NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 04.03.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP (IB) No.71/9/AMR/2020		9 Of IBC	K Computers Vs PI Data Centers Pvt Ltd

Counsel for Petitioner(s):
Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):
Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP (IB) No.71/9/AMR/2020 is admitted, vide separate orders.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH

CP (IB) No.71/9/AMR/2020

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

In the matter of
M/s. PI DATA CENTERS PRIVATE LIMITED

BETWEEN:

M/s.K Computers,
Rep.by Mr.Borra Vijay Vardhan (Managing Partner),
1-2-234/13/45, Plot No.45,
Aravind Nagar Colony, Domalguda,
Hyderabad - 500029

.... Operational Creditor

AND

M/s.PI Data Centers Private Limited,
Rep.by Mr.Manu Sharma (CFO),
Survey No.49/P, Plot No.12, I T Layout,
Auto Nagar, Mangalagiri, Guntur,
Andhra Pradesh – 522503

.... Corporate Debtor

Orders pronounced on: 04.03.2022

***Coram*:**

Justice Telaprolu Rajani, Member Judicial.

Parties/Counsels present:

For the Operational Creditor:	Mr.Y.Suryanarayana, Dr.K.V.Srinivas & Mr.Yasaswi, Advocates
For the Corporate Debtor :	Mr.P.Ravi Prasad & Mr. Kamesh Vedula, Advocates

ORDER

1. This application is filed by M/s. K Computers ("hereinafter referred to as Operational Creditor") seeking initiation of Corporate Insolvency Resolution Process in respect of M/s. PI Data Centers Private Limited ("hereinafter referred to as Corporate Debtor") alleging that the Corporate Debtor committed default in making payment of Rs.9,72,14,511/- (Principal Amount Rs.8,31,81,659/-+ Interest Amount Rs.1,40,32,852/-) towards invoices raised against the goods supplied.

2. The facts briefly as stated in the petition are as follows:

   i. The Operational Creditor is in the business of providing comprehensive IT Infrastructure Services and Outsourced Business, IT Support to growing companies, etc.,

   ii. The Corporate Debtor is into the business to supply design, develop, carryout, research, manufacture, maintain, buy and other things used as accessory to or in relation to or in connection with the foregoing, etc.,

iii. The Corporate Debtor has issued a work order to the Operational Creditor for supply of flexible capacity works and other ancillary services. A copy of the agreement is annexed as **Annexure – 3.** Based on the assurance and representations of the Corporate Debtor, the Operational Creditor duly supplied flexible capacity works and other ancillary services to the address specified by the Corporate Debtor. Ledger copies are annexed as Annexure -4.

iv. The Corporate Debtor has to pay total debt amount of Rs.9,72,14,511/- out of which Principal amount is Rs.8,31,81,659/- and rest is interest.

v. Demand notice was issued in Form 3 & 4 on 10.06.2020 under Section 8 (1) of IBC.

vi. A reply notice was issued by the Corporate Debtor on 26.06.2020 and 05.09.2020 with false contentions. Since the Corporate Debtor failed to discharge the amount, this application seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Insolvency

Resolution Professional (IRP) as prescribed under the Code and Rules thereon.

3. The Corporate Debtor filed counter denying the averments in the application and raising certain contentions as follows:

   i. M/s. Hewlett Packard Enterprise India Pvt. Ltd. (HPe) (Principal Service Provider) is the Original Equipment Manufacturer and is engaged in supply and distribution of equipment manufactured by HPe. It was engaged by the Government of Andhra Pradesh since 2017 for their e-Pragati Core Application Project and supplied necessary machinery and equipment to the AP Government. The Corporate Debtor was asked by HPe to enter into a hardware leasing arrangement and place a hardware lease order to the Operational Creditor for the purpose of the said project.

   ii. The Corporate Debtor did not have the wherewithal to commit and to take the huge infrastructure inventory and pay to the Operational Creditor. On the said specific understanding and reason the Corporate Debtor engaged itself in the project and entered and executed a "Statement of Work" (SOW) to Pi Data Centers Pvt. Ltd for flexible capacity from K. Computers & Hewlett Packard Enterprise India Pvt. Ltd. (HPe) Dated 23.03.2018 and the Operational Creditor did not provide any services to the Corporate Debtor. Under Clause 2 of the SOW, the Services of System Provisioning, Installation Services, Enhanced Call handling Services, Rapid Response to Critical Hardware, etc., have to be done by the Principal i.e., HPe. The Operational Creditor's role was limited to merely raising invoices on behalf of HPe.

