



S.No.6

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
22-02-2024 AT 10:30 AM**

CP(IB) No. 361/9/HDB/2022

And

IA (IBC) 402/2023 in CP(IB) No. 361/9/HDB/2022

u/s. 9 of IBC, 2016

IN THE MATTER OF:

TVN Enterprises

...Operational Creditor

VS

Servomax Limited

...Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

O R D E R

CP(IB) No. 361/9/HDB/2022

Orders pronounced. In the result, **this Company Petition is allowed**. CIRP is initiated against the CD and Moratorium is imposed, as per the terms of the order. IRP, named is hereby appointed.

IA (IBC) 402/2023

in the light of the orders passed in **company petition this IA is dismissed. No costs.**

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – I**

CP (IB) No. 361/09/HDB/2022

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

Between:

M/s. TVN Enterprises

Represented by its Partner

Mr. Tadapalli Venkata Ramesh

3-47-189, Plot No. 158, Second Floor,

Mahalakshmi Nivas, Old Vasavi Nagar Colony,

Karkhana, Secunderabad- 500015

**... Petitioner
Operational Creditor**

VERSUS

M/s.Servomax Limited

Having its registered office situated at

Plot No. 1269, 4th Floor, Road No.36,

Jubilee Hills, Hyderabad – 500033.

**... Respondent
Corporate Debtor**

Date of Order: 22.02.2024



CORAM:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
HON'BLE MEMBER (JUDICIAL)**

**SHRI CHARAN SINGH
HON'BLE MEMBER (TECHNICAL)**

PARTIES/COUNSELS APPEARANCE:-

For Petitioner : Shri Himangini Sanghi & Yogesh
Agarwal, Counsels.

For Respondent : Shri VK Sajith & V Ravi Kumar, Counsel

PER: BENCH

ORDER

1. Under consideration before us is the petition filed by the Operational Creditor herein stating that M/s. Servomax Limited/ Corporate Debtor committed default of Rs.1,00,49,270/-. Hence this petition *filed* under Section 9 of Insolvency and Bankruptcy Code (hereinafter to be referred as "Code"), read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, *seeking admission of the Petition, commencement of*



Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

2. The averments put forth by the Petitioner are:

2.1 It is averred that the Operational Creditor is a partnership firm registered as MSME commenced from 09.05.2016 with an objective to supply CRGO Laminations, DPC Copper Strip, DPC Copper wire, Pre-Comp Press Boards, S.E. Copper Wire, KV/630 AMP L.V, Kraft Paper on multiple occasions.

2.2 It is averred that the Corporate Debtor have issued multiple purchase orders and subsequently, issued multiple invoices for supply of CRGO Laminations, DPC Copper Strip, DPC Copper wire, Pre-Comp Press Boards, S.E. Copper wire, KV/250 AMP L.V, Kraft Paper. Copies of Purchase orders and invoices are filed as **Annexure C and D.**



2.3 It is averred that as the Corporate Debtor and the Operational Creditor had a long-standing business relationship, payments were made in installments. In due course, the debt fell due and the total outstanding amount due Rs.1,00,49,270/-. The Corporate Debtor issued various cheques in the month of August, 2022, totalling to Rs.39,93,625/- to partially clear the pending dues liable to be paid to the operational creditor. Copies of the cheques have been cumulatively annexed as **Annexure-E**.

2.4 It is averred that the Operational Creditor sent several messages through Whatsapp to the Corporate Debtor requesting for release of payment. However, the Corporate Debtor has not responded to the same. It is stated that the Corporate Debtor after multiple requests by Operational Creditor has issued 3 cheques. On presenting the cheque, all the Cheques were returned stating that the Account does not have sufficient funds to honour the Cheque. Copies of the



Cheques along with memo of returned is files as **Annexure-F.**

2.5 It is averred that as the payments have not been made by the Corporate Debtor the Operational Creditor was constrained to issue Form 3 along with demand notice for payment of the outstanding amount of Rs.1,00,49,270/- plus interest @ 18% per annum. Copy of Form 3 along with Form 4 is filed as **Annexure-G** and **Annexure-H.** Copy of the acknowledgement card is filed as **Annexure-I.** The last payment received by the Corporate Debtor for the invoices received was on 15.12.2020.

3. The Corporate Debtor/Respondent filed counter, inter-alia stating that:

3.1 It is stated that the Petitioner/Operational Creditor is one of the suppliers for the Corporate Debtor out of a long-standing business relationship, and the Corporate Debtor is a reputed transformer manufacturing Business entity the Operational Creditor requested the Corporate Debtor to give



orders for the supply of Copper & Core bushes so that the Petitioner can build its credentials as suppliers for an electrical equipment manufacturer major. The products which is supplied by the Operational Creditor are crucial components in the manufacturing of electrical equipment, and any defect in the components can affect human safety.

3.2 It is stated that some of the customers have initiated legal actions against the Corporate Debtor for the supply of D-Graded materials to them which affected their business. The Corporate Debtor demanded from Operational Creditor to replace the supply of cheap substandard materials to them. In turn, the Operational Creditor assured this Corporate Debtor that they will replace the earlier stock or make good of the loss incurred to the Corporate Debtor, in one such incident the Operational Creditor has compensated Rs.30,00,000/- (Rupees Thirty Lakhs only) to this Corporate Debtor. The Authorized Signatory of Corporate Debtor considering the



personal relationship has decided not to terminate the supplies and asked them to compensate at least the production cost of those transformers which works out to be Rs.40 Lakhs and they in turn paid the said amount to the Corporate Debtor, which they are claiming as Loan amount in COS.No.01 of 2023.

3.3 It is stated that on page No.122 of the Application with respect to the response given by Corporate Debtor in NESL that, *“Debt exists but outstanding amount wrong, Pre-Existing Dispute, others amount has been withheld due to supply of sub-standard materials, the demand claimed is incorrect and the customers have claimed damages due to delivery of defective products. One such customer has initiated Legal Proceedings because of the supply of sub-standard goods”*. As per the records of the Information Utility which accompanies the application the Date of Default is shown as 14.03.2020 wherein in the Application the date of default is marked as 15.12.2020.



3.4 It is stated that on 11.09.2022, the Operational Creditor choose to record the financial information in Form-C, and the type of debt is referred to as Operational Debt on 29.09.2022 this Corporate Debtor raised a dispute on the debt claimed by the Operational Creditor and thereafter suppressing the fact of raising a dispute the Operational Creditor has issued notice dated 28.09.2022 wherein the same is booked on 30.09.2022 and received by the Corporate Debtor on 03.10.2022 which is evident in Page No.108 & 109 of the Petition. The Operational Creditor choose to proceed with the issuance of notice to initiate CIRP against the Corporate Debtor even after a dispute is recorded with details of the dispute in the Information Utility.

3.5 It is stated that the Operational Creditor filed a Commercial Original Suit No.01 of 2023 before the Commercial Courts, Hyderabad seeking recovery of Rs.2,31,52,631/- and claims Interest @24% p.a. before the Hon'ble Commercial Courts. The



Operational Creditor also has filed IA No.04 of 2023 seeking attachment of the property of the Corporate Debtor in an attempt to secure his debt, and arm-twist the Corporate Debtor to meet his illegal demands which were heard on 23.01.2023. The suit filed is also seeking relief for recovery of Rs.40 Lakhs which the operational creditor claims as a Loan given to Corporate Debtor, no such details are provided in the company petition filed by him. It is a fact that the Operational Creditor has agreed to settle the matter for Rs.69 Lakhs as a full and final settlement towards the entire outstanding payable to the Operational Creditor. However, the Operational Creditor choose to add up the imaginary figure of Rs.1,00,49,000/- to achieve the statutory threshold. It is pathetic that Operational Creditor does not have any idea of what amount is due and payable to them but, the Corporate Debtor is clear as per the understanding Rs.69 Lakhs is due and payable and they have issued cheques to the Operational Creditor for that amount. However, after issuing the cheques the Operational Creditor



demanded another Rs.30 Lakhs from Corporate Debtor, and the same was declined and not paid. It is a fact that one of the customers of Corporate Debtor has threatened Legal Action and taken away goods worth Rs.45 Lakhs from the premises of the Corporate Debtor against which a complaint has been lodged in the concerned police station and this fact has been indicated before the Operational Creditor filed information on NESL.

3.6 It is stated that this application is not maintainable and the same is liable to be rejected. For Rejecting a petition under section 9(5)(2) of IBC:

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2) by an order- if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility;
or



(e) any disciplinary proceeding is pending against professional any proposed resolution

3.7 It is stated that a suit is pending before the Commercial Court relating to existing dispute on the amount of Debt. That the Dispute of debt is raised before the issuance of the Demand Notice at NESL. The existence of the Debt has been disputed. The Suit filed by the Operational Creditor is for the recovery of Money and the application filed here is also not for CIRP with the sole intention of terrorizing the Corporate Debtor and its management with a possibility of initiation of CIRP on the admission of Section 9 petition. The Operational Creditor is not serious about this petition as the initiation of CIRP and the moratorium will stop the continuation of Civil Suit proceedings pending before the commercial court as COS No.01 of 2023. The Act of the Corporate Debtor amounts to evidenced Malicious initiation of present proceedings under section 65 of IBC, 2016 wherein the present proceedings were initiated other than the resolution or liquidation of



Corporate Debtor. The Section 65 of IBC, 2016 read as follows:

Section 65: Fraudulent or malicious initiation of proceedings.

“(1) If any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) If any person initiates the pre-packaged insolvency resolution process-

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.”

3.8 It is stated that the date of default mentioned is 14.03.2020 and the date of default mentioned in the company petition in Form 5 is 15.12.2020 wherein the date of default mentioned in the above recited is



13.02.2020. Hence the operational creditor itself is not clear about the date of default. It is pertinent to mention here that, in the Memo dated 20.11.2022 filed by the Operational Creditor, it is recited in para no.4 that there are pre-existing disputes in between the parties. Even assuming that is a clerical error in para no.5 "pre-existing dispute wherein section 10A of IBC does not apply".

3.9 It is stated that as per the Demand notice served on the Corporate Debtor which was received on 03.10.2022, there is no date of default mentioned by the Operational Creditor wherein the same is the mandatory content under section 8 of the Insolvency and Bankruptcy Code, 2016. It is very pertinent to mention here that, since the invoices attached to the petition are covered under section 10A of IBC, 2016. As per the working attached by the Operational Creditor alleged that the invoices were defaulted by this corporate debtor from 13.02.2020 to 16.09.2020. As per Section 10A of the Insolvency and Bankruptcy



Code, 2016 no application for initiation of the corporate insolvency resolution process of a corporate debtor shall be filed for any defaults arising on or after 25.03.2020 for a period of six months or such further period, not exceeding one year from such date. In the present case, the date of default mentioned in the petition is 15.12.2020. Hence as per the above provision, the Operational Creditor can claim the default amounts before 25.03.2020 only. Hence it is evident as per the working attached by the operational creditor in the captioned Company Petition that, they can claim the amount from 13.02.2020 13.03.2020 wherein the following are the invoices as per the working in the table narrated herein below:

Sl.No.	Date of Invoice	Invoice No.	Amount
1.	13.02.2020	2019-20/344	2,86,994.00
2.	28.02.2020	2019-20/366	7,86,964.00
3.	10.03.2020	2019-20/377	3,91,272.00
4.	11.03.2020	2019-20/380	6,78,135.00
5.	12.03.2020	2019-20/382	1,95,823.00
6.	12.03.2020	2019-20/383	1,58,342.00
7.	13.03.2020	2019-20/384	6,53,312.00
	Total		31,50,842.00



3.10 It is stated that the right or entitlement of the operational creditor to apply to this Tribunal as per the new amendment is that for the default of Rs.31,50,842/- (Rupees Thirty-One Lakhs Fifty Thousand Eight Hundred and Forty-Two Only) wherein the Operational Creditor claiming an amount of Rs.1,00,49,270/- is only to cross achieve the statutory threshold the threshold for applying to this Tribunal under Section 4 of IBC, 2016 wherein the minimum amount of Default has changed from Rs.1 Lakh to Rs.1 Crore and hence with that context the present petition may be dismissed as the quantum of debt is less than the statutory threshold under Section 4 of the Insolvency and Bankruptcy Code, 2016.

3.11 It is stated that the application may be dismissed as the same is evident with a genuine existence of a dispute and recorded in the Information Utility and substantiated by filing of COS.No.01 of 2023 and by filing IA.No.04 of 2023 for the attachment of



Corporate Debtor property before the Commercial Court.

4. The Counsel for the Petitioner/Operational Creditor filed written submissions, reiterating the contents of the Petition, apart from that,

4.1. It is stated that the payment of the invoice from 13.02.2020 the Corporate Debtor started making default in payment. It is not disputed that an oral contract exists between the Corporate Debtor and Operational Creditor. The Credit period for an invoice is 30 days and therefore, the date of default falls on 14.03.2020 which is before the suspension period as per section 10A of IBC. Therefore, it is stated that present application is not covered by the provisions of Section 10A of the IBC.

4.2. It is stated that the Operational Creditor was raised and communicated for first time regarding the dispute as a reply to the NeSL, which the Corporate Debtor in well-known that the NeSL is not authorized to



verify the dispute but will reflect the reply as it is guided by the Corporate Debtor. Hence, the dispute raised in reply to NeSL cannot be considered as pre-existing dispute. It is clear that the dispute is an afterthought and the defence of pre-existing dispute is a moonshine defense.

4.3.It is stated that relaying upon the landmark Judgement by the Hon'ble Supreme Court in the **Mobilox innovations Private Limited vs. Kirusa Software Private Limited** it is clear that the objective of the code is not recovery of money but to bring out of insolvency and maximization of value of assets of the Corporate Debtor.

4.4.It is stated that the Tribunal is not a recovery forum and the limitation for recovery was getting exhausted, in the year 2023 the Operational Creditor decided to file a recovery suit before the Commercial Court in COS.No.01 of 2023 where as it is clear that the suit is filed by the Operational Creditor for the recovery of the amount due by the Corporate Debtor and the



present application is filed in the year 2022 for initiation of CIRP. It is stated that as the commercial suit is filed by the Operational Creditor itself is cannot be considered as a pre-existing dispute.

5. In the light of the contest as aforementioned the points that emerge for our consideration are:

POINTS:

- (1) *Whether an operational debt of a sum exceeding rupees one crore due and payable by the respondent to the petitioner exists as on the date of filing of this petition? If so, whether the respondent defaulted in repayment of the same?*
- (2) *Whether there is a pre-existing dispute as to the subject debt between the parties? If so, whether the petition is maintainable?*
- (3) *Whether the initiation of Corporation Insolvency Resolution Process (CIRP) against the respondent is barred under section 10A of the Insolvency & Bankruptcy Code, 2016? If so, whether the Company Petition is maintainable?*

6. We have heard Ms. Himangini Sanghi and Shri Yogesh Agarwal learned Counsels for the petitioner/



Operational Creditor and Shri VK Sajith and Shri V. Ravi Kumar, learned Counsels for the respondent/ Corporate Debtor. Perused the record and the case laws presented before us.

POINT (1) :

Whether an operational debt of a sum exceeding rupees one crore due and payable by the respondent to the petitioner exists as on the date of filing of this petition? If so, whether the respondent defaulted in repayment of the same?

7. Ms. Himangini Sanghi, learned counsel for the Operational Creditor had vehemently contended that, the respondent had issued multiple Purchase Orders, followed by Invoices for supply of CRGO Laminations, DPC Copper Strip, DPC Copper wire, etc. and on account of longstanding business relationship between the parties, payments in respect of the above Invoices were received in instalments. Ld. Counsel further submits that, as on the date of filing of the present application, the Corporate Debtor had committed default in repayment of



Rs.1,00,49,270/- and in partial discharge of the debt, the respondent in the month of August 2022 issued cheques, in all, for a sum of Rs.39,93,625/-, which are fully described in Annexure A5 (pages 96-101 of the Company Petition). However, the said cheques, when presented have been dishonoured due to *insufficiency* of funds in the account of the respondent. Thus, according to the learned counsel not only the existence of operational debt of a sum over rupees One Crore, due and payable by the respondent to the petitioner, but also its default by the respondent stands admitted.

8. Shri V.K. Sajith, learned counsel for the respondent while admitting the longstanding business relationship between the petitioner and the respondent, has denied existence of any operational debt as claimed by the petitioner and contended that the material supplied by the petitioner being of inferior quality, had affected the business of customers of the respondent and when the same was brought to the notice of the petitioner, the petitioner had compensated the respondent paying a sum of Rs.30 lacs, and when the respondent intended to



terminate supply contract of the petitioner, the respondent asked the petitioner to compensate the respondent at least by paying production cost of the transformers whereupon the parties have worked out that the sum of at Rs.40 lacs and the same has been paid by the petitioner to the respondent, however, by claiming that the said amount as ‘debt’ and further by adding ‘interest’ to the same, which was neither agreed between the parties nor formed part of the conditions of Purchase Order/ Invoices, the petitioner inflated the claim so as to bring the same within the pecuniary jurisdiction of this Tribunal. As such the plea of existence of an operational debt of any sum, much less a sum of over Rs.one crore due and payable by the respondent to the petitioner, besides its default, is false and baseless.

9. Ld. Counsel further submits that even assuming that the amount as claimed by the petitioner, is due and payable by the respondent yet in light of clear and categorical mention of the date of default as 15.12.2020, the so-called operational debt, is not recoverable as the same is barred by section 10A of the I&B Code, besides



as on 15.12.2020 the sum claimed as due also fails to meet the threshold limit as envisaged under section 4 of the I&B Code. As such on this ground alone the Company Petition is liable to be dismissed.

10. Having heard the learned counsels for both the sides and on perusal of the Company Petition it is clear that in the company petition, as well as in the notice of demand the petitioner had mentioned the date of default as 15.12.2020. However, in the Certificate of Record of Financial Information – Form C dated 11.09.2022, issued by National E-Governance Services Limited (NeSL), the date of default has been mentioned as 14.03.2020. It is pertinent to state herein, the “date of default” assumes importance when limitation in filing the Company Petition is raised. Insofar as the case on hand is concerned, even if we take any of the “dates of default” mentioned in this case, the Company Petition as filed is well within the prescribed period of limitation.

11. However, in light of the plea by the Corporate Debtor that the ‘dates of default’ as mentioned assumed



importance, since the Corporate Debtor is contending that the present petition will attract the bar envisaged under section 10A of the I&B Code, 2016, we wish to discuss the aspect as well.

12. In this context, learned counsel for the Corporate Debtor submits that out of total 28 Invoices enclosed to the petition, the supplies under 21 Invoices amounting to Rs.72,33,920.00 have been made prior to the introduction of section 10A in I&B Code, and the rest of the Invoices relate to the period between 29.05.2020 and 16.09.2020. Therefore, since section 10A of the I&B Code has come into force effective from 25.03.2020, all the invoices post 25.03.2020 are non-est, in the eye of law, as such the claim amount, if any, can only be in respect of the invoices which are prior to 25.03.2020, and when the said invoices are taken into consideration the same does not exceed Rs.72,33,920/- and in that view of the matter, the petition failed to meet the threshold limit of Rs. One crore, in terms of section 4 of the I&B Code, as such the petition is liable to be dismissed.



13. Since we have separately framed a point of the applicability or otherwise of Section 10A IBC, to the facts of this case, we intend to deal with the said plea under Point No.3. We therefore will confine our discussion on the threshold limit of this claim which was filed on 11.11.2022.

Here we usefully refer to section 4 of I&B Code, 2016 which is as below.

“4. Application of this Part. – (1) This Part shall apply to matters relating to the 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.

Provided further that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the pre-packaged insolvency resolution process of corporate debtors under Chapter II-A.”

Thus, it is quite clear from the above provision that, as on the date of filing this petition. i.e. 11.11.2022, the operational debt claimed as due and defaulted shall be rupees one crore or above. The sum so arrived at by the petitioner/ Operational Creditor which shall exceed



rupees one crore, can also include the interest even for the period when section 10A of the I&B Code was in force, for the purpose of threshold limit, of this Tribunal.

14. In this regard reliance can be placed on the ruling of the Hon'ble NCLAT in, *Beetel Teletech Ltd. v. Arcelia IT Services Private Limited*, wherein it was held that:

“the interest accrued during the suspension period under Section 10A of IBC can be claimed under Section 9 of the IBC and can be computed to trigger the threshold under the IBC”.

15. Moreover, it is pertinent to note herein that, according to the petitioner the respondent on 12.08.2022, 08.08.2022 and 10.08.2022 issued *cheques* in partial discharge of the subject operational debt. Interestingly, all these cheques are dated when the section 10A of the I&B Code, is not *in force*. Section 10A of the I&B Code was in operation till 25.03.2021. The statement of account of the respondent for the year 01.04.2021 to 31.03.2022 and the letter of confirmation of debt dated 05.01.2022 by the respondent also pertain to the period when section 10A of IBC is not in suspension. So much



so, it is quite clear that the respondent had acknowledged the debt post *non-operation* of section 10A of I&B Code, 2016. Thus, the enforceability of debt which was under mere suspension only till 25.03.2021, got revived by virtue of the ‘acknowledgement’ by the Corporate Debtor.

16. In so far as the plea of the respondent that, out of total 28 Invoices enclosed to the application only 21 Invoices and the supplies under the said Invoices amounting to rupees 72,33,920.00 have been made *prior* to the introduction of section 10A in IB Code, and the rest of the Invoices being of the period between 29.05.2020 and 16.09.2020, when Section 10A IBC, has come in to force effective from 23.03.2020, are *non-est*, in the eyes of law is concerned, the same is *without force*, in as much as the aim and objective of Section 10A of the IBC was to protect a corporate debtor from the filing of any insolvency application against it for any default committed during the period when COVID-19 pandemic was prevailing and not eternally. The present claim is made not only on the basis of Invoices which are *prior to*



and post 23.03.2020, but also on the basis of the statement of account of the respondent for the year 01.04.2021 to 31.03.2022. Besides, the letter of confirmation of debt dated 05.01.2022 by the respondent confirming that a sum of Rs100,49,270.00 was due as on 5/06/2022, which certainly pertain to the period when section 10A of IBC is not in suspension. Therefore, when it is as clear as crystal that the respondent had acknowledged the debt post *non-operation* of section 10A of IBC, the invoices whether are of prior to or post 25.03.2020 are insignificant.

17. Hence, the plea that the present company petition does not meet the threshold limit under section 4 of IB Code, cannot sustain.

18. Having thus held, since it is not the case of the respondent that it had paid the amount acknowledged under the letter of confirmation of debt dated 06.01.2021, supra, the default in repayment of the subject operational debt is as clear as crystal.



Point is answered accordingly.

POINT (2) :

Whether there is a pre-existing dispute as to the subject debt between the parties? If so, whether the petition is maintainable?

19. In terms of *subsection 2 (a) of Section 8* of IB Code, the corporate debtor shall, within a period of ten days of the *receipt of the demand notice or copy of the invoice* mentioned in sub-section (1) bring to the notice of the operational creditor.

Section 8(2)(a):

“existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.”

Admittedly, the respondent corporate debtor herein failed to send any reply to the demand notice issued by the petitioner/operational creditor under section 8 (1) of IB Code. However as held by Hon’ble NCLT in, Greymatter



Entertainment (P) Ltd. v. Pro Sportify (P) Ltd., 2023 SCC
OnLine NCLAT 82, *held that,*

“mere fact that Reply to notice under Section 8(1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application.”

The respondent/corporate debtor herein, therefore, is *not precluded* under law from bringing the same to the notice of the operational creditor, through the counter filed in a petition under section 9 of IB Code.

20. It is therefore necessary to find the respondent’s plea of existence of a *pre-existing dispute* raised for the first time in its counter, satisfies *the criteria* laid down by Hon’ble Supreme Court of India in *Mobilox Innovations Private Limited Versus Kirusa Software Private Limited, in Civil Appeal No. 9405 of 2017*, wherein on *pre-existing* dispute, it was held as follows:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if



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

21. The plea of pre-existing dispute is strongly resisted by the Ld. Counsel for the petitioner contending, *inter alia*, that the petitioner has not placed any material in support of this plea and the so called dispute has been raised for the first time before NeSL, and NeSL only recorded what has been purportedly stated by the respondent long after receipt of the demand notice, and the said recording does not tantamount to either raising a dispute as contained in section 8 of IB Code, or can be termed/treated as pre-existing dispute.



22. Having heard the Ld. Counsels and on perusal of the subject invoices it is to be stated that, the Invoices clearly provide for payment within 30 days from the date of Invoice and further that quality complaints if any shall be raised within 30 days of receipt of goods. According to the Ld. Counsels the customers of the respondent to whom the goods in turn were purportedly supplied have raised quality complaints. However, no record is placed in this regard by the respondent. Admittedly goods were not returned to the Petitioner.

23. Here we usefully refer to order dated 16.02.2024 in CP (IB) No.65/9/ HDB/2022, in M/s Lumi Vietnam Joint Stock Company Vs. M/s Hogar Controls India Pvt Ltd., wherein it was held that:

“25. Hon’ble NCLAT, in re, Deepak Modi, supra, wherein also the Corporate Debtor/Appellant had raised the defence of ‘pre-existing disputes’ on the ground that the product supplied was defective, held as below;

“13. [...] It is true that under the provisions of Code if Adjudicating Authority is satisfied with pre-existing dispute at the time of entertaining an application filed under Section 9 of the Code there is no reason to initiate the same or admit the application. However, law is settled on the point that there must be pure pre-existing dispute. Meaning thereby that genuine pre-existing dispute must exist in rejecting an application Section 9 of the code. In the present case it is



reflected from inspection report of SGB Infra Ltd. dated 16.12.2019 which is at page 147 that the Corporate Debtor was asked by the SGB Infra Ltd. to remove the flooring. This fact is itself enough to draw an inference that the Corporate Debtor had accepted the delivery of granite slabs made by the Operational Creditor without raising any dispute or objection. Otherwise the Corporation Debtor would have rejected the entire materials at the time of unloading of the same”.

In the case on hand also the corporate debtor accepted the ‘product’ without any kind of ‘**demur**’ and also **utilised** the same, and also part payment. Therefore, the above ruling on facts is applicable to the case on hand with all its force.”

24. The terms of the purchase order or the Invoices does say that, that the goods agreed to be supplied by the Petitioner are meant for the use of customers of the respondent, besides that the Petitioner is liable for quality complaints if any even from the customers of the respondent, in respect of the goods supplied. In the absences of any such contract/ agreement between the petitioner and the respondent the “pre-existing dispute” envisaged under section 8 of the IB Code, which shall be between the operational creditor and corporate debtor, cannot be extended to even third parties.



25. Moreover, it is not the case of the respondent that, before raising the same before NeSL, the respondent had brought the same to the notice of the operational creditor. No record is placed before us to show that the alleged notice of dispute has been received by the operational creditor before the respondent raised the same with NeSL. In terms of section 8 of the I&B Code, the notice of dispute must be received by the Operational Creditor before the service of demand notice on the Corporate Debtor.

26. So much so, in the light of our discussion as above, we hereby, hold that there is a plausible contention which requires further investigation and that the argument of existence of a pre-existing dispute claimed by the respondent is a patently feeble legal argument unsupported by any evidence. Hence, we hereby reject the submission of the Ld. Counsel for the respondent that a *pre-existing* dispute between the parties herein relating to the *quality of goods* supplied by the petitioner to the respondent exists, by the date of receipt of the demand notice by the respondent.



Point is answered accordingly.

POINT (3) :

Whether the initiation of Corporation Insolvency Resolution Process (CIRP) against the respondent is barred under section 10A of the Insolvency & Bankruptcy Code, 2016? If so, whether the Company Petition is maintainable?

27. Section 10A of the I&B Code, which has been inserted vide SO No.2365(E) dated 24.09.2020, Government of India, states that;

“Section 10A.

Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified² in this behalf:

*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said **default occurring during the said period.***

Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

*(*The prohibited period was extended to 25.03.2021 vide MCA Notifications)*

Insofar as the present petition is concerned, even though the present petition was filed on 11/11/2022, the *date of*



default as per the petition and the demand notice is 15.12.2020 whereas as per the record of default issued by NeSL, the date of default was shown as 14/03/2020. Therefore, if the date of default as mentioned in the Petition is taken into consideration, the same *squarely* falls within the time where the operation of Sections 7, 9 and 10 of the I&B Code, has been suspended, in terms of section 10A of I&B Code. However, if the date of default as mentioned in the Record of Default, i.e. 14.03.2020 issued by NeSL is to be considered, section 10A of the I&B Code has no application. Here it is pertinent to note that, it is the specific plea of the petitioner in the petition that, the last invoice was dated 13.03.2020. As per the terms of payment mentioned in the invoices, the corporate debtor shall make payment within 30 days from the date of receipt of invoice. Thus, the date of default falls on 14.03.2020.

28. In this context reliance can be placed on the following rulings:



- In SSP Pvt Ltd Vs. Govind Jee Dairy Milk Pvt Ltd., (2023) ibclaw.in 131 NCLT, NCLT, Delhi Bench on 28.03.2023 held that:

“the date of default can only be calculated when the invoice becomes due and payable”

The said order was challenged before the Hon’ble NCLAT, and the Hon’ble NCLAT has upheld the order of the NCLT, Delhi. This further brings in a thought of determining the date of default through the invoices.

- Hon’ble Supreme Court of India, in Ramesh Kymal Versus M/s Siemens Gamesa Renewable Power Pvt Ltd. Civil Appeal No. 4050 of 2020, held that,

“The substantive part of Section 10A adverts to an application for the initiation of the CIRP. It stipulates that for any default arising on or after 25 March 2020, no application for initiating the CIRP of a corporate debtor shall be filed for a period of six months or such further period not exceeding one year "from such date" as may be notified in this behalf. The expression "from such date" is evidently intended to refer to 25 March 2020 so that for a period of six months (extendable to one year by notification) no application for the initiation of the CIRP can be filed. The submission of the appellant is that the expression "shall be filed" is indicative of a legislative intent to make the provision prospective so as to apply only to those applications which were filed after 5 June 2020 when the provision was inserted. Such a construction cannot be accepted.”



29. However, if date of default as mentioned in the Company Petition as well as in the Demand Notice, viz. 15.12.2020, is taken into consideration then the default falls within the period between 25.03.2020 and 24.03.2021. As such section 10A of the I&B Code may get attracted.

30. Here, it is pertinent to note that, according to the petitioner the respondent on 12.08.2022, 08.08.2022 and 10.08.2022 issued *cheques* in partial discharge of the subject operational debt. Interestingly, all these cheques are dated when the section 10A IBC, is not *in force* as the last date of operation of section 10A IBC is 25.03.2021. Moreover, the statement of account of the respondent for the year 01.04.2021 to 31.03.2022 and the letter of confirmation of debt dated 05.01.2022 by the respondent which certainly pertain to the period when section 10A of IBC is not in operation, clearly establishes that the respondent had acknowledged the debt post *non-operation* of section 10A of IBC.



31. Hon’ble NCLAT Principal Bench, in Vishal Agarwal Erstwhile Director of Gagan I-Land Township Pvt. Ltd. v. ICICI Prudential Real Estate AIF-I & Anr. Company Appeal (AT) (Insolvency) No. 1016 of 2022, held that,

“Insofar as application being barred by 10A, benefit under Section 10A can be claimed by the application only when there is clear default during the prohibited period. The said benefit cannot be claimed by the Appellant by ignoring the admission of default which was prior to 25.03.2020. There being clear admission in the present case, in letter dated September 9, 2021 where the Corporate Debtor itself has admitted that he has 5 Company Appeal (AT) (Insolvency) No. 1016 of 2022 failed to pay interest for the quarters ending September 2019 and December 2019 thus acknowledging that it has defaulted in servicing its obligations under the DSA.”

So much so, in view of the post 25.03.2021 (the last date of operation of suspension of sections 7.9.&10 of IBC) documents, namely, statement of account of the respondent for the year 01.04.2021 to 31.03.2022 and the letter of confirmation of debt dated 06.01.2022 by the respondent the subject debt stands admitted by the respondent/corporate debtor, when the suspension of the operation of Section 10A IBC, was not in force. That apart, the said acknowledgment of debt is within the period of *three years* from the last payment under the



subject invoices was made, i.e.15.12.2020, we hold that section 10A of IB Code is not applicable to the case on hand.

The point is answered accordingly.

32. Therefore, in light of our discussion as above, we are of the firm view that the present Company Petition is required to be admitted.

33. Hence, the Adjudicating Authority admits this Petition under Section 7 of I&B Code, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:

(A) Corporate Debtor, M/s Servomax Limited is admitted in Corporate Insolvency Resolution Process under section 7 of the Insolvency & Bankruptcy Code, 2016.

(B) The Bench hereby prohibits institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration



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

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

(D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the



time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

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

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

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



(H) Since the petitioner has not nominated IRP, in Part-III, Form-5 of the Company Petition, this Bench hereby appoints Mr. Sreedhar Nukala, having IBBI/IPA-001/IP-P00432/2017-2018/10755, address : 6-3-252/A/8 & 9, F No 203, Mount Castle Apts, Erramanzil Colony Nr Taj Deccan Hotel, Erramanzil, Somajiguda, Hyderabad, Telangana PIN: 500082, e-mail: sreenuka_1[at]yahoo[dot]com as Interim Resolution Professional, to carry on the functions as mentioned under the Insolvency & Bankruptcy Code, 2016. His AFA is valid till 03.12.2024.

(I) Proposed IRP shall file requisite form having valid Authorisation for Assignment within three days hereafter.

(J) The Registry is directed to furnish certified copy of this order to the parties as per Rule 50 of the NCLT Rules, 2016.

(K) The petitioner is directed to communicate this order to the proposed Interim Resolution Professional.



34. Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for making appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under Corporate Insolvency Resolution Process.

Accordingly, this Petition is admitted.

Sd/-

**CHARAN SINGH
MEMBER (TECHNICAL)**

Sd/-

**DR.VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)**

sridher/ karim`