed before this Bench, the Corporate Debtor was carrying out business of Construction. The Operational Creditor is providing all Civil Construction Services. Thane Municipal corporation (TMC) awarded the work of Holistic Meditation and Spiritual Center (HMSC), "***Special Structure***", Gr. +2 building, to Corporate Debtor in lieu of TDR against construction Cost, on public amenity plot owned by TMC at Kavesar, Thane. Further, the

Corporate Debtor contacted Mr. Jaywant Shesherao Nagargoje and father of Mr. Suresh Sunder Maske and offered to construct said project i.e. Holistic Meditation spiritual Centre building on lump-sum rate per square feet payable on actual built up area (Turnkey Contract) as particularly mentioned in terms and conditions of the said “Main Work Order”.

Furthermore, Mr. Jaywant Nagargoje and Mr. Sunder Maske (i.e. father of Suresh Maske) considering each other’s expertise decided to do the work of HMSC building jointly. Mr. Sunder Maske asked to Mr. Jaywant to make his son as a partner in the “Mauli Enterprises”. Accordingly, both have registered the said “Mauli Enterprises” as a Partnership Firm. Moreover, Petitioner submitted their quotation to Corporate Debtor, after negotiation, the Corporate Debtor’s contract department issued detail Work Order No. VSRLLP/HMC/ENGG/ML/05/2017-18, dated 14/04/2017 for total Work Order value Rs. 3,91,58,441/- (including taxes) in favour of Petitioner. The Corporate Debtor also issued another Work Order No. VSRLLP/HMC/ENGG/L/09/2017-18 dated 08-08-2017 for Departmental Labour for said project i.e. “Holistic Mediation Spiritual Center” for total Work Order value is Rs.2,32,932/-including taxes. The Corporate Debtor once again issued another Work Order No. VSRLLP/HMC/ENGG/MC/06/2017-18 dated 01/11/2017 for the same project i.e. “***Holistic Mediation Spiritual Center***” to carry out additional civil and plumbing work for total work order value is Rs. 13,87,906/- including taxes.

3. The Operational Creditor has carried out the entire Construction of HMSC building work as per the Work Orders issued by the Corporate Debtor from time to time and also had submitted necessary Tax Invoices with Corporate Debtor. The detail of paid and unpaid Tax Invoice/proforma including taxes are as follows:

1. *Mobilization advance invoice dated 01-07-2017 for sum of Rs. 41,62,791/- (Paid)*
2. *Tax Invoice No. RA-01 dated 11-07-2017 for sum of Rs. 99,90,694/- (Paid)*
3. *Tax Invoice No. RA-02 dated 04-09-2017 for sum of Rs. 24,98,756/- (Paid)*
4. *Tax Invoice No. RA-03 dated 11-10-2017 for sum of Rs. 90,32,170/- (Partly Paid)*
5. *Tax Invoice No. RA-04 dated 11-11-2017 for sum of Rs. 41,27,406/-*
6. *Tax Invoice No. RA-05 dated 12-12-2017 for sum of Rs. 68,51,952/-*
7. *Tax Invoice No. RA/6th /18.19 dated 04-06-2018 for sum of Rs. 44,85,405/-*
8. *Tax Invoice No. RA/7th/18.19 dated 02-08-2018 for sum of Rs. 32,36,569/-.*
9. *Performa Invoice No. RA-08 dated 01-10-2018 for sum of Rs. 14,04,941/-*
10. *Performa Invoice No. RA-09 & final dated 03-10-2018 for sum of Rs 21,86,953/-.*
11. *Release of retention money dated 03-04-2020 for sum of Rs. 18,58,856/-.*
12. *Tax Invoice No. RA I/03 dated 18-09-2017 for sum of Rs. 1,06,365/-*
13. *Tax Invoice No. RA/2nd/05/17.18 dated 06-11-2017 for sum of Rs. 85,550/-.*
14. *Tax invoice No. RA/1st/18.19 dated 04-06-2018 for sum of Rs. 10,09,332/-.*

The Corporate Debtor has paid sum part payment in respect of Tax invoice raised by Petitioner. The details of part payment by Corporate Debtor to Petitioner are as follows:

1. Payment through RTGS on 15-07-2017.
2. Payment by Cheque No. 010428 on 05-10-2017.
3. Payment by Cheque No. 584310 on 27-11-2017.
4. Payment by Cheque No. 010631 on 01-02-2018.