iii. The burden on the Corporate Debtor was the billing by the Operational Creditor at the instance of HPe at full load, despite the Corporate Debtor only using a portion i.e., mere 15% of the total capacity at one point of time as per the requirement of Project team and at peak volume. The utilisation never went beyond 50% of the supplied capacity. The HPe and the Operational Creditor were actively working with the end user i.e., e-Pragati Authority/AP Government for designing the solution even before the Operational Creditor was part of this project.

iv. Corporate Debtor entered into Agreement, because under its Exhibit-B, the pricing of the products and services availed by the Corporate Debtor were to be done on the actual usage basis. It is for this reason that the Corporate Debtor at several instances approached HPe and the Operational Creditor for resizing of the total capacity load so that the Corporate Debtor paid only for the actual usage as per the load being used towards the project. However, after assuring the resizing of Flexible Capacity Servers being supplied to the Corporate Debtor based on the actual usage for the said project, the request made by the Corporate Debtor was denied and was never considered by the Operational Creditor and the principal of the Operational Creditor.

v. The HPe along with the Operational Creditor caused serious operational concerns for the Corporate Debtor by intermittently denying the services when it was most needed. The project was on high risk, several important transactions and data of the AP Government was on risk and the Corporate Debtor requested for immediate support from HPe. The Operational Creditor's principal HPe withdrew the technical support on 24.11.2019 and on 02.06.2020, in order to coerce the Corporate Debtor into settling unpaid disputed invoices.

vi. Even as negotiations for revised invoicing and resizing were ongoing, the Corporate Debtor was served with the Demand Notice on 19.06.2020 demanding Rs.9,72,14,511/-. The falseness of the Demand Notice is apparent from the fact that in a Notice dated 10.06.2020 from HPe addressed to one Savex Technologies Private Limited and marked to the Corporate Debtor, HPe with reference to the SOW demanded payment for an amount of only Rs.3,91,47,627/-.

vii. The Corporate Debtor, on 26.06.2020 duly replied to the demand notice disputing the payment putting forth the pre-existing dispute between the parties with respect to the invoicing by the Operational Creditor and deficiency in services by HPe. In the reply it is categorically stated that Operational Creditor had issued the Demand Notice for amounts based on false invoices and based on invoices which were never raised on the Corporate Debtor and by demanding full amounts irrespective of the actual utilization of capacity of servers in clear contravention of the Agreement.

viii. The claim of the Operational Creditor does not fit within the purview of the definition of the term Operational Debt.

The Operational Debt under Section 5 (21) of the Code, should be in respect of the provision of any goods or services and there should necessarily be a supply of goods or services from the Operational Creditor to the Corporate Debtor. The debt becomes an operational debt only when there has been a supply of goods or services by the Operational Creditor.

ix. The claims of the Operational Creditor are neither against any goods purchased nor against any services availed by the Corporate Debtor from the Operational Creditor. The Operational Creditor is a mere collection agent of HPe which is a channel partner. HPe for all purposes is the supplier of all services under the Flexible Capacity Agreement dated 23.03.2018. It has no technical wherewithal, no technical personnel and does not have the capacity to evaluate the requirement and usage of the services rendered to the Corporate Debtor.

x. It was HPe that was all along responsible for the entire execution of the project from the inception. Even the follow up for payment of invoices and calling for revaluation of the infrastructure and consequential billing based on capacity utilization was done by HPe and not by

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the Operational Creditor. There is nothing on record to show that the Operational Creditor has the requisite authority to prosecute these proceedings before the Tribunal.

xi. The invoices claimed by the Operational Creditor, amounting to **Rs.4,96,30,800/-** were never submitted to the Corporate Debtor nor were they part of the Creditor's own ledger account sent on 06.05.2020. They were made-up for the purpose of filing this case.

xii. That the GST on these purported invoices has also not been paid by the Operational Creditor. Under the GST regime, an amount cannot be claimed to be due and payable by the service recipient and a tax invoice cannot be sent to the service recipient unless the service provider has declared the due and payable GST amounts to the department in GSTR1.

xiii. In the present transaction, there were serious disputes between parties over billing of the services rendered and usage of the capacity deployed and also with regard to the Operational Creditor providing services. The major part of the claim amount is, towards the servers supplied by HPe which were never used by the Corporate Debtor.

xiv. The Operational Creditor issued both Form 3 and Form 4 to the Corporate Debtor, but did not bring Form 4 on record, where it is mentioned "Pi Data Centers Private Limited" as the Operational Creditor. In order to conceal the error made by the Operational Creditor, the same was not filed.

xv. The Operational Creditor has deliberately misstated and concealed the material and relevant facts. Since the Operational Creditor is not an Operational Creditor the Company Petition under Section 9 of IBC, 2016 is not maintainable and has to be dismissed as frivolous, vexatious and not maintainable.

