

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No.324/BB/2019  
U/s 9 of IBC, 2016  
R/w Rule 6 of I&B (AAA) Rules, 2016

**IN THE MATTER OF:**

**Navalmar (UK) Limited**

2, Beulah Road, Wimbledon,  
London – SW19 3 SB.

- Operational Creditor

**Versus**

**Navalmar Shipping (India) Private Limited**

No. 207/208, Sunrise Chambers,  
2<sup>nd</sup> Floor, No. 22 Ulsoor Road,  
Bangalore – 560 042.

- Corporate Debtor

**Order Pronounced on: 29<sup>th</sup> May, 2020**

**Coram:**

1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present:**

For the Operational Creditor : Mr. Chintan Chinnappa with  
Mr. Anandi Kumar

For the Corporate Debtor : Mr. K.R. Krishnamurthy with  
Mr. Abhinag S.

**ORDER**

***Per: Ashutosh Chandra, Member (Technical)***

1. This Company Petition has been filed by M/s. Navalmar (UK) Limited (hereinafter referred to as 'Operational Creditor') under Section 9 of the IBC, 2016 R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of M/s. Navalmar Shipping (India) Private Limited (hereinafter referred to as 'Corporate Debtor') on the ground that the Corporate Debtor has committed default for a total outstanding amount of USD 17,35,645.46/- (United States



Dollar Seventeen Lakh Thirty-Five Thousand Six Hundred and Forty Five Decimal Point Forty Six Only) .

2. Mr. Andrea Colombo has filed this petition being duly authorised by Board Resolution dated 15.07.2019 passed by the Operational Creditor Company. Copy of the Board Resolution dated 15.07.2019 along with Power of Attorney dated 16.07.2019 is annexed to the Petition.

3. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are inter alia as under:

- (1) It is stated that the Corporate Debtor acted as the representative of the Operational Creditor in India for the period 2002 to 2018. In this period, the Corporate Debtor collected various payments due from the Operational Creditor's company's customers in India and remitted the same to the Operational Creditor. The Operational Creditor claims that the Corporate Debtor failed to make payments aggregating to USD 13,40,572.89/- in relation to freight charges for cargo on Board.
- (2) It is further stated that Corporate Debtor failed to make payments for the purchase of motor boat made in October 2015 to April 2017 from the Operational Creditor and the repair charges for the motorboat amounting to USD 1,41,072.57 (USD 61,119.45, for import of motorboat and USD 79,953.12 for repair charges incurred with respect to the motorboat). Copies of invoices and debit notes reflecting amounts payable for purchase of motorboats, freight collections are annexed to the Petition.
- (3) It is stated that from December 2015 to January 2018, the Operational Creditor made certain advances to the Corporate Debtor for services to be provided amounting to USD 2,54,000.00. The services for such advances were neither provided nor were these advances refunded.
- (4) The Operational Creditor submits that the Corporate Debtor has defaulted in making payments of USD 17,35,645.46 (United States Dollar



Seventeen Lakh Thirty-Five Thousand Six Hundred and Forty-Five decimal point Forty-Six) amounting to Rs.11,93,42,982 at the exchange rate of 1 USD = Rs. 68.76 as on July 29, 2019), towards outstanding amounts of advances (unsecured loans) taken from the Operational Creditor , motorboat import and repair charges freight charges.

- (5) It is further stated that the audited financial statements of the Corporate Debtor for the year ending 31.03.2018 acknowledge the advances due to the Operational Creditor and reflect as 'Trade payables- Due to Related party (Principal, a company in which Director is interested' as Rs.5,93,67,527/- (Rupees Five Crore Ninety Three Lakh Sixty Seven Thousand Five Hundred and Twenty Seven only). Various invoices and debit notes reflects the amounts payable for purchase of the motorboat, repair charge in relation to the motorboat and freight collection. Copy of the latest audited financial statements of the Corporate Debtor and the invoices and debit notes are annexed to the petition.
- (6) The Operational Creditor issued demand notice dated 12.06.2019, to the Corporate Debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016. The said notice demands payment of all unpaid debts due amounting to a sum of USD 17,35,645.46 (US Dollars Seventeen Lakh Thirty Five Thousand Six Hundred Forty Five and decimal point Forty Six only) to the Operational Creditor within (10) ten days. Copy of the Demand Notice dated 12.06.2019 is annexed to the petition.
- (7) It is submitted by the Operational Creditor that the Corporate Debtor vide its Reply Letter dated 01.07.2019 has admitted that various amounts are due from the Corporate Debtor but has not made any payments of the outstanding amounts to the Operational Creditor.
- (8) It is stated that in the light of the aforesaid and the continuing default on the part of the Corporate Debtor, the Operational Creditor is constrained to file the present Application for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor in order to recover the amounts payable by the Corporate Debtor to the Operational Creditor.