The Last payment made by Corporate Debtor was on 01-02-2018. Further on 10-04-2019, by email, the Corporate Debtor asked to Petitioner to provide running ledger account detail for last 3 financial years maintained by Petitioner. The Petitioner vide their email dated 13-04-2019, provided detail ledger Account for 3 financial years to the Corporate Debtor. Even after providing the detail ledger account to the Corporate Debtor, no reply received from the side of Corporate Debtor, for which the Petitioner again reminded him vide email dated 29-04-2019 and once again provided him detail ledger account for 3 financial year. The Corporate Debtor has received Occupation Certificate dated 29-10-2018 from Thane Municipal Corporation (TMC) in said Project.

4. The Petitioner has submitted that it shows that the Petitioner has carried out all construction work sincerely as per work order on time and Corporate Debtor never raised any objection regarding quality of work. Further as per the main work order, the Corporate Debtor has to clear the dues raised

on Tax invoices within the one month from date of issue of Tax invoices. Even though the Petitioner was doing their work sincerely and completed their work upto 90% surprisingly the Corporate Debtor by their email dated 11-06-2018 has issued Termination of Construction of HMSC building on Turnkey Basis to the Petitioner. It is shows that the Corporate Debtor who themselves has failed to clear the dues within a time and on other side they were blaming to petitioner for delay. Further submitted that the Corporate Debtor who himself came to Petitioner and asked to complete the balance 10% work and accordingly Corporate Debtor issued the Completion schedule of Balance work dated 12-06-2018 and took a signature of Mr. Maske on that schedule. The Corporate Debtor also promised to the Petitioner that they will pay all pending dues including final bill by single cheque on completion of 100% work. The Corporate Debtor who themselves not only failed to comply terms of work order but also failed to pay pending due of tax invoices raised as per work order. Even though the Petitioner handed over possession well before time on 06-09-2018. The Corporate debtor who himself orally inform Petitioner to stop the work until and unless the Corporate Debtor received Plinth Completion Certificate (PCC) from Thane Municipal Corporation (MC). The Corporate Debtor applied PCC on 11-05-2017 before TMC and TMC issued the said PCC on 10-07-2017 to the Corporate Debtor. It was the Corporate Debtor who asked the Petitioner to stop the Construction work.

As per Agreement between Corporate Debtor and TMC dated 07-02-2018 at clause No.4 of said agreement the construction should be completed within 6 months from the date of signing of this Agreement and if we added the 2 months delay where Corporate Debtor waited to get PCC then the Completion date fall on 07-10-2018 and Petitioner handed over the possession on 06-09-2018 so Petitioner handed over well within time.

5. Further, this Operational Creditor has issued Section 8 notice (Form 3) through speed post on 27.08.2021. The Corporate Debtor also replied to the said demand notice on 03.09.2021 and has also filed a detailed reply to the main petition and has denied to any amount as claimed in the notice and/or even otherwise is due and payable to operational creditor. The Corporate Debtor mentioned in the reply to the notice your client has falsely demanded from our clients a sum of Rs. 2,43,08,945/- comprising of a principle claim of Rs. 1,63,60,780/- and an interest amount of Rs. 79,48,165/- within a period of 10 days from receipt of the Notice under Reply, failing which, your client has stated that it would initiate Corporate Insolvency Resolution Process (hereinafter referred to as **"CIRP"**) against our clients. Further, by the Notice under Reply, your client has also called upon our clients to intimate to them of the pendency of any Suit or Arbitration Proceedings filed prior to receipt of the Notice under Reply in relation to the dispute

pertaining to the existence or amount of the aforesaid claim. In relation to this, the Corporate Debtor states that in or around November, 2019 they became suspicious and became aware of the fraud played upon by them by their ex-technical director, Srihari in collusion with your client and various other contractors. The services of Srihari were already terminated by this time. The total loss caused by Srihari to our clients is to the tune of approximately Rs. 6,50,00,000/- however, as far as your client is concerned, your client, in collusion with Srihari, caused loss to the tune of Rs. 2,03,86,510/- to our clients by committing the various fraudulent acts as stated hereinabove. On 3rd December 2019, the Corporate Debtor has filed a criminal complaint with the Economic Offences Wing on account of the fraud played upon them. The Economic Offences Wing has registered a FIR against Srihari and the investigation in the matter is ongoing. Moreover, the Corporate Debtor has further stated that in addition to the above, towards recovery of the aforesaid amount of Rs. 2,03,86,510/- which is the loss occurred to the Corporate Debtor on account of the defective work undertaken, they filed the aforesaid Suit being ***Special Civil Suit No. 275 of 2020*** before the Civil Judge Senior Division, Thane which is pending adjudication.

The Corporate Debtor in its affidavit to reply has taken the defense that there is no debt due and payable by the respondent to the Petitioner. Further submitted that there is a pre-existing dispute between the parties with the respect to the claim which forms the subject matter of the present proceedings. It is also an admitted fact that the said suit was filed on 18th September, 2020 which is much prior to the issuance of the Demand Notice under Section 8 of the said Code and even the claims made by the Petitioner are barred by the law of limitation.

6. In response to this, the Operational Creditor has also filed rejoinder to reply of the Corporate Debtor and denied all the contentions raised in reply and further submitted that the Corporate Debtor in order to create an impression about the genuine dispute between the Petitioner and the Corporate Debtor has filed a Suit before the Hon'ble City Civil Court at Thane, seeking some relief as prayed therein. Further submitted that from the reading of the Plaint it is the case of the Corporate Debtor that the claim of the Corporate Debtor in the said Suit is in respect of standard rates of TMC and the rate at which work was allotted to the Petitioner. However, the Corporate Debtor had not served copy of the said Plaint upon the Petitioner nor moved the Hon'ble Court seeking some relief. The Petitioner has further stated that as per the website of the Hon'ble City Civil Court Thane, the Corporate Debtor lodged the suit on 18th September 2020, but till date, the Corporate Debtor has not served the copy of the Plaint upon the Petitioner and status is showing 'awaiting notice'. The said suit is filed by the Corporate Debtor only for the purpose of showing pre-existing dispute, so in the event of the Petitioner's action under IB Code, the

Corporate Debtor can take shelter under the said suit to object to the maintainability of IB Code Application.

Moreover, after the Petitioner's email dated 29th March 2019 demanding a sum of Rs. 1,45,04,312/- and email dated 29th April, 2019 demanding a sum of Rs.1,63,60,873/-, the Corporate Debtor has filed the above-mentioned suit, which clearly shows that the Suit was filed to create dispute to avoid the IB Code proceedings. Further submitted that it is clear that the Suit was filed by the Corporate Debtor to create artificial dispute to avoid the payment to the Petitioner. The Corporate Debtor has also filed their Audited Balance Sheet as on 31st March, 2020 and in the said Balance Sheet there is no claim against the Petitioner and therefore, it is clear that a Suit is false and cannot be considered as pre-existing liability while deciding the present Petition.

7. Heard the submissions made by the Learned Counsel for both the parties and perused the material on record, in relation to the issue of pre-existing dispute, we are of the view that ***Special Civil Suit No. 275 of 2020*** before the Civil Judge Senior Division, Thane is pending adjudication. The said suit was filed on 18th September, 2020 which is much prior to the issuance of the Demand Notice dated 26.08.2021, under Section 8 of the said Code. Therefore, the dispute was raised prior to the issuance of Demand Notice and the nature of dispute raised by the Corporate Debtor seems to be genuine. This Bench hereby

holds that dispute is in existence between them as on the date of receipt of Section 8 notice by the Corporate Debtor, therefore we hereby dismiss this Company Petition.

Sd/-	Sd/-
SHYAM BABU GAUTAM	**JUSTICE P.N. DESHMUKH**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**

Arpan, LRA

23.12.2022