4. Operational Creditor filed rejoinder wherein it is stated that:

i. The documentary evidence showing the existence of Operational Debt is filed which includes invoice demanding payment. A copy of the certificate from the Financial Institutions maintaining accounts of the Operational Creditor confirming that there is no payment of an unpaid operational debt. Copy of the record with information utility confirming that there is no such payment. The Corporate Debtor has categorically admitted the debt in the reply notice. There is no whisper of any legally valid dispute as required under section 8 (2) (a) of IBC, 2016. The default has arisen out of EPC Contract which itself is a continuing contract. The debt continues to fall even today, as the EPC contract between the parties never terminated. The procedural lapse of not enclosing Form 4 to the notice is a curative defect and cannot be a ground for dismissal. There is no agent and principal relationship between the Operational Creditor and HPe. All parties to entire transaction are completely independent. Clause 2 of the State of Work (SoW) executed between Operational Creditor/Operational Creditor and Operational Creditor/Corporate Debtor reads as follows:

> *"This Statement of Work (SoW), including any applicable exhibits or appendices (collectively the "Agreement"), is effective as of the last date of signature indicated in the signature section further below ("Effective Date")**by and between the Hewlett-Packed Enterprise Channel Partner Entity listed below ("K Computers") and Pi ("Pi")** and identifies the Flexible Capacity ("Services") K Computers will perform for Pi".*

When the Corporate Debtor/Corporate Debtor itself willingly recognised that services were to be provided by K Computers, it is futile to mislead the Tribunal by alleging that a third party is to perform the services.

ii. With regard to usage base model and pricing. It is submitted that Clause-7.1.1 of the SoW makes it clear that the Corporate Debtor has chosen a fixed base approach as opposed to variable one. It is contended that there have been numerous occasions when the same was clarified to the Corporate Debtor. Emails clarifying that they have not opted for variable billing have been adequately covered by the Corporate Debtor in its counter affidavit. Clause 7.1.1 of the SOW reads as under:

> *"For the Basic model, the committed capacity is equal to the Requested Capacity. Committed capacity increases automatically as the Customer uses the Buffer Capacity.* ***In addition, no shrinkage is allowed in the Committed Capacity or within the Buffer.****"*

iii. From the above, it is clear that the Corporate Debtor had chosen a fixed based approach as opposed to a variable one. Subsequently, another email was also sent to the

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Corporate Debtor clarifying that the consumption price model/variable model was not what the contract stipulates and that their team never wanted the variable model. If the Corporate Debtor wishes to change from fixed usage model to variable usage model, it can be done by terminating the existing contract, paying for early termination and then moving to a variable based approach. Until then, agreed amounts continue to become due and payable as per the contract, since the contract continues to exist. The contract was never terminated by the Corporate Debtor and mere requests to downsize when the contract does not permit to do so, does not amount to a valid and pre-existing dispute under the IBC, 2016.

iv. In I.A.No.1/2021 with regard to notice by HPe is stated as follows:

The notice from HPe was never intended for the Corporate Debtor but it was kept in the loop since its non-payment was affecting other parties and such an act is a standard practice. The notice was sent to Savex alone and the others are marked in the notice, so that they are kept in the loop, which is made clear from the following parts of the notice:

"2.. Quoting reason of non-payment by your own customer in the chain involved in this project, you have been both delaying our payments and also asked us to stop raising further invoices till the situation is resolved with your own customer chain.
3.. Owing to the reasons quoted, we even tried to coordinate with the other parties involved in the chain but the outcome has been in vain. We are now left with no options as the current dues in the project have become as high as being stated in the table.
5.. As admitted by you, you have been unable to release payments due to lack of release of payments from your customers in the chain and this suggests that there is lack of funds to meet your contractual commitments and payment obligations.
10.. It shall be the responsibility of Savex to communicate further up the ***customer chain while HPe is proactively keeping them copies.***"

v. In the above notice, it is clear that your own customer in para 2 of the notice is HPe referring to K Computers who

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is a customer of Savex. From a full understanding of the above, it is clear that HPe is merely keeping the Operational Creditor and the Corporate Debtor in the loop and the notice dated 09.06.2020 is in no way indicative of either a dispute in terms of the amounts claimed by the Operational Creditor nor that the amounts due are payable to HPe. The Corporate Debtor vide, its reply to the statutory notice categorically admitted that it is liable to pay K Computers cost towards materials supplied for the said project on quarterly basis. It had also admitted the reasons for non-payment of dues stating that it had not been paid by the e-Pragati Authority for the project and due to the same, there has been a delay in payment of the correct amounts. In the said reply there is no whisper of any legally valid dispute that was raised or demonstrated as required under Section 8 (2) (a) of IBC, 2016, which states that, the Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in Sub-section (1) bring to the notice of the Operational Creditor:

a) *Existence of a dispute, if any, record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.*

b) *The payment of unpaid operational debt:-*

i. By sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the Corporate Debtor; or

ii. By sending an attested copy of record that the Operational Creditor has encashed a cheque issued by the Corporate Debtor.

