

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

**IA No. 333/2022, MA No.01/2023, IA NO.87/2023
IN CP (IB) NO.31/ALD/2021
Along with CP (IB) No.31/ALD/2021**

IN THE MATTER OF

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with an application under Rule 11 of NCLT Rules, 2016

CP (IB) No.31/ALD/2021

IN THE MATTER OF:

M/s. MAHAVEER MEDICARE

#82/1, B 'Shreeshyla', Doddakallasandra Post,
Kanakpura Main Road,
Bangalore, Karnataka- 560063 Operational Creditor

Versus

M/s. RANCOM HELATHCARE PRIVATE LIMITED

No. E-1-1, Phase-II, Transport Nagar,
Kanpur Road,
Lucknow, Uttar Pradesh- 226 012 Corporate Debtor

IA NO.333/2022

IN THE MATTER OF:

M/s. Mahaveer Medicare Applicant

Versus

M/s. Rancom Healthcare Private Limited
..... Respondent

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IA No. 333/2022, MA No.01/2023, IA NO.87/2023
IN CP (IB) NO.31/ALD/2021
Along with CP (IB) No.31/ALD/2021

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MA No.01/2023

IN THE MATTER OF:

M/s. Rancom Healthcare Private Limited Applicant

Versus

M/s. Mahaveer Medicare Respondent

IA NO.87/2023

IN THE MATTER OF:

M/s. Mahaveer Medicare Applicant

Versus

M/s. Rancom Healthcare Private Limited
..... Respondent

Order pronounced on 21st December, 2023

Coram:

Mr. Praveen Gupta : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Srijan Mehrotra with Sh. : For the Operational Creditor
T.S Suresh & Ms. Aparna, Advs & Applicant in IA No.87/2023
& Respondent in MA
No.01/2023

Sh. Amit Dhall, Adv. : For the Corporate Debtor &
Applicant in MA No.01/2023 &
Respondent in IA No.87/2023

ORDER

1. The instant application was filed on 19.03.2021 by M/s **Mahaveer Medicare** (hereinafter referred to as 'Operational Creditor/ Applicant) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "**I & B Code, 2016**") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "**the Rules**"). The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against **M/s Rancom Healthcare Private Limited** (hereinafter referred as '**Respondent-Corporate Debtor**') due to default in payment of total outstanding amount of Rs. 11,11,63,901 /- (Rupees Eleven Crores Eleven Lakhs, Sixty-Three Thousand Nine Hundred One) with the date of default mentioned in the application as 25.09.2018.

2. As stated in the application, the Operational Creditor i.e. **M/s Mahaveer Medicare**, is an all-India consignee agent of Cipla Limited engaged in the business of marketing, sale and distribution of pharmaceutical products, including generic

medicines (hereinafter referred to as 'Products') manufactured by Cipla Limited, all over India, through its sub-agents located in various cities across their country.

3. The Corporate Debtor i.e. **M/s Rancom Healthcare Pvt. Ltd.** is a sub-agent of Cipla Ltd. with which the Operational Creditor entered into an Sub-Agency Tripartite Agreement (hereinafter referred to as 'Agreement') dated 11.04.2016, between Cipla Limited, the Operational Creditor and Corporate Debtor, wherein the Corporate Debtor was appointed as a sub-agent on a non-exclusive basis in terms of clause 3.1 for the purpose of sale/distribution/ marketing of pharmaceutical products to semi wholesalers, stockiest and distributors. Copy of the Agreement dated 11.04.2016 has been annexed as '**Annexure-A**' with the Application.

4. It is further stated in the application that the Operational Creditor possesses a comprehensive data entry software known as INTERACT which is designed for managing records and accounts related to various operations, distribution, marketing, and sales of Products. This software serves as a centralized platform accessed by all appointed sub-agents, mandating them to input data

regarding sales, collections, and product-related records. Both Cipla and the Operational Creditor utilize INTERACT for data entry and retrieval, facilitating access to information submitted by sub-agents, including opening balances, quantities of Products received and sold, realized revenues, and remaining stock balances for Products dispatched by the Operational Creditor. According to the Agreement, during the Financial Year 2018-19, the Operational Creditor transferred Products valued at Rs. 18,46,25,310/- from its Jaipur depot to the Corporate Debtor's facility in Lucknow on a periodic basis. Copy of few invoices and delivery challan receipts evidencing products arte annexed as **Annexure -'B1 to B31' & 'C1 to C8'** respectively with the Application.

5. It is further stated in the application that the Corporate Debtor got engaged in the sale of these Products. However, the Corporate Debtor has defaulted in fulfilling its obligation to remit the complete value of the gross sales of the Products, thereby violating Clause 14.1 of the Agreement as per which sale of every month by the Corporate Debtor is to be remitted by 25th day of every month to the account of the Operational Creditor. This

failure is substantiated by the data extracted from the INTERACT Software, specifically pertaining to the sales conducted by the Corporate Debtor to its stockists during the Financial Year 2018-19. A Copy of the aforementioned extract has been annexed as **Annexure-D** with the Application. Some of the affidavits signed by various Stockists evidencing, payment of sale proceeds to the Corporate Debtor in the relevant period as **Annexures- 'E1 to Eq.'** with the Application.

6. It is further stated in the application that as per ledger account of Corporate Debtor's C & A Sales, there is total outstanding stands Rs.7,67,69,862/- on account of principal amount which is entered and accepted by the Corporate Debtor itself. Copy of the ledger account of Corporate Debtor's C & A sales for 1st April 2019 to 31st March 2020 are annexed as **Annexure 'F1'** and for 1st April 2020 to 30th September 2020 are annexed as **Annexure- 'F2'** with the Application.

7. Furthermore, it is stated in the application that as per Clause 14.1 of the Agreement, the Corporate Debtor is responsible for collecting and remitting the value of the gross sales of the Products to the Operational Creditor. In the same clause it is stated that the

entire risk of any non-collection of sale shall be solely borne by the Sub-Agent i.e. the Corporate Debtor. Notwithstanding this, in terms of the same clause, the Corporate Debtor is under an obligation to make payments to the Operational Creditor, irrespective of whether the Corporate Debtor receives payment for its sales. According to the terms, the Corporate Debtor was required to transmit the entire sales amount for a given month to the Consignee Agent, i.e., the Operational Creditor, by the 25th of the following month.

8. In terms of the clause 14.2, the Corporate Debtor is liable to pay an interest at @ 18% p.a. on delayed remittance of gross sale value of the Products. Therefore, the applicable interest as on 2nd March 2021 is of Rs.3,43,94,039/-. Further, while calculating the effective unpaid operational debt, the Operational Creditor has adjusted certain amounts relating to security deposit, interest on security deposit, Commission and target incentives payable to the Corporate Debtor as mentioned in Part IV of the Application. After making these adjustments, the effective unpaid operational debt due from the Corporate Debtor as on 02.03.2021 has been computed as Rs.11,11,63,901/-. However, in addition to providing

total debt amount including interest due as on 02.03.2021, it is also clearly provided in Part IV of the application against the column on “ **THE DATE FROM WHICH SUCH DEBT FELL DUE**” that “ *Considering the continuing nature of the liability , the due date for the debts fell due between the period commencing from 25th September 2018 to 25th March 2019*” and moth wise breakup of the bill amount under default are also provided for the months from August 2018 to February 2019.

9. Due to non-receipt of the operational debt from the Corporate Debtor, Operational Creditor issued Demand Notice u/s 8 read Rule 5 of the insolvency and Bankruptcy (application and Adjudication) Rules,2016 issued on 07.10.2020 demanding a sum of Rs. 10,51,97,390/- as on 30.09.2020 computed taking into account the outstanding bill amount of Rs. 6,67,69,826/ till 25.03.2020 and interest computed @ 18% up to 30.09.2020 along with future interest calculated at the rate of 18% p.a. from 01.10.2020 till the date of full payment. Copy of Form-3 Demand Notice has been annexed as **Annexure-G** with the Application.

10. In response to the demand notice, Corporate Debtor sent reply dated 22.10.2023 vide an email dated 26.10.2023 copy of

which has been annexed as **Annexure- H** with the Application, raising dispute on the amount mentioned in the Demand Notice. It is stated by the Operational Creditor in Part IV of the Application that Corporate Debtor has never raised any dispute prior to the issuance of demand notice and has previously agreed to pay the operational debt to the extent of an amount of Rs. 6.75 crore for which settlement talk was going on with the Corporate Debtor and emails connected with such settlement talk have also been enclosed with the reply of the Corporate Debtor. Transcript of certain WhatsApp message has also been enclosed in **Annexure-J** and **Annexure-K** with the Application showing that the Corporate Debtor gave assurances for repayment of the debt amount but failed to make the payment despite giving assurance of repayment of operational debt.

11. As regards the issue of the case of the Operational Creditor being barred u/s 10A of the I & B Act, 2016 as replied in response to the Demand Notice of the Operational Creditor, it is clarified by the Operational Creditor in the Application that the allegations made by the Corporate Debtor is false and is wholly misconceived as the Corporate Debtor has completely misunderstood amended

provisions of Section 10A of the Insolvency and Bankruptcy Code. As per Section 10A of the Insolvency and Bankruptcy Code, "no application for initiation of CIRP of a Corporate Debtor shall be filed, for any default arising on or after 25.03.2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified. It is further mentioned that in the present case, the liability for payment of the debt owed to Operational Creditor fell due way back on 25.09.2018. Therefore, the Corporate Debtor cannot take shelter under the said provision to avoid and delay payment of debt owed to the Operational Creditor Month wise breakup of outstanding dues of bills as given in the application is reproduced below, which fell due for payment on 25th day of the next month to which the bills pertained.

THE TABLE DEPICTING THE TOTAL AMOUNT OF DEBT IN DEFAULT

PERIOD	Amount (in Rs.)
August 2018	1,31,41,016
September 2018	2,24,54,118
October 2018	52,31,269
November 2018	1,06,74,462
December 2018	1,40,07,750
January 2019	77,02,004
February 2019	14,28,224

GST Receivables	21,31,019
Total Due on Account of Principal Amount (after the adjustments) Outstanding as per Ledger	7,67,69,862
Interest on unpaid Operational Debt due from the Corporate Debtor	
Particulars	Amount (in Rs.)
Interest @18% p.a. on unpaid operational debt as on 2 nd March 2021	3,43,94,039/-
Effective unpaid Operational Debt	11,11,633,901/-

12. Thus, it has been shown that considering the continuing nature of the liability, the due date for the debts fell due between the period commencing from 25th September 2018 to 25th March 2019 and such dates are falling much before the cutoff date for 10A i.e. 25.03.2020. It is further explained that the first date of default has occurred on 25.09.2018 when the bills for the month of August 2018 totaling to Rs. 1,31,41,016/- was not made and subsequent defaults for the months from September 2018 to February 2019 continued till 25.03.2019 when outstanding bill amounts under default has reached to Rs. 7,67,69,862/- and such default amount is much above the thresh amount of Rs. 1 crore and date of default is also covered under section 10A as being prior to 25.03.2020.

REPLY ON BEHALF OF THE CORPORATE DEBTOR

13. Countering all the averments made in the Application, the Corporate Debtor filed its reply dated 06.12.2021 stating that the Application filed by the Operational Creditor u/s 9 of the I & b Act, 2016 is in contravention to the law laid down by the Hon'ble Supreme Court in the matter of " Mobilox Innovation" wherein the Hon'ble Apex Court has held that in case of any dispute , which requires appropriate adjudication/enquiry , are not required to be considered under section 9 of the I & B Code, 2016, therefore , the petition filed by the applicant deserves to be rejected out rightly without going into merit.

14. On merit, the Corporate Debtor submitted that it was the agent of the Cipla Ltd. as per the tripartite agreement dated 11.04.2016 for a limited period up till 31.03.2017. It is also contended by the Corporate Debtor that as per the conditions stipulated in the tripartite agreement, Corporate Debtor was responsible for distribution of goods in the eastern and southern region of Uttar Pradesh through the applicant firm. The agreement was not renewed after 31.03.2017. However, business between the Applicant and the Respondent remained in force on the mutual

understanding of the parties but the role of the respondent was only to the extent of C & F Agent.

15. As per the Respondent/Corporate Debtor, payments from dealers were being routed through the account of the sister concern of the Operational Creditor i.e. M/s Mahaveer Medicare Inc but later on, vide an email dated 12.05.2017, the Applicant had informed the Respondent that payment will be received by the Respondent directly from the dealers instead of the Applicant and/or the sister concern of the Applicant i.e. M/s Mahaveer Medicare Inc. The Respondent on 12.05.2017 itself responded to the applicant, confirming their intention to collect payments under the name of M/s. Rancom Health Cares Pvt. Ltd. They also requested the issuance of a letters to all stockists, aligning with the established practice among the applicant's dealers. However, on 12.02.2019, a complication arose when government authorities seized the applicant's goods during transit from the respondent's warehouse to different dealers. The GST department issued a seizure memo, attributing it to various lapses on the part of the Applicant. The Applicant was fully aware of these lapses, communicated the seizure memo, and, subsequently, the

Respondent explicitly declined to dispatch goods on old invoices to other dealers. This decision was driven by the Respondent's financial losses resulting from the Applicant's acts of omission.

16. The Respondent, compelled by the Applicant's adoption of policies conflicting with prior understandings, found no alternative but to cease business operations with the applicant in March 2019. They urged the Applicant to engage in an account reconciliation process, reflecting the necessity for resolution due to the divergent policies implemented by the Applicant.

17. The Corporate Debtor has contended that a suit has also been filed before the Commercial Court, Lucknow in which notices have been issued to the parties and is pending adjudication. Copy of suit has been annexed as **Annexure-13** with the Reply. As per this Annexure, this civil suit has been found to be filed on 26.02.2021 much after the date of issuance of Demand Notice on 07.10.2020 by the Operational Creditor.

18. The Respondent has overall denied all the allegations raised in the Application and the amounts claimed under default by the Applicant in Part-IV of the Application and hence, has prayed to

dismiss the application filed by the Application under section 9 of the IBC,2016.

REJOINDER ON BEHALF OF THE OPERATIONAL CREDITOR

19. The Applicant has filed Rejoinder dated 01.02.2022 in response to the Reply filed by the Corporate Debtor wherein he has made the following submissions in support of its claim made in the Application and countering all the arguments taken up by the Respondent In its Reply, which are as follows: -

i. As regards to reliance of the Corporate Debtor on the decision of the Hon'ble Supreme Court in Case of **Mobilox Innovation Pvt. Ltd.** in respect of their being a dispute between the Corporate Debtor and Operational Creditor with regard to payment of outstanding debt and hence, the present petition u/s 9 not being maintainable, the Operational Creditor has countered such contention stating that the Corporate Debtor has taken spurious defenses of a dispute to misguide this tribunal as there was no dispute raised before issuance of demand notice on 07.10.2020. It is also pointed out that the civil suit stated to have been filed by the Corporate Debtor is dated 26.02.2021 and the same is much

after the date of issuance of demand notice therefore, there is no pre-existing dispute. In order to so that there was no dispute on the amount payable by the Corporate Debtor on account of the outstanding bills, it has been stated by the Operational Creditor that the Corporate Debtor has itself acknowledged its outstanding liability owed to the Operational Creditor and the directors of the Corporate Debtor had themselves proposed orally to pay an amount of Rs. 6,75,00,000/- which is mentioned in the email dated 06.01.2020 sent by the Operational Creditor in response to the aforesaid oral proposal, copy of which has been enclosed by the Corporate Debtor in Annexure R-12 of its statement of objections filed against the application of the Operational Creditor. From this email, it is evident that the said proposal was made by the Corporate Debtor and the said mail was sent at the request of the Corporate Debtor, therefore the claim of the Corporate Debtor that there was a dispute on payment of outstanding debt and there was no admission on their part is not correct and hence untenable.

ii. Operational Creditor contends that the Corporate Debtor has acknowledged in its Preliminary Submissions stating that even after the expiration of the Sub-Agency Tripartite Agreement on 31.03.2017, the business relationship with the Operational Creditor continued in accordance with the terms of the Agreement. In essence, the Corporate Debtor functioned as the consignment agent (Sub-agent) of the Operational Creditor for the sale, marketing, and distribution of products manufactured by M/s Cipla Ltd., ensuring efficient service to Stockists, Dealers, Semi-wholesalers, and Distributors. This ongoing business relationship effectively extended the Agreement, despite not formalizing it through another written agreement. Consequently, the Corporate Debtor cannot selectively affirm or disapprove of the Agreement at its convenience. Subsequently, the Operational Creditor sent a renewed agreement for the Corporate Debtor to sign. This was communicated via both email on 02.07.2018, and a registered post (via Blue Dart), both of which were duly received by the Corporate Debtor.

iii. The contentions made by the Corporate Debtor in Paragraph 01 are unfounded, legally unsustainable. It is acknowledged that the Agreement expired on 31.03.2017, the Operational Creditor, as previously outlined in Paragraph 3 of this rejoinder, extended the opportunity to renew the Agreement by sending a revised Sub-Agency Tripartite Agreement. Contrary to this, the Corporate Debtor failed to execute the renewed Agreement or return the executed copy despite numerous reminders through email.

iv. The Operational Creditor denies the Corporate Debtor's assertions regarding the licenses, contending that such claims are false. The Corporate Debtor's inaccurate assertion that the Operational Creditor was responsible for obtaining required licenses, including the drug license, is contrary to the terms of the Agreement, specifically Clause 8.1 and 8.5. These clauses establish that the Corporate Debtor was obligated to apply for all necessary licenses for the storage and sale of the Products, as mandated by the law. Moreover, the Operational Creditor points to an email sent on 09.04.2016, reinforcing the agreement that the Corporate

Debtor would procure all licenses. The email thread from 09.04.2016, and 10.04.2016, annexed as R-2 in the Statement of Objections filed by the Corporate Debtor, clearly reveals that it was the Corporate Debtor itself requesting certain documents from the Operational Creditor to facilitate the Corporate Debtor in obtaining the required Drug Licenses. Moreover, the other averments with respect to the arrangement of collecting the money from the stockists/dealers/semi-wholesalers/ distributors was continued only till 30.11.2017 and the Corporate Debtor is well aware of the same. The Corporate Debtor has failed and neglected to remit the entire value of the gross sales of the products to the Applicant from August 2018 as required by the Agreement.

v. The Corporate Debtor has provided an email dated 28.09.2016, attached as [**Annexed as R-9 in the Statement of Objections filed by the Corporate Debtor**], as evidence of the Operational Creditor allegedly requesting documents for the purpose of obtaining licenses. However, a thorough examination of the subject and content of the mentioned email

clearly indicates that the Operational Creditor did not send this email in relation to licenses or the procurement thereof. It is asserted that the email was transmitted for internal record-keeping purposes and not with the intention of discussing or facilitating the licensing process.

vi. Applicant contends that an email dated 12.05.2017 sent by the Operational Creditor to the Corporate Debtor was regarding the change in indirect tax regime system and with further request to register themselves under the GST. Email didn't mention anything about the change in the payment collection arrangement between the Operational Creditor and Corporate Debtor.

vii. Applicant also contends that in terms of clause 9.1 of the tripartite agreement, the Corporate Debtor was responsible for the supply of goods and Operational Creditor shall not bear the liability arising out of transactions between the Corporate Debtor and Stockists/Dealers/Semi-Wholesalers Distributors or any sub-agent.

viii. Applicant further contends that the Corporate Debtor was completely responsible for handling and controlling the

billing mechanism only after Corporate Debtor's approval, Operational Creditor shall raise the bill as stipulated in an email dated 12.02.2019 which has been annexed as **Annexure-RA-2** with the Reply.

ix. With regard to averment of reconciliation of accounts raised by the Corporate Debtor, the Applicant contends that the Operational Creditor vide an email dated 30.01.2021 requested the Corporate Debtor for confirmation of accounts from 01.04.2017 to 31.03.2018 of which no response was received from the side of the Corporate Debtor. Copy of email dated has been annexed as **Annexure-RA-3** with the Reply.

x. With respect to commercial suit instituted by the Corporate Debtor, the Applicant contends that this commercial suit was filed by the Corporate Debtor after the initiation of CIRP by the Operational Creditor and issuance of demand notice dated 07.10.2020. Therefore, the present application filed by the Operational Creditor is within the regulations of IBC, 2016.

20. During the course of hearing, the Corporate Debtor has filed a separate application bearing No. M.A No. 01 of 2023 wherein it

has prayed to reject the application filed under Section 9 of IBC,2016- CP (IB) No. 31/ALD/2021 filed by the Operational Creditor before this tribunal stating that it is in violation of section 10A. The Corporate Debtor has contended that

“.....7. That the present application has been filed to reject the proceedings qua Provision of 10 A of the IBC, 2016 and notifications 24.09.2020 and 22.12.2020 issued thereunder, Wherein the CIRP initiation has been suspended for any default arising on or after 25.03.2020 for a period of 12 Months. That further no petition can ever be filed for initiation of CIRP for a default occurring during the said period. Thus the alleged default, as mentioned to occur as on 31st March 2020, and 30th September 2020 and the fact the Demand notice was served dated 7th October 2020 reiterates the same dates of default, falls within the suspension period for initiation of CIRP...”

SUPPLEMENTARY AFFIDAVIT ON BEHALF OF THE OPERATIONAL CREDITOR

21. In compliance of order dated 27.02.2023 passed by this tribunal, on a specific objection raised by the Corporate Debtor as regards the application u/s 9 being barred by the section 10A and a MA-01/2023 also filed in this regard, the Operational Creditor has filed supplementary affidavit on 12.06.2023 wherein it has relinquished the amount of interest falling under the period of Section 10A, I & B Code, 2016

“.....Considering the continuing nature of the liability, the due date for the debts fell due between the period commencing from 25th September 2018 to 25th March 2019. The consolidated debt amount including interest calculated as on 24th March 2020 is Rs.9,79,07,032/- (Rupees Eleven Crores, Eleven Lakhs, Sixty Three Thousand, Nine Hundred and One Only) and future interest at the rate of 18% from the date of institution of the present application till actual payment thereof.

UNPAID OPERATIONAL DEBT DUE FROM THE CORPORATE DEBTOR	
PERIOD	Amount (in Rs.)
August 2018	1,31,41,016
September 2018	2,24,54,118
October 2018	52,31,269
November 2018	1,06,74,462
December 2018	1,40,07,750
January 2019	77,02,004
February 2019	14,28,224
GST Receivable	21,31,019
Total Due on Account of Principal (Outstanding as per Ledger)	7,67,69,862
INTEREST ON UNPAID OPERATIONAL DENT DUE FROM THE CORPORATE DEBTOR	
Interest @18%p.a on the unpaid operational debt as on 24 th March 2020	Rs. 2,15,37,170
EFFECTIVE UNPAID OPERATIONAL DEBT	Rs. 9,79,07,032 (Rupees Nine Crores Seventy Nine Lakhs Seven Thousand Thirty Two)

**COUNTER AFFIDAVIT ON BEHALF OF THE CORPORATE
DEBTOR**

22. The Corporate Debtor has filed Counter Affidavit vide dairy no. 2297 dated 24.08.2023 wherein it is stated that civil suit has been filed before the Commercial Court, Lucknow. It is also stated in the Counter Affidavit that the instant application is barred by Section 10A of the IBC, 2016 as the date of default mentioned in the demand notice is 30.9.2020 which clearly falls within the period of suspension of CIRP stipulated under section 10A of the IBC, 2016.

23. Further, it is also stated that outstanding amount due as stated in demand notice dated 07.10.2020 has been amended in 2021 through the Affidavit of the Applicant on the basis of demand notice dated 11.04.2016, the rate of interest 18% is not continuing rate of interest or future rate of interest as mentioned under clause 14.2 of the Agreement. Therefore, the amount mentioned in demand notice dated 18.4.2023 annexed as Annexure-1 of the Supplementary Affidavit is a fresh amount raised by the operational creditor which is in violation of Section 9(3)(b) of the IBC, 2016. Such a demand dated 18.04.2023 mentioned in

supplementary affidavit is barred by the limitation period. With respect to amendment in the pleadings in matter filed under IBC,2016, Corporate Debtor has placed reliance on **“Comfort Fincap Ltd. Vs. Seven Indian Heads Infrabuild Pvt. Ltd. I.A. 2804/2022 IN C.P. (IB) 825 (MB) /2022 NCLT Mumbai Bench”**.

WRITTEN ARGUMENTS ON BEHALF OF THE OPERATIONAL CREDITOR

24. Operational Creditor has filed written arguments vide dairy no 2876 of 2023 dated 07.11.2023 wherein it is contended that the total outstanding principal amount of Rs. 7,67,69,862 fell due during the period starting from 25.09.2018 to 25.03.2019 which is before the bar placed under Section 10A of the IBC,2016. The ledger account of the said period has not been denied by the Corporate Debtor. Sum of Rs. 2,15,37,170 is outstanding @18% p.a interest on delayed remittance of gross sale value till 24.03.2020.

25. With reference to date of default, it is contended that Operational Creditor issued demand notice on 07.10.2020 for demanding operational debt of Rs. 10,51,97,390 which includes Principal as well as Interest. The principal amount fell due between

25.09.2018 to 25.03.2019 and Interest is calculated as on 30.09.2020. The contention raised by the Corporate Debtor that the outstanding amount is falling under period stated under section 10A is not sustainable.

26. The date of default is taken to be date on which first default occurred in repayment of debt for the purpose of section 7 and 9 of IBC, 2016. Hence, the date of default in the instant case for the principal amount is commencing from 25.09.2018 to 25.03.2019 which is more than the threshold limit of one crore and is not covered under section 10A of the IBC, 2016. In this regard, the Operational Creditor has relied on the Judgement passed by the Hon'ble Supreme Court in ***Ramesh Kyamal v Siemens Gamesa Renewable Power Private Limited (2021) 3 SCC 224.***

27. The Hon'ble NCLAT in *Beetel Teletech Ltd. v. Arcelia IT Services Pvt. Ltd. (Company Appeal (AT) (Insolvency) No.1459 of 2022 [Copy of the judgment of the is annexed as Annexure '2']* has expressly been held that "what is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A

period, this statutory provision does not put any bar on the initiation of CIRP proceedings."

28. Other issues relating to existence of debt and default and also admitted by the Corporate Debtor in emails and WhatsApp messages are reiterated in the written submission as have already been discussed in foregoing paras

29. With reference to pre-existing dispute, it is contended by the Operational Creditor that there is no pre-existing dispute in the present matter with respect to operational debt stated in Part-IV of the Application. The Corporate Debtor has never raised any dispute prior to issuance of Form-3 i.e. Demand notice dated 07.10.2020. The civil suit filed by the Corporate Debtor before the Commercial Court, Lucknow is after the issuance of Demand notice and with reference to dispute pertaining to period 2016-17. In this regard, Operational Creditor has placed reliance on judgements passed by the Hon'ble National Company Law Appellate Tribunal, in ***Ahluwalia Contracts (India) Limited v. Raheja Developers Limited [Company Appeal (AT) (Insolvency) No. 703 of 2018]***, relying on the case of ***Innovative Industries Ltd. v. ICICI Bank and Anr, 2018 1 SCC 407***, [Copies attached

herewith as Annexure '4'] held that insolvency plea cannot be rejected if the disputed claim is not raised prior to the demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016.

WRITTEN ARGUMENTS ON BEHALF OF THE CORPORATE

DEBTOR:

30. The Corporate Debtor has also filed written submissions vide dairy no. 2862 dated 06.11.2023.

In the written submission the Corporate Debtor has pointed out certain infirmities in the demand notice dated 07.10.2020 issued by the Operational Creditor which has already been discussed in previous paras of the order while discussing the application u/s 9, reply filed by the Corporate Debtor and also the reply of the Corporate Debtor to the Demand Notice. The main objection raised by the Corporate Debtor is as regards to the date of default which is being taken by it as being on 30.09.2020 as stated in the Demand Notice while mentioning the consolidated debt amount due including the interest as on 30.09.2020 hence, raising the contention that the application filed by the Operational Creditor is barred u/s 10A of the I & B Code. This contention of the Corporate Debtor has been duly countered by the Operational Creditor

showing that the first date of default occurred on 25.09.2018 when the default amount has already crossed the threshold limit of Rs. 1 crore hence, the date of default is 25.09.2018 and not 30.09.2020 as being interpreted by the Corporate Debtor.

Following points have been also reiterated in the written submission of the Corporate Debtor challenging the validity of the application u/s 9:

A. The demand notice dated 07.10.2020 is in-violation Section 8(2)(b) of the I&B Code, 2016.

B. Non-compliance of Section 9 (3)(b) of the I&B Code, 2016

C. Suspension of initiation of CIRP u/s 10 of I&B Code, 2016

D. Reliance of the Operational Creditor upon the sub-agency tripartite agreement has been also challenged stating that it is not a inter se agreement between the parties and the insolvency process against the respondent, it can only be done in the clear cases where no real dispute exist between the two parties.

E. Pre-existing dispute between the Applicant and the Respondent.

F. It has also been pointed out that the affidavit as per Section 9(3)(b) of the I & B Code, 2016 has not been filed along with the Application and affidavit was supplied at the time of hearing on 31.10.2023 but as per the Corporate Debtor, there is no proof of filing of the said affidavit before this tribunal

G. As regards the pre-existing dispute, the civil suit filed before the civil court as on 26.02.2021 has been emphasized stating that the affidavit u/s 9(3)(b) is dated 05.07.2021 and by that time, the suit was already filed.

H. In support of its submission as regards the change of date of default and amount of default as not being permissible under the provision of the I & B Code , as shown by the Operational Creditor in the Supplementary Affidavit and discussed in para 21 of this order, reliance has been placed on the decision of this tribunal in case of **Dinesh Kumar Goyal vs. Shanti Refrigeration Industries Pvt. Ltd.** in CP (IB) No. 36/ALD/2020 in which it is held that any change in date of default is not permitted by filling an affidavit during the course of hearing. Reliance has also been placed on the

decision of Hon'ble NCLT Mumbai in the matter of **Conferred Fincap Ltd. vs. Seven India Heads Infrawill Pvt. Ltd.** in which amendments in the pleadings for changing the default amount and date of default has not been allowed.

Finally the Corporate Debtor in the written submission made a prayer to reject the application u/s 9 of I & B Code, 2016 CP (IB) No. 31/ALD/2021 filed by the Operational Creditor due to the disputed facts and reasons as stated in the said written submission and the judgments relied upon by the Respondent.

31. Operational Creditor has also filed an Interim Application i.e. I.A No. 87/2023 wherein Mr. Rajeev Ranjan has been proposed as IRP in present matter i.e. CP (IB) No. 31 of 2021. And another IA 333/2022 has been filed praying for immediately granting a status quo order restraining the Corporate Debtor from selling/ disposing off any of its assets or business or registering the transfer of its equity shares pending disposal of this petition in the interests of justice and equity

FINDINGS AND ORDER

32. We have perused the materials available on record and heard Ld. Counsels of both the parties and considered all the facts of the case as presented before us and discussed in foregoing paras.

33. It is an admitted case of the Operational Creditor that the Corporate Debtor being sub-agent of M/s Cipla Ltd. used to supply Products for sale to semi-wholesalers/dealers/stockiest in Eastern and Central Uttar Pradesh and was also responsible for remitting the entire value of the gross sale of products to the Operational Creditor's account by 25th day of the subsequent month as per the Tripartite Agreement dated 11.04.2016.

34. In the present matter, the issues for consideration before us are: -

- i. Whether there is acknowledgment of debt and default by the Corporate Debtor in the present matter.
- ii. Whether the present application is barred by Section 10A of the I & B Code, 2016.
- iii. Whether there is any pre-existing dispute as regards the operational debt in the present matter between the parties.

35. With reference to the first issue of the acknowledge of debt and default by the Corporate Debtor, it may be noted that as stated in Supplementary Affidavit, there is total outstanding debt of Rs. 7,67,69,862 (Principal Amount) till February 2019 along with interest of Rs. 2,15,37,170 as on 24th March 2020. The same is evident from the Ledger Account of Corporate Debtor as maintained by the Operational Creditor from 01.4.2019 to 31.03.2020. It may also be noted that the Corporate Debtor has acknowledged and accepted the liability of outstanding dues which is evident from WhatsApp conversation between 03.02.2020 to 11.08.2020 annexed as Annexure-K at page 206 of the Application. An affidavit to that effect under section 65-B has also been filed by the Operational Creditor.

36. It is significant to note that Ld. Counsel appearing on behalf of the Corporate Debtor on several dates stated that there is amicable settlement of dispute going on with the operational creditor.

37. We find that the debt against the goods supplied with respect to the invoices raised by the Operational Creditor falls within the definition of Operational Debt u/s 5(21) of the I & B Code, 2016.

The Operational debt is defined u/s 5(21) of the Code to mean “*a claim in respect of provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*”. The invoices against which the debt is outstanding are raised for supply of Pharmaceutical products which will come under the category of goods, hence would qualify for the operational debt. Thus, we find that there exists an operational debt duly established by the records produced during the hearing of the case. As no payment of the outstanding debt has been made by the Corporate Debtor subsequent to the date of 25.09.2018 and nothing has been presented before us by the Corporate Debtor explaining if there was any dispute for not paying the outstanding amount and the Operational Creditor in an affidavit filed along with the application, has confirmed that no arbitration proceedings are initiated by the Corporate Debtor against the Operational Creditor or of any dispute which were in existence prior to the receipt of the demand notice under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016, it is amply established that there is default due to

non-payment of the outstanding debt of Rs. 7,67,69,862, (along with interest @ 18% as computed in the application) on the part of the Corporate Debtor.

38. In the present case, we have clearly found that there is a debt and also there is a clear default of the principal amount of debt starting from 25.09.2018 for the bill pertaining to the month of August 2018 amounting to Rs. 1,31,41,016 which fell due for payment on 25.09.2018 but still not paid and it is more than the threshold limit of Rs. 1 crore. Subsequent bills for the months from September 2018 till February 2019 have also not been paid, totaling to Rs. 7, 67,69,862/-, which have not been paid up to 25.03.2019 and default is still continuing. Thus, total amount of default excluding interest is Rs. 7,67,69,862/-out of which there was settlement talk between both parties for an amount of Rs. 6.75 crore and during WhatsApp conversation, the Director of the Corporate Debtor, Mr. Amandeep has clearly said that *“I agree to make the payment, which I haven’t ever denied”* (**page no 207 of the application**). The only condition, he has put that *“But the payment which I will not get from market where sales team has given goods on their responsibility that payment, I won’t be able to*

give until and unless I receive the payment from those parties”.

However, during the hearing of the case, it could not be clearly specified by the Ld. Counsel representing the Corporate Debtor as to how much such amount could not be received from the parties concerned. But the Ld. Counsel for the Operational Creditor has shown to us from the documents generated from the INTERACT software that most of the medicines were supplied/sold to stockists through the Corporate Debtor being its Agent and as the information available on this software and the ledger running account of sales (**attached as Annexure D and Annexure F1 and F2 of the application**), the total outstanding due as on 31st March 2020 is Rs. 7,67,69,862/- from previous balance of Rs.9,97,56,446/- as on 01.04.2019 (*continuing from the first default occurred on 25.09.2018 when entire amount of bills for August 2018 was not paid*) after last payment was made on 16.09.2019 of Rs. 16,00,000/-. Even affidavit from some of the stockists were filed confirming that they have made the payment (**Annexure E1-E9 of the Application**) and these affidavits are not countered by the Corporate Debtor in its reply. Moreover, the settlement talks between parties for Rs. 6.75 crore of amount is

evident from E-mails attached at pg no. 199-201 of the Application.

39. As regards the amount of Rs. 6,75,00,000/- for which negotiation for settlement was going on, the Corporate Debtor has also written in the reply to the Demand Notice u/s 8 that “*when your client itself has given a mail dated 14.03.2020 in respect of the outstanding amount of Rs. 6,75,00,000/-, then no question arises for giving acceptance for Rs. 7,67,69,862/-by my client on 31.03.2020*”. It is worth to note that in the email dated 06.01.2020 sent by the Applicant/Operational Creditor to the Respondent/Corporate Debtor, it is written that “*Further continuing on our discussion of your account , we wish to inform you that it would be difficult for us to accept your proposal for Rs. 6.75 crore*” Content of this email has not been disputed by the Corporate Debtor, rather this email has been enclosed by it with its reply in response to the Demand Notice to show that talk was going on for payment of Rs. 6.75 crore hence, the amount of Rs. 6,67,69,862/- (principal amount) mentioned in the Demand Notice was not acceptable. However , in subsequent email dated 14.03.2020, the Operational Creditor agreed to settle with the

Corporate Debtor for Rs.6.75 crore stating that *“As per continuation of our mail and you also insisted for the same, we hereby agree to settle your account on mutual agreement basis for Rs.6.75 crore as full and final settlement against our outstanding due which you have principally agreed”* This email has also been attached by the Corporate Debtor along with its reply to the Demand Notice to emphasize on the settlement amount of Rs. 6.75 crore in place of the amount of Rs. 7,67,69,862/-crore mentioned in the Demand Notice, stating that *“It is relevant to mention here that through Mail dated 14.03.2020, your client gave an offer to my client for the payment of Rs. 6.75 crore and it was also proposed by your client to my client that the payment of the said amount has to be paid in phased manner”*. It is also further mentioned in the said reply that *“That my client clearly asked your client to amicably arrive on a certain amount to be paid to your client....”*

Such assertion made in the reply letter of the Corporate Debtor submitted in response to the Demand Notice and these emails enclosed with the said reply letter in support of the contentions raised therein clearly establish that proposal for settlement of outstanding dues to the extent of Rs. 6.75 crore was

from the Corporate Debtor as mentioned in the said emails. Therefore, the outstanding operational debt which is in default is admitted by the Corporate Debtor to the extent of Rs. 6.75 crore but modalities and conditions for its settlement was being discussed between both parties. In the hearing held on 14.12.2022 also, it was informed by both parties that there is a possibility of settlement and as a last opportunity to make an amicable settlement, adjournment was sought. On such request of both parties, following order was passed; -

Order

“Sh. Sirjan Mehrotra along with Ms. Aparna, Advocate for the petitioner/operational creditor and Sh. Amit Dhall, Advocate for the respondent/corporate debtor present.

At the outset the Ld. Counsels representing the parties submit that there is a possibility of settlement, however, despite earlier efforts being made by the parties, no settlement seems to be arriving at.

Ld. Counsel representing the respondent/ corporate debtor, however, states that the respondent will make all out sincere and bonafide efforts as a last opportunity to make an amicable settlement with the operational creditor, failing which, further proceedings would continue.

IA NO. 333/2022

This is an application moved by the petitioner seeking interim relief and a notice is issued and received by the Ld. Counsel representing the respondent/ corporate debtor and therefore waivers service. Reply, if any, be

also filed to this IA by the respondent/ corporate debtor in the meantime.

Let the matter be adjourned for further consideration on 3rd February, 2023.”

40. Later on, when settlement talk did not succeed, the case was finally heard on merit. Though settlement talk did not succeed but facts remain that debt of the Operational Creditor towards Corporate Debtor was admitted and in the email conversation, the amount for which settlement talk was going on was mutually agreed between parties at an amount of Rs. 6.75 crore and dispute was only with regards to modalities and the manner in which payments were to be made and such dispute cannot be said to be covered under the definition of dispute given in section 5(6) or 8(2) of the I & B code as dispute is not on the existence of the amount of the debt but on the quantum of the debt and the modalities and manner in which such settled amount was to be paid.

41. Hon'ble NCLAT in case of ***Manmohan Gupta vs MDS Digital Media Pvt. Ltd. & Anr. (2023) ibclaw.in 241 NCLAT*** has held that *“when the admitted amount is more than the threshold, the Adjudicating Authority did not commit any error in admitting Section 9 application. The question as to what is correct amount of debt was*

*the question which was to be subsequently looked into at the time of collation of the claims by the Resolution Professional and **at the stage of admission of section 9 application it was not necessary for the Adjudicating Authority to express any opinion.***”

(Empasis supplied)

42. Once default has occurred involving rupees one crore or more in terms of section 4 of the I & B Code, 2016, the requirement of threshold of debt in default is satisfied and quantum of default is to be decided by the Resolution Professional with the approval of the Committee of Creditors during the course of CIRP. Once default in terms of Section 3(12) of the I & B Code, 2016 more than the threshold limit is established and all other requirements as per section 9(5)(i) are fulfilled, CIRP is to be triggered. In the present case, we have found that there is acknowledgement of debt to the extent of Rs. 6.75 crore between both parties for which even settlement talk was also underway but the same could not be materialised and first default for the bill of August 2018 has occurred on 25.09.2018, when the bill amounting to Rs. 1,31,41,016/- for the month of August 2018 could not be paid and it is still continuing. **Therefore, we are satisfied that there is**

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IN CP (IB) NO.31/ALD/2021

Along with CP (IB) No.31/ALD/2021

-Sd-

-Sd-

debt as well as default in terms of section 5(21) and section 3(12) of the I & B Code, 2016.

43. Now, the second issue to be decided is whether the present application is barred u/s 10A. In this regard, it is significant to have a look at Section 10A of IBC which is as follows: -

“Section 10A: Suspension of initiation of corporate insolvency resolution process.

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 notified 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.”

44. The Hon'ble Supreme Court in **“Ramesh Kymal vs. M/s Siemens Gamesa Renewable [Civil Appeal No. 4050 of 2020]”**

has held that

*“.....Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25 March 2020. **The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year.** Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection because the application was filed before 5 June 2020. WWW.LIVELAW.IN LL 2021 SC 72 16*

24. We have already clarified that the correct interpretation of Section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.

(Emphasis Supplied)

45. From the above landmark decision of the Hon'ble Supreme Court, it is very clear that bar on filing of application for initiation of CIRP under section 7/9/10 is for those default that has occurred on or after 25/03/2020 and embargo remained in force for one year i.e. up to 24.03.2021. Meaning thereby that if any default has occurred before 25.03,2020, the said embargo will not apply. In the present case under consideration, the first default of Rs. Rs. 1,31,41,016/- has occurred on 25.09.2018 and subsequent bills for the months from September 2018 till February 2019 have also not been paid, totaling to Rs. 7, 67,68,862/-, which have not been paid despite becoming due for payment on 25.03.2019 and default is still continuing. Thus, all these defaults on payment of these outstanding operational debts arising out of these pending bills have occurred much before the cutoff date of 25.03.2020 as prescribed in section 10A. Therefore, we are

inclined to hold that the case of the present applicant is not covered by the provision of section 10A keeping in view the above decision of the Hon'ble Supreme Court.

46. Now, coming to question of interest charged by the Applicant falling within the period covered by the provision of section 10A. In this regard, the Hon'ble NCLAT in a recent judgment delivered on 11.09.2023 in case of Beutel **Teletech Ltd. Vs Arcelia IT Services Pvt. Ltd. Company Appeal (AT) (Ins.) No. 1459 of 2022** has made it clear that Liability of Interest Accrued during Section 10A Period not to be excluded aside. The relevant part of this decision is reproduced as under:

“10. A plain reading of Section 10A signifies that no application/ proceedings under Sections 7, 9 and 10 can be initiated for any default in payment which is committed during Section 10A period. Thus, what is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings.

11. The law of Section 10A is well settled. The object and purpose of Section 10A has been explained in the ordinance by which Section 10A was brought into operation. Further, the object and intent underlying the insertion of Section 10A has also been propounded by the Hon'ble Supreme Court in its judgment of **“Ramesh Kymal vs. M/s Siemens Gamesa Renewable [Civil Appeal No. 4050 of 2020]”**

.....

12. Further this Tribunal while taking cognizance of the above judgment of this Tribunal in Raghavendra (supra), in the matter of Company Appeal (AT) (Ins.) No. 294 of 2023 in Narayan Mangal v. Vatsalya Builders & Developers Pvt. Ltd it proceeded further to answer as to whether interest payments accrued during the Section 10A period is to be deducted while computing the threshold and it has been held that: -

*“If the default is committed prior to Section 10A period and default continues there is no prohibition in initiating proceedings under Section 7 and we are not persuaded to accept the submission of the counsel for the respondent that the liability of interest which accrued during Section 10A period should be ignored or should not be computed in the amount while finding the threshold. **Liability to pay interest which default committed prior to Section 10A period continues and is not obliterated by Section 10A.**”*

13. Thus, the aim and objective of Section 10A 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. It was never intended to cover any default which occurred before Section 10A period and continuing thereafter.

14. The present is a case where default has been committed by the Corporate Debtor since 29.02.2020 which is prior to commencement of Section 10A period. Hence, this is a case where the default was undisputedly committed before the bar of Section 10A came into play. There being categorical default by the Corporate Debtor prior to Section 10A period, the Corporate Debtor was clearly not entitled to claim the benefit of Section 10A period.

15. Further, since the default was committed prior to Section 10A period and **the liability to pay interest having clocked prior to Section 10A period, we are of the considered opinion that the view taken by the Adjudicating Authority that the liability of interest which accrued during Section 10A period should be ignored or should not be computed for triggering CIRP is misconceived.”**

(Emphasis Supplied)

47. In the present case, as per clause 14.1 of the tripartite agreement, the Corporate Debtor was liable to remit the gross sales

by 25th of the subsequent month and per clause 14.2 of the Agreement, any delay in remittance of the amount will attract an interest @18% p.a. on gross sale value of the products payment of which is delayed. The Corporate Debtor has challenged the applicability of the terms of the said tripartite agreement dated 11.04.2016 as it has expired on 31.03.2017 and was never renewed but in reply filed to the application , the Corporate Debtor itself has admitted that “ *After the expiry of the tripartite agreement dated 11.04.2016 , the business between the applicant and the respondent remained in force on the mutual understanding of the parties but the role of the respondent was only to the extent of C&F agent*” Thus , it is clear from its own admission of the Corporate Debtor that business remained in force between parties on mutual understanding and it is also stated in reply by the Corporate Debtor that “ *The Respondent on 12.05.2017 itself had replied to the Applicant that they will be collecting the payment in the name of M/s Rancom Health Cares Pvt. Ltd. and request to issue the letter to all stockists*” So, it is clear that it was responsibility of the Corporate Debtor to collect payment from the stockists and pay to the Operational Creditor as it itself admitted in its reply hence, the terms of the agreement to the extent of remitting the gross sales

to the Operational Creditor continued with mutual understanding even if it is accepted that the tripartite agreement after expiry on 31.03.2017 has not been renewed.

48. As term relating to the payment of gross sales by the Corporate Debtor made through stockists continued with mutual understanding, it is logical to take the due date for deposit of entire sale of a month by 25th day of next month as provided in clause 14.1 of the agreement Therefore, it is logical to take the first date of default committed by the Corporate Debtor for the bills of August 2018 for a sum of Rs. 1,31,41,016 on 25.09.2018 and Subsequent bills for the months from September 2018 till February 2019, the default occurred from 25.10.2018 to 25.03.2019 as regards to principal amount of the bills for the sales of these months is concerned, out of which total outstanding amount is 7,67,69,826 and default in payment of such outstanding debt is still continuing. On such outstanding amount of debt arising out of these bills, interest as per clause 14.2 of the agreement is to be computed @ 18% thereon thus, the total due amount as mentioned in Part IV of the application comes to Rs. 11,11,63,961 till the date of filing of the Application. Even month

wise break up of default amount with the date on which default has occurred is given in the demand notice issued u/s 8. Thus, it can be seen that the first date of default i.e. 25.09.2018 and subsequent date of defaults for the bills of later months being from 25.10.2018 till 25.02.2019 are much before the cutoff date of 25.03.2020 hence, objection taken by the Corporate Debtor that this application is barred under the provisions of section 10A is not tenable.

49. The objection of the Corporate Debtor with respect to this application being barred u/s 10A has been taken pointing out that in Demand Notice u/s 8, the consolidated debt amount of Rs. 10,51,97,390/- was stated to be due as on 30th September, 2020 which falls within the time period specified in section 10A making the filing of application under sections 7/9/10 barred as this date of default falls during the specified period after the cutoff date 25.03.2020. It appears that the Corporate Debtor has not considered full details of the columns **“Date From which Such Debt Fell Due”** and **“Amount Claimed to Be In Default And The Date On Which The Default Occurred”** as contained in the Demand Notice in which first date of default is mentioned as

25.09.2018 at an amount of Rs. 1,31,41,016 sufficient to trigger CIRP u/s 9. Subsequent computation of interest and mentioning of the total consolidated debt amount up to 30.09.2020, which mainly include interest amount on debt for which default has occurred up to 25.02.2019, making the liability to pay interest getting clocked prior to Section 10A period, hence this application cannot be barred u/s 10A as held by the Hon'ble NCLAT in the case of ***Beetel Teletech Ltd. Vs Arcelia IT Services Pvt. Ltd. (supra)***

50. On raising of the objection by the Corporate Debtor that interest part of debt having been covered u/s 10A, the Operational Creditor filed a Supplementary affidavit dated 18.04.2023 deleting the interest portion from the default amount of the outstanding debt. On this Supplementary Affidavit, the Corporate Debtor contended that it amounted to fresh demand notice, which is filed during the pendency of proceeding and it is not permissible as per section 9(3)(b) as the interest charged is disputed amount which is taken out from the outstanding demand under default. It is also pointed out that the revised demand notice dated 18.04.2023 is barred by limitation.

51 We have considered these submissions of the Corporate Debtor. We have already given our finding that the first date of default is 25.09.2018 on which the default amount has crossed the threshold limit and default for subsequent months occurred from 25.10.2018 till 25.02.2019 as far as the payment of bills amount is concerned so there is no change in default date. The Corporate Debtor has mistakenly taken the consolidated debt amount shown as due on 30.09.2020 as mentioned in the Demand Notice as date of default, which in fact is the date on which total outstanding amount has been calculated after computing the interest, for which the liability to pay interest has commenced on a debt which has fell due for payment prior to Section 10A period. Therefore, it is very clear that the application of the Operational Creditor u/s 9 is not covered under the provision of section 10A as we have already held.

52. Though the Operational Creditor as an abundant precaution has deleted the interest part from the default amount in its supplementary affidavit but such supplementary affidavit will not amount to any fresh demand notice as it is only an amendment in the pleading and such amendment has not made any material

change on the facts of the case as the default amount without considering the interest is itself more than the threshold limit and the date of default has also not got altered with such Supplementary Affidavit, which has already been held by us as being 25.09.2018 and even for subsequent bills, it occurred up to 25.02.2020 and such default is still continuing. Therefore, no material change has happened to the facts of the case affecting the merit of the case except that the default amount is reduced by the amount of interest falling during the period covered by section 10A. Such amendment in pleadings is allowable as held by the Hon'ble Supreme Court in case of "**Asset Reconstruction Company vs Tulip Star Hotel Limited (Civil Appeal Nos. 84-85 of 2020) dated 01.08.2022**". Therefore, Objection taken by the Corporate Debtor on filing of Supplementary Affidavit dated 18.04.2023 by the Operational Creditor is rejected. Reliance of the Corporate Debtor on the decisions by NCLT Mumbai in case of *Comfort Fincap Ltd. Vs Seven India Build Pvt Ltd. IA 2804/2022 in CP(IB) 825/2022* and this court decision in case of *Dinesh Kumar Goel vs Shanti Refrigeration Industries Pvt Ltd. CP(IB) 36/2020* is misplaced as in the former case , an MOU was sought to be introduced which substantially affected the amount and date of default and it could

not be satisfactorily explained by the applicant that why this MOU was not filed when it was made one year prior to the date of filing of application . In later case, date of default was tried to be changed by one payment made on subsequent date and such change at pleading stage cannot be allowed. In the present case, no such change has been sought. Date of default remained to be 25.09.2018 and amount of default even after deleting the interest remained above threshold limit. We have already held the amount of default is immaterial as long as it remains above the threshold limit.

53. In view of foregoing discussion, we clearly find that this is a case where the default by the Corporate Debtor was undisputedly committed before the suspension period of CIRP provided under the provision of section 10A. The Corporate Debtor is clearly not entitled to claim the benefit of Section 10A period. Since, the default was committed prior to the period stated under the provision of Section 10A and the liability to pay interest having clocked prior to Section 10A period, mentioning of debt including interest amount up to 30.09.2020 in Demand Notice would not affect the admissibility of this application due to provisions of

section 10A, irrespective of the fact that the interest amount is already deleted by the Applicant in the Supplementary Affidavit and the objection of the Corporate Debtor in this regard is already rejected by us and Supplementary Affidavit dated 18.04.2023 of the Operational Creditor is taken on record. **Therefore, objection of the Corporate Debtor on the application being barred u/s 10A is rejected and accordingly MA-1/2023 is also dismissed.**

54. As regards the pre-existing dispute, the Corporate Debtor in its reply as well as in the written submission has taken a plea that a civil suit has been filed before the Commercial Court in Lucknow which is pending adjudication and thus, this application may be dismissed on this ground alone. It is stated that in terms of Section 8 and 9 of the IBC, 2016, Pre-Existing dispute should be prior to the issuance of demand notice. In the instant matter, the demand notice was issued on 07.10.2020 and commercial suit was instituted on 12.02.2021 which is after the issuance of demand notice. Therefore, the plea taken by the Corporate Debtor is not sustainable on the aforesaid ground. Moreover, it should also be taken into consideration that Corporate Debtor has not mentioned about the institution of any civil suit in the Commercial court of

Lucknow in reply dated 22.10.2020 submitted in response to the Demand Notice of the Operational Creditor sent vide an email dated 26.10.2020. In this reply, amount mentioned in the demand notice was only disputed mentioning about emails of the Operational Creditor in which the settlement of debt to the extent of Rs. 6.75 crore was being discussed. Details in this regard have already been discussed while dealing with the issues in paras 35 to 42 above relating to debt becoming due and its subsequent default. Thus, we are of the considered view that there is no pre-existing dispute and civil suit filed on 12.02.2021 being much after the date of issue of the Demand Notice, cannot fall in the category of pre-existing dispute in view of the decision of the Hon'ble Supreme Court in case of **Mobilox Innovations Private Ltd. vs Kirusa Software (supra)**.

The contention on the part of the Corporate Debtor that the affidavit under Section 9(3)(b) was filed on behalf of the Operational Creditor on 5th July, 2021 which is after the institution of the Civil Suit on 26th February, 2021, we have considered the contention of the Corporate Debtor which is not legally tenable, in view of the fact that the demand notice was issued on 7th October,

2020 and the Commercial suit was instituted on 12th February, 2021 and the present petition has been filed in the month of March, 2021, therefore, the compliance of Section 9(3)(b) which is a technical formality even though filed on 5th July, 2021 would relate to the issuance of the demand notice dated 7th October, 2020, as on that day, there was no such civil suit filed and thus no pre-existing dispute. Filing of the affidavit under Section 9(3)(b) of not having pre-existing dispute is only a declaration to that effect. The contention of the Ld. Counsel representing the Corporate Debtor is thus not acceptable.

55. Having considered the entire facts of the case and considering our findings in foregoing paras of this order after taking into account the provisions of Section 9 of the I & B Code, 2016, we find that the application made under sub-section (1) of Section 9 along with documents and fees as mentioned in its sub-section (2) is complete. The payment of the outstanding operational debt has not been made which is well above the threshold limit of Rs.1 crore. The petition u/s 9 was filed on 19.03.2021, hence, petition is well within the limitation period. In terms of section 9(3) of I & B Code 2016, the Operational Creditor has provided a copy of invoice

demanding payment and demand notice u/s 8 was issued to the corporate debtor for payment of outstanding dues for goods supplied. Therefore, after finding that all the conditions for admission of application under Section 9(5)(i) of the I & B Code 2016 against the Corporate Debtor, has been fulfilled and the Ld. Counsel of the Corporate Debtor has failed to demonstrate before us anything about there being any pre-existing dispute as regards the payment of the operational debt, we find this application fit for admission under Section 9(5) of the I & B Code, 2016 for starting CIRP against the Corporate Debtor, M/S Rancom Healthcare Pvt. Ltd.

56. The Operational Creditor has proposed the name of Mr. Rajeev Ranjan as the IRP in the present application, bearing Registration No. IBBI/IPA-002/IP-N00707/2018-2019/12418, having registered office at Flat No.14049, 16 Avenue, Gaur City-2, Greater Noida West, Gautam Buddha Nagar, Uttar Pradesh, 201310. The written consent by IRP in Form 2 has been on record by way of affidavit. The verification of the said IRP has been carried out by Law Research Associate of this Tribunal, Ms. Ankita Sharma, and it is found that there is no proceeding pending

against the proposed IRP. Upon verification from the website of IBBI, it is found that IRP holds valid authorization till 31.10.2024.

57. Accordingly, this application is admitted u/s 9(5)(i) of I & B Code, 2016 under the following terms and conditions.

i. The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor i.e. **M/S Rancom Healthcare Pvt. Ltd.** is hereby admitted.

ii. We hereby declare a moratorium u/s 14 and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii. This Adjudicating Authority hereby appoints Mr. Rajeev Ranjan as IRP as discussed in para 56 above.

iv. The IRP shall cause a public announcement of the initiation of the Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016 shall be made immediately.

v. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following: -

a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

b) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

c) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

vi. The supply of essential goods or services rendered to the Corporate Debtor as may be specified, shall not be terminated, suspended, or interrupted during the moratorium period.

vii. The provisions of sub-section (1) of Section 14 of I & B Code, 2016 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

viii. The IRP shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of Constitution of the Committee.

ix. The Committee of the Creditors shall appoint a Resolution Professional (hereinafter referred as **“RP”**) as per section 22 of the I & B Code, 2016. A monthly progress report shall be filled by the Resolution Professional providing the details of work done in respect of completing the CIRP within the timeline as prescribed under the provision of section 12 of the I & B Code, 2016.

x. The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution process.

xi. However, at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

xii. The personnel of the Corporate Debtor, its promoters or any other person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP/RP to provide necessary details and documents as may be required by him in managing the affairs of the Corporate Debtor in accordance with the provision of the I & B, Code, 2016.

xiii. The Operational Creditor/Applicant is directed to deposit Rs. 1,00,000/- (Rupees One lakh only) with the IRP appointed hereinabove within two weeks from this order. IRP can claim the preliminary expenses and fees subject to approval by the CoC and after the constitution of the CoC.

58. In view of the foregoing order, the I.A No. 333/2022, I.A No. 87/2023 is disposed off and M.A No. 01/2023 is dismissed accordingly.

59. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the IRP and the jurisdictional Registrar of Companies by Speed Post as well as through email.

60. List the matter on 30.01.2024 for filing of the first monthly progress report.

61. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

62. Ordered accordingly.

-Sd-

(Ashish Verma)
Member (Technical)

-Sd-

(Praveen Gupta)
Member (Judicial)

Date:-21st December, 2023

Ankita Sharma
(LRA)