4. The Corporate Debtor filed its Statement of Objection on 20.11.2019 which are relevant to the issue in question by inter alia contending as follows:

- (1) It is contended that the Petition is liable to be rejected solely on the ground that there exists pre-existing dispute with regard to the amount of debt. The Operational Creditor has relied upon the disclosures made by the Corporate Debtor to the statutory authorities to establish the existence of debt. However, the amounts disclosed in the Financial Statement towards liability is not matching with the amount claimed by the Operational Creditor. The differences between the amounts disclosed by the Corporate Debtors in its financial statement submitted to the statutory authorities, and the amount claimed by the Operational Creditor itself indicates "Pre-existing dispute".
- (2) It is contended that the authorised signatory of the Operational Creditor, Mr. Andrea Colombo has made a deliberate false statement in the affidavit filed in compliance with Section 9(3) (b) that there is no notice received from the Corporate Debtor relating to the pre-existing dispute of the alleged unpaid Operational Debt. In this regard, Mr. Andrea Colombo has suppressed the material fact that he was the Director on Board of the Corporate Debtor Company from 18.03.2002 to 1<sup>st</sup> April 2019. Mr. Andrea Colombo is well aware that the Corporate Debtor is not due to the Operational Creditor to the extent of USD 17,35,645.46. Even in the Exhibit 5 at page 18 (internal Page 1 of 21), the liability is shown as only INR.6,68,34,562 and at page 28 (internal page 11 of 21) in item No. 5.1 & 5.2 the liability is referred to the Operational Creditor with an explanation that the Director is interested. This is a sufficient notice to the Operational Creditor Company also. There is no admission on the part of the Corporate Debtor in any of its statutory filing acknowledging the debt of USD 17,35,645.46.
- (3) It is contended that the Petition is verified and presented by Mr. Andrea Colombo, who has got serious conflict of interest. This would cause serious prejudice to the interest of the Corporate Debtor as the authorised



person could be the material witness for the Corporate Debtor Company in the facts and circumstances of the case.

- (4) It is further contended that the Operational Creditor made a false claim at item No. 13 to 15 at page 10 Exhibit 4 produced by the Operational Creditor. This document is attested by Mr. Andrea Colombo knowing fully well that, the claims at items no. 13 to 15 are false and non-existent. Hence, the Operational Creditor and its authorised representative Mr. Andrea Colombo are guilty of committing the offence of perjury. The Petition is also liable to be dismissed for want of bona fides. The Petition is filed in retaliation to the removal of Mr. Andrea Colombo from the Board of Directors of Corporate Debtor Company.
- (5) It is contended that the debit notes produced at page 72 to 75 of Exhibit 6 corresponding to the export invoices at page 70 and 71 in respect of motor vessels are invalid debit notes, having regard to the fact that, there cannot be any debit note subsequent to the Bill of Entry for customs clearance in India Ports. All the cost and expenses of export are part of the export invoice raised in the year 2015. The invoices produced at page 76 to 82, and pages 88 to 91 are invalid and false claim having regard to the fact that all these invoices are pertaining to freight charges that are already raised by the Corporate Debtor Company on the Shipper (exporter), on behalf of the Operational Creditor Company. The claims made under several invoices are barred under the provisions of Limitation Act and hence liable to be rejected.
- (6) It is stated that merely by reason of not dealing specifically with any claims, allegations, contentions, insinuations or averments, the Corporate Debtor does not, nor shall the Corporate Debtor be deemed to have admitted the authenticity or the veracity thereof. The Corporate Debtor further submits that, all the averments contained in the Application, and the accompanying affidavit filed by the Operational Creditor, insofar as that which is not borne from record, are denied as false, and the Operational Creditor shall be put to strict proof thereof.



- (7) It is contended that the Operational Creditor's claim for the amount of USD. 17,35,645.46, is false and frivolous. The amount shown as outstanding in the financial statement has to be adjusted towards the amount due by the Operational Creditor on various counts to the Corporate Debtor. The Operational Creditor shall be put to strict proof of the claim made in the Petition.
- (8) It is contended that the condition of insolvency does not exist in respect of the Corporate Debtor Company, M/s. Navalmar Shipping (India) Private Limited. The Corporate Debtor, being a going concern, is commercially solvent, and has various existing and probable assets. The amount due to the Operational Creditor is not paid as there is an issue between the Operational Creditor and the Corporate Debtor with regard to the amount due. Further, it is a well settled position in law that, the proceedings under IBC is not intended to be a substitute to a recovery forum, and whenever there exists a real dispute, the provisions of Insolvency and Bankruptcy Code, 2016 cannot be invoked.
- (9) It is contended that apart from Mr. Andrea Colombo, as mentioned earlier, one Mr. Fernando Poletti was also a Director of the Corporate Debtor Company from 18.03.2002 to 15.02.2019. He has resigned from the office of the Director on 15.02.2019. Copies of the Details of Directors and the Minutes of various Board meetings dated 09.04.2004, 18.03.2005, 12.08.2005 and 25.03.2008 are annexed to the objections. All decisions in respect of the affairs of the Corporate Debtor Company from 18.03.2002 to 15.02.2019 were taken by Mr. Andrea Colombo and Mr. Fernando Poletti. Therefore, Mr. Andrea Colombo being the erstwhile Director of the Corporate Debtor Company herein took a decision and signed the General Agency Agreement with the Operational Creditor Company in the year 2003. Under said Agreement the Corporate Debtor herein was appointed as protective Agent on non-exclusive basis for remuneration by way of commission, to represent and to act for the Operational Creditor in respect of its business of vessel and services such as booking of vessels and cargos; to collect



freight charge. The Agreement was signed by Mr. Andrea Colombo till 2017. However, the Operational Creditor, unilaterally terminated the said Agreement, by its notice dated 05.09.2018.

(10) It is contended that the freight invoices were raised by the Corporate Debtor Company, only in Indian Currency value on behalf of the Operational Creditor, being its agent under the Agreement. The Corporate Debtor collected the invoice amounts in Indian Currency value from shippers (exporters). As such, invoices and debit notes produced by the Operational Creditor along with the Petition are false, fabricated and fictitious, created for the purpose of this case. The Operational Creditor has not chosen to produce before this Adjudicating Authority, all other material records such as, Bill of Entry, Bill of Lading, Ledger Account, and financial only with mala fide intentions of misleading this Bench.

(11) It is contended that the Corporate Debtor purchased two (2) Second hand Gottawald Cranes from the Operational Creditor in the year 2005, to facilitate the cargo loading activities of the Operational Creditor Company. Mr. Andrea Colombo and Mr. Fernando Poletti were the Directors of the Corporate Debtor Company during 2005. The Corporate Debtor Company has paid the amount of INR. 3,38,29,915.00 towards customs duty payable. The said amount is liable to be adjusted out off the total amount of INR. 5,97,45,758. Without prejudice to the contention of the Corporate Debtor that, the claims of the Operational Creditor are barred in Law by limitation, the Corporate Debtor submits that, the dues from the Corporate Debtor, as per the books of accounts maintained by Mr. Andrea Colombo and Mr. Fernando Poletti during the period they were managing the affairs of the Corporate Debtor Company as hereunder;

A. Details of amounts payable towards Yacht Costs to the Operational Creditor :



Sl. NO.	Particulars	Import Bill No.	Bill Amount (in USD)	Paid in FY 2018-19 (in USD)	Balance Payable (in USD)
1.	Motor Boat- Gobbi31	317/21.10.2015	35,824.95	-	35,824.95
2.	Motor Boat- Gughi Deu	331/23.11.2015	36,836.41	36,836.41	-
3.	Motor Boat- Airon Marine	354/11.12.2015	25,294.50	-	25,294.50
4.	Motor Boat- Montecristo	5/12.02.2016	17,066.70	17,066.70	-
IMPORT BILL PAYABLE					61,119.45

The Amount reflected at item Nos. 1 to 3 herein above cannot be considered as acknowledgement of debt for the purpose of initiating insolvency proceeding but only for the purpose of complying with the provisions of taxation statutes.

B. Details of Freight payable to the Operational Creditor :

Sl.No	Vessel Name	Voyage No.	Month/Year	Amount equal to USD of Collection	Amount Payable (In INR)
1.	MV. NASR	006A_IN	April 2005	4,95,658.74	2,17,59,419
2.	MV. HUMBOLDT CURRENT	022A_IN	June 2005	1,88,822.05	82,70,406
3.	MV. ELGRECO	019A_FE	April 2006	83,803.86	37,12,502
4.	MV. ROSSEL CURRENT	043A_IN	May 2008	4,35,560.19	1,78,16,935
5.	MV. TIANJIN	002A_FE	Feb 2008	11,047.11	4,40,338
6.	MV. HUMBOLDT CURRENT	048A_IN	June 2009	5,393.12	2,58,492
7.	MV. CMD CATRINA	001A_FE	Au g 2013	15,071.23	9,24,469

*Zus*

8.	MV. THOR WAVE	001A_FE	Nov 2013	82,163.43	51,81,226
9.	MV. CHANG LONG	001A_FE	Jan 2015	11,845.44	7,54,910
10.	MV. NEW LUCKY	001A_FE	July 2015	2,667.55	1,69,069
11.	MV. INUMAYA	001A_FE	Nov 2015	980.22	64,695
12.	MV. UNION DEMTER	002A_FE	Feb 2016	5,794.86	3,93,297
SUB					5,97,45,758
TOTAL					
LESS: Custom duty on Cranes paid by the Corporate Debtor on behalf of the Operational Creditor , as stated hereinabove					3,38,29,915
TOTAL FRIEGHT PAYABLE					2,59,15,843

The Amounts reflected at item No. 1 to 12 herein above cannot be considered as acknowledgement of debt for the purpose of initiating insolvency proceeding but only for the purpose of complying with the provisions of taxing statutes.

(12) It is contended that on 25.09.2015, the Operational Creditor has provided a confirmation to the Corporate Debtor, clearly indicating that, the Corporate Debtor is due a sum of INR. 5,43,24,255.00 as on 31.03.2015, towards freight charges collected from the customers on behalf of the Operational Creditor. The financials of the Corporate Debtor Company as on 31.12.2015, was also duly furnished to the Corporate Debtor. Further, the Corporate Debtor, on being mindful of the long-standing relationship with the Operational Creditor, in order to resolve the issue amicably in good faith, offered to settle the amounts due, after adjusting all the receivables (Customs duty on Cranes paid by the Corporate Debtor on behalf of the Operational Creditor ), within a period of two years, by selling the immovable assets standing in the name of the Corporate Debtor (i.e. residential flats No. 203 & 301 in Galina Apartments, Indiranagar, Bengaluru, and commercial flats No. 5A, 5B, 5C,

& 5D in Sea View Towers, Chennai), after obtaining possession from, and evicting the occupant(s), Mr. Fernando Pelotti.

- (13) Regarding Part A – Details of Advances totally amounting to USD. 2,54,000.00: The remittance received has been adjusted towards various costs and expenses incurred by the Corporate Debtor Company, in the course of business.
- (14) Regarding Part B – Details of the amounts payable to the Operational Creditor towards Yacht Costs: it is not correct to state that, the Corporate Debtor Company is liable to pay the amount towards the invoices and amounts reflected in Part B. Some of the invoices and debit notes are fabricated, as explained hereinabove. It is pertinent to note that, to obtain a loan from any foreign company, the company needs to obtain prior approval from the Reserve Bank of India, under the Foreign Exchange Management Act, 1999.
- (15) Regarding Part C – As stated hereinabove, the freight invoices were always raised by the Corporate Debtor Company on behalf of the Operational Creditor in India currently value only, and collected these freight charges from the shippers (Exporters) in Indian Currency Value only, and not in US Dollars as claimed by the Operational Creditor. The Debit notes produced by the Operational Creditor are fabricated and concocted for the purpose of this case.
- (16) It is contended that the Operational Creditor has inflated its claim on various freights by producing false, fabricated and fictitious invoice copies, without producing the supportive material records like copies of Bill of Lading, Ledger Account and copy of financials of the Operational Creditor, to substantiate the claim, which are in the custody of the Corporate Debtor. The claim of the Operational Creditor in US Dollars is in contravention with the prescribed norms of the Reserve Bank of India and Foreign Exchange Management Act, 1999.



- (17) It is contended that the Operational Creditor has fabricated certain debit notes in the name of Corporate Debtor Company. There is no such liability incurred by the Corporate Debtor Company as the Corporate Debtor Company is not a party to the freight transaction. The actual invoices/debit notes were required to be raised directly on shippers (Exporters), since they are the party to the freight transaction, and are also liable for making the freight payment for loading the Cargo on their ships, loading in Indian ports.
- (18) The Corporate Debtor has acted as a facilitator for collecting the freight on behalf of the Operational Creditor, by raising the invoices. Therefore, the invoices and debit notes produced by the Operational Creditor before this Adjudicating Authority are false, fabricated and fictitious. Further, it is also false to state that the Corporate Debtor is liable to the Operational Creditor in a sum as claimed in the Petition.
- (19) It is further contended that the Operational Creditor Company has made the false claim on the basis of false and fabricated accounts maintained by it and has raised a demand on the following freights, which had been already remitted by the Corporate Debtor.
- (20) As regards Sl. No. 13 & 14 of part C, Exhibit 4: the claim of Operational Creditor USD. 2,97,597.50 towards Freight charges earned for Cargo on Board MV. VELASQUEZ has already been remitted to the Operational Creditor by the Corporate Debtor. The actual freight amount as per the invoices raised by Corporate Debtor of USD. 2,94,597.50 has been remitted by the Corporate Debtor on 28.09.2010, to Navalmar UK Limited LINER DEPT IND, USD ACCT NR. 1127 Cassa Di Risparmio Di Lucca Pisa Livorna Avenza, via Campo D'appio 44 – Avenza, Carrara, Italy.
- (21) As regards Sl. No. 15 of Part C, Exhibit 4: the claim of Operational Creditor USD. 2,39,208.33 towards Freight charges earned for Cargo on Board MV. VANDYCK has already been remitted to the Operational Creditor by the Corporate Debtor. The actual freight amount as per the invoices raised by the Corporate Debtor of USD. 2,41,594.63 has been



remitted by the Corporate Debtor on 11.05.2010 in pursuance thereof, to Navalmar UK Limited LINER DEPT IND, USD ACCT NR. 112, Cassa Di Risparmio Di Lucca Pisa Livorna Avenza, via Campo D'Appio 44 – Avenza, Carrara, Italy.

5. The Rejoinder filed by the Operational Creditor to the Statement of Objections dated 03.12.2019 which are relevant to the issue in question, is inter alia as follows:

- (1) It is contended that the in Re: Para 3(a) The Corporate Debtor has not initiated any dispute against the Operational Creditor till date. The Statement of Objections filed by the Corporate Debtor itself admits the various amounts payable to the Operational Creditor. This further establishes that there is no 'pre-existing dispute' and that the Corporate Debtor is merely attempting to create them in order to avoid the consequences under the Insolvency and Bankruptcy Code, 2016 ("Code"). In paragraph 8(i) of the Statement of Objections, the Corporate Debtor has admitted to receiving USD 2,54,000. In paragraph 7 (VIII) (A), the Corporate Debtor has admitted to a remaining import bill payable of USD 61,119.45. In paragraph 7(VIII)(B), the Corporate Debtor has admitted to outstanding freight payables of USD 13,38,807.80. The amount admitted in the above paragraph itself amount to USD 16,53,927.25 as against the Operational Creditor's total claim USD 17,35,645.46 leaving only USD 81,718.21. The Corporate Debtor has further admittedly not taken into account various debit notes issued by the Operational Creditor. Accordingly, the amounts admitted by the Corporate Debtor nearly add up to the amounts claimed by the Operational Creditor. The Corporate Debtor has not ever raised the issue of false and fabricated debit notes in the past and is merely trying to 'create' a dispute for the purposes of the Code. It may be noted that there is no allegation of any false and fabricated debit notes even in the reply given by the Corporate Debtor dated 01.07.2019 in response to the notice issued by the Operational Creditor dated 12.06.2019 under the Code.



- (2) It is contended that in Re: Para 3(J) The claims made by the Operational Creditor by way of invoices produced are valid claims and are within the limitation period. As per Section 18(i) of the Limitation Act – *“Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.”* It is well settled that the amounts reflected in the accounts are acknowledgement of debt for the purposes of Section 18 of the Limitation Act.
- (3) It is contended that in Re: Para 5 and 6: As regards the amounts outstanding, the issue has been dealt with in detail previously. It is clear from paragraph 7(x) of the Statement of Objections that the Corporate Debtor does not have the necessary income to clear its outstanding obligations. It has accordingly sought a time of 2 years to clear of its obligation to the Operational Creditor. This further reinforces the Operational Creditor’s claim that the provisions of CIRP under the Code be applied to the Corporate Debtor in order to immediately find a resolution or liquidate the assets of the Corporate Debtor to ensure that creditors are paid. Any further delay will only enable the management to remove further funds from the Corporate Debtor and deny the creditors of their rightful dues. The latest annual accounts of the Corporate Debtor sets out that the total revenue from operations was Rs. 2,68,02,827. Page (internal page 19 of 22 sets out that the entire revenue from operations of Rs. 2,68,02,827 was earned from the Operational Creditor . As noted in paragraph 7 (v) of the Statement of Objections, the agreement with the Operational Creditor under which the Corporate Debtor was earning commission income has been terminated on September 5, 2018. It is clear from reading the accounts together with the fact of terminating of the agreement with the Operational Creditor that the Corporate Debtor has no other source of income.



- (4) It is contended that in Re: Para 7 (vii): The statements made by the Corporate Debtor are false, baseless and more importantly, irrelevant to the proceedings. This liability has never been that of the Operational Creditor. The latest annual accounts of the Corporate Debtor sets out the balances outstanding from the Operational Creditor and there is no mention of the said amount of INR 3,38,29,915. This has never previously been shown as outstanding or been claimed from the Operational Creditor. This amount is being falsely claimed by the Corporate Debtor from the Operational Creditor merely to create a dispute where there is none. It may be noted that the accounts for 31.03.2019 and 31.03.2018 have both been signed by the current Directors being Ms. Rosy Rego and Mr. Joseph Jayananda. These have not been signed by Mr. Andrea Colombo or Mr. Fernando Poletti. It may be further noted that from 2005, the Corporate Debtor has deployed and earned revenues by operating the said cranes. The Operational Creditor has, in fact, waived the lease rental for the cranes as evidenced by the letters set out. Accordingly, the Corporate Debtor has benefited from the use of cranes without even paying the lease rental for these cranes. The Corporate Debtor has provided no basis for its claim of customs duties against the Operational Creditor. In addition, any claim for these amounts is further barred by the Limitation Act.
- (5) It is contended that in Re: Para 7 (viii) (A): The Corporate Debtor has admitted to an amount of USD 61,119.45. The Corporate Debtor has admitted to these amounts being due even in its reply dated 01.07.2019 in response to the notice issued by the Operational Creditor dated 12.06.2019 under the Code. Accordingly, the Corporate Debtor has admitted to these amounts being due and payable.
- (6) As stated before, there is no basis for the adjustment of the amount of Rs.3,38,29,915 on account of customs duty incurred by the Corporate Debtor for its own benefit.
- (7) It is contended that in Re: Para 7(x) and (xi): The statements made by the Corporate Debtor make it abundantly clear that it is not able to pay its



legitimate dues. It will have to liquidate its immovable assets in order to make payments. As stated before, this is a fit case for application of the CIRP process as the Corporate Debtor has not made and further, is not in a position to clear admittedly outstanding dues owed to the Operational Creditor.

- (8) It is contended that in Re: Para 8(i): The Corporate Debtor has admitted to receiving the said payments of USD 2,54,000. The Corporate Debtor has further admitted to unilaterally adjusting it towards costs and expenses without providing any basis nor even informing the Operational Creditor. It may be noted that the Corporate Debtor has not mentioned its claim of having adjusted these amounts in its reply dated 01.07.2019 in response to the notice issued by the Operational Creditor dated 12.06.2019 under the Code. Therefore, it is clear that the Corporate Debtor has made up this reason as an afterthought.

6. The Written submissions dated 31.12.2019 filed by Corporate Debtor which are relevant to the issue in question, are inter alia as follows:

- (1) It is contended that the material documents produced by the Operational Creditor disclose that the Operational Creditor has confirmed the balance due as on 31.03.2015 as Rs. 5,43,24,255/- equivalent to USD. 8,72,356/- Thereafter, there were only two transactions between the parties. At present, the Operational Creditor is claiming USD 17,35,645.46 in the demand notice, whereas in reply notice to the demand notice the Corporate Debtor has not admitted the quantum of the debt. Thus the documents placed on record clearly shows that there exists a dispute about the liability of the Corporate Debtor even prior to the issuance of the Demand Notice. There are no documents placed by the Operational Creditor reflecting the admission of the debt as claimed by the Operational Creditor in the application. Admittedly, the claim of the Operational Creditor is refuted by the Corporate Debtor, and the dispute between the parties in fact raises a serious and a bona fide



dispute. The Corporate Debtor has placed reliance on Para 51 of the decision of the Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. v. Krusa Software (P) Ltd.* It is stated that the proceedings under Insolvency and Bankruptcy Code are not intended to be a substitute to a recovery forum, and whenever there exists a real dispute, the provisions of Insolvency and Bankruptcy Code, 2016 cannot be invoked, the Application filed by the Operational Creditor is liable to be rejected.

- (2) It is contended that Section 5 of Foreign Exchange Management Act, 1999 provides that, any person may sell or draw foreign exchange to or from an authorised person if such sale or drawl is a current account transaction. Therefore, even in respect of the transactions between the Operational Creditor and the Corporate Debtor, the drawl of foreign exchange would be limited to effect the transaction on the current account. The Corporate Debtor is only obliged to transfer the amount lying in its books, to the credit of the Operational Creditor, by drawing foreign exchange equivalent to the amount lying in its account as credit. The Corporate Debtor has no liability over and above the amount collected from the importers in INR to the Operational Creditor. The amount of foreign exchange drawn should be in conformity with the contractual obligations. The obligations of the Corporate Debtor were limited to collecting the money from the importers, and remit the same to the Operational Creditor. The Corporate Debtor cannot make any payments over and above the amount actually collected and reflected in its books of accounts to the credit of the Operational Creditor. Any payments made exceeding the amounts reflected in the books account leads to the violation of FEMA regulations and attracts penal consequences. The claim of the Operational Creditor is therefore, in contravention with the provisions of Section 5 of the Foreign Exchange Management Act, 1999.

7. Heard Shri Chintan Chinnappa along with Anandi Kumar, learned Counsels for the Operational Creditor and Shri K.R. Krishnamurthy along with



Shri Abhinag S., learned Counsels for the Corporate Debtor. We have carefully perused the pleadings of both the parties and extant provisions of the code and the rules made thereunder. Material brought on record has been considered.

8. As per the General Agency Agreements from 2003 to 2017 between the Operational Creditor and the Corporate Debtor, the Corporate Debtor acted as an agent of the former in India, and collected various payments due from the customers of the Operational Creditor and remitted the same to the Operational Creditor. The Operational Creditor has annexed various invoices and debit notes with the Petition as evidence of the claimed amount. As the Corporate Debtor is an agent and service provider of the Operational Creditor, the amounts due under these transactions would fall within the ambit of 'operational debt' as defined in section 5(21) of the Insolvency and Bankruptcy Code, 2016.

9. At this point, it is imperative to mention the well settled legal proposition, as laid down by the Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*, is as follows:

*"51.... 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."*

10. In view of the above decision, it has to be examined whether on the facts brought on record, there exists a clear undisputed debt and a default in discharging the same. From a perusal of the facts brought before us, it appears that the Corporate Debtor does not have a valid or bonafide pre-existing dispute. Its main contention is only that the amounts claimed by the Operational Creditor

and its Financial Statements do not match. This is untenable as there is no plausible ground taken to deny or dispute its liability altogether. It is not for this Adjudicating Authority to ascertain, investigate or fix the exact amount of liability. As long as there is a default of Operational Debt and the said default is more than a sum of Rs. One Lakh, subject to the Form-5 being complete, the debt and default have to be taken into consideration by this Tribunal.

11. The Operational Creditor has filed an Affidavit stating that the Corporate Debtor has given no notice relating to any dispute regarding the unpaid operational debt until the Demand Notice dated 12.06.2019, nor is there any document to establish that there was a dispute in relation to the operational debt prior to the Demand Notice. Apparently no dispute on account of falsification or fabrication of Invoices etc. was also raised earlier, nor even in its reply dated 01.07.2019. However, it has attempted to raise demands on the Operational Debtor to project a semblance of dispute, even though its latest annual accounts do not mention the said amount of INR 3,38,29,915, stated to be due to it. The dispute as contemplated under the I & B Code, 2016 ought to be a pre-existing dispute which is genuine and not a patently feeble argument, as held in the case of Mobilox Investment (supra). There was therefore no pre-existing dispute that comes in the way of these proceedings.

12. Even with regard to the semblance of dispute raised with regard to the amounts due to the Operational Debtor, we make it clear that this is not a dispute resolution forum nor one where we can undertake a detailed investigation. Any investigation into issues of fabrication/falsification of documents, invalid debit notes, Directors having a conflict of interest after leaving the Corporate Debtor Company etc., as now raised by the Respondent/Corporate Debtor are issues clearly outside the scope of these summary proceedings. These issues can be investigated elsewhere. We have taken into consideration only the material and accounts as brought on record. Further, the Petition has been filed by Mr. Andrea Colombo being duly authorised by Board Resolution dated 15.07.2019 passed by the Operational Creditor Company, a separate legal entity, and not in his personal capacity. Again, issues of violations of FEMA regulations by the



Operational Creditor in making payments, as alleged by the Corporate Debtor, are neither relevant in these proceedings nor fall within the scope of these summary proceedings.

13. As against the above position we find that the Reply to the Demand Notice dated 01.07.2019 issued by the Corporate Debtor to the Operational Creditor clearly indicates an admission of liability to repay the due amount. The relevant paragraph of the above Reply Notice wherein the Corporate Debtor has admitted its liability is extracted herein below:

*“Under these circumstances, on being mindful of the long standing relationship with you, in order to resolve the issue amicably in good faith, we are ready and willing to reimburse the amount of INR 5,97,445,758/- (Indian Rupees Five Crore Ninety Seven Lakh Forty-Five thousand and Seven hundred and fifty eight only) as the freight payable, and USD.61,119.45 towards the settlement of Yacht import bills, within a period of TWO (2) years, by selling the immovable assets standing in the name of the company (i.e., residential flats No.203 & 301 in Galina Apartments, Indiranagar, Bangalore and commercial flats No.5A, 5B, 5C & 5D in Sea View Towers, Chennai), after evicting the current occupants.”*

14. Further we have also perused the Report dated 16.09.2019 by the National e-Governance Services Limited where the Operational Creditor has reported the default of the Corporate Debtor.

15. At various places in its statement of objections, the Corporate Debtor has admitted receiving USD 2,54,000, the remaining import bills of USD 61,119.45 and outstanding freight payables of USD 13,38,807.80. It is also seen that although the Corporate Debtor agreed to repay a sum of Rs. 5,97,445,758/- as admitted in the Reply to Demand Notice dated 01.07.2019, the same has not been done till date. In this regard we have perused the Bank Statement of the Operational Creditor for the period 31.05.2019 to 07.06.2019 showing that the Operational Creditor has not received any amount after the Demand Notice was issued. On a perusal of the latest Audited Financial Statement of the Corporate

Debtor for the year ending 31.03.2018 produced by the Operational Creditor, it is seen that the Corporate Debtor admits to a sum of Rs.5,93,67,527/- as trade payables to the Operational Creditor. The Balance Sheet of the Corporate Debtor has been acknowledging the operational debt extending the period of limitation to file the present petition.

16. It may also be mentioned that on the request of the Learned Counsel for the Corporate Debtor, parties were given an opportunity for settlement between themselves. Two week's time was granted and the matter was reserved for orders on 10.12.2019. The Corporate Debtor has failed to utilise this opportunity to make arrangements for payment of the debt. The Corporate Debtor, although admitted its liability by seeking to settle the matter, has failed to discharge the same. In view of the above facts, it is clear that there is an admitted liability for an amount higher than Rs. One Lakh.

17. As regards the financial status of the Corporate Debtor, it has contended that this condition does not exist, that it is a going concern and can repay its debts from its existing and probable assets. However, a perusal of its latest Audited Financial Statement shows that the Company has incurred losses including cash losses and the net worth of the Company is negative. Further, from its Independent Auditors report it is seen that a material uncertainty exists that may cast a doubt on its ability to continue as a going concern. Further, while admitting the debt owed to the Operational Creditor, Corporate Debtor submits that in order to resolve the issue it offered to settle the amounts due, after adjusting all the receivables within a period of two years, by selling the immovable assets standing in the name of the Corporate Debtor. Further, it is seen that its only source of income, being commission, was from the Petitioner/Operational Creditor, and that mutual agreement has since been terminated on 05/09/2018. On account of this termination the Corporate Debtor has no other source of income. It has therefore admittedly lost its substratum and its ability to pay its debts. This is, therefore a fit case for initiation of CIRP in respect of the Corporate Debtor.



18. The instant Company Petition is filed in accordance with law, and the Operational Creditor has also suggested a qualified Resolution Professional, namely Mr. Ritesh Prakash Adatiya, with Registration No.IBBI/IPA-001/IP-P01334/2018-19/12013, who has also filed written Consent in Form-2 dated 24.07.2019, to the effect that he is eligible to be appointed as IRP. It is settled position of law that once debt and default in question is proved, and there being no dispute raised by the Corporate Debtor, in an Application/Petition filed U/s 9 of Code, it is mandatory for the Adjudicating Authority to initiate CIRP, appoint IRP, impose moratorium etc. Therefore, we are convinced that there is a debt and default in question, which is not in dispute and thus the Petition is fit to be admitted, by initiating CIRP in respect of Corporate Debtor

19. In view of the above facts and circumstances of the case and the law on the issue, by exercising powers conferred on the Adjudicating Authority, U/s 9 (5)(i) of the Code, the Company Petition bearing C.P.(IB) No.324/BB/2019 is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of the Respondent/Corporate Debtor with the following consequential directions:

- (1) **Mr. Ritesh Prakash Adatiya**, bearing **Registration No.IBBI/IPA-001/IP-P01334/2018-19/12013**, who is qualified Resolution Professional, is hereby appointed as Interim Resolution Professional, in respect of the Corporate Debtor/Corporate Debtor to carry out the functions as mentioned under the Insolvency and Bankruptcy Code, 2016 and various rules issued by IBBI from time to time;
- (2) The following moratorium is declared prohibiting all of the following, namely:
  - a. the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor/Corporate Debtor including execution



- of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
  - c. 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
  - d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor;
  - e. The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;
  - f. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
  - g. The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;
- (3) The IRP should follow all extant provisions of IBC, 2016 and the rules including fees rules as framed by IBBI. The IRP is hereby directed to file his report in the Tribunal from time to time.
- (4) The IRP is directed to follow all extant provisions of the IBC, 2016 and all extant rules including fees rules as framed by IBBI from time to time. The IRP is hereby directed to file progress reports to the Tribunal from time to time.



- (5) The Board of Directors and all the staff of Corporate Debtor/Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.
- (6) Post the case for report of IRP on **15th July 2020**.



**ASHUTOSH CHANDRA  
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA  
MEMBER, JUDICIAL**

Aparna