vi. Moreover, there exist valid correspondences between the Operational Creditor and the Corporate Debtor. Wherein, the Corporate Debtor is admitting amount claimed by the Operational Creditor.

vii. The Operational Creditor is HPe channel partner entity. It provides services to its clients, by availing the same from HPe. There is another entity involved between HPe and the Corporate Debtor which is Savex Technologies Private Limited ("Savex"). It is clear that there exists no agent and principal relationship between the Corporate Debtor and HPe. All parties to the entire transaction from HPe, Savex, K Computers and Pi Data Centeres Pvt Ltd are all completely independent contractual obligations.

viii. Clause-2 of the SOW, makes it clear that this transaction is between the Operational Creditor and the Corporate

Debtor alone. The relevant part of Clause detailing the parties involved reads as follows:

"This Statement of Work (SOW), including any applicable exhibits or appendices (Collectively the "Agreement"), is effective as of the last date of signature indicated in the signature section further below ("Effective Date") by and between the Hewlett-Packard Enterprise Channel Partner Entity listed below ("K Computers") and Pi ("" Pi) and identifies the Flexible Capacity ("Services") K Computers will perform for Pi".

Clause 8 of the same SOW reads as follows:

"The following signature indicates Pi Acceptance of this Agreement.

In addition to Pi execution of this SOW, K Computers shall require a valid acceptable purchase order referencing this SOW in order to begin to provide the Services hereunder and the Pi represents that their execution of this SOW is a binding commitment to purchase the Services described herein. However, in the event that Pi does not issue purchase orders as a matter of business practice, Pi hereby warrants and represents that: i) its signature *on this SOW authorises K Computers to provide the Services hereunder, and ii) that Pi shall pay for services provided to Pi without the necessity of a purchase order, and iii) Pi will not contest payment for the provision of Services hereunder due to the fact that no purchase order was issued. "*

ix. The above would make it clear that, the contract was entered into between K Computers and Pi, out of their own individual capacities and there is no mention of any kind of agent-principal relationship whatsoever between the Operational Creditor and HPe. The services were provided to the Corporate Debtor as per the SOW by the Operational Creditor. The invoices were duly raised and served on the Corporate Debtor by the Operational Creditor. The Operational Creditor is an Operational Creditor as per the Insolvency and Bankruptcy Code, 2016.

x. There is no pre-existing dispute as it is clarified to the Corporate Debtor multiple times over email, that he had chosen a fixed based approach as opposed to a variable one.

xi. Even if there is a dispute in terms of the amount being claimed, the Tribunal cannot set aside the application filed by the Operational Creditor since, the Hon'ble NCLAT in the matter of *Ahluwalia Contract (India) Limited vs. Raheja Developers Limited -Company Appeal (AT) (Insolvency) No.703 of 2018 held as follows:*

> *"20. From the aforesaid findings, it is clear that 'claim' means a right to payment even if it is disputed. Therefore, merely the 'Corporate Debtor' has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute, in absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.*
>
> *22. The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by Hon'ble Supreme Court in "Innoventive Industries Ltd. V. ICICI Bank and Anr." Wherein it is observed that "claim*

means a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4)."

5. Heard the arguments of both the counsel, and perused the written submissions filed on either side. Before, appreciating the arguments, it can be noted that the Corporate Debtor has filed an Interlocutory Application bearing **I.A.No.1/2021** questioning the maintainability of the Application on the ground that the Respondent is not an Operational Creditor within the meaning of Section 5 (20) of IBC, 2016. All the issues raised in this Application are raised in the said Interlocutory Application and were decided. The order has become final as the same does not seem to have been challenged. The written submissions are also almost the same as the arguments that were made in the said Interlocutory Application. Based on the written submissions and the material on record, the following points are framed for consideration.

I. Whether the person who singed on the Application filed by the Operational Creditor is competent to file the Application.

II. Whether the Petitioner is an Operational Creditor within the meaning of Section 5 (20) of IBC, 2016.

III. Whether there is any pre-existing dispute between the parties.

IV. Whether the Corporate Debtor is due any amount to the Operational Creditor and whether Corporate Debtor has committed any default in discharging the debt.

V. To what result.

I. <u>Whether the person who singed on the Application filed by the Operational Creditor is competent to file the Application.</u>

This aspect, as already observed, is raised in the Interlocutory Application (i.e., I.A.No.1/2021) and was answered as follows:

> "The Counsel for the Respondent/Operational Creditor contends that it is a partnership firm in which every partner has a right to sue independently. In proof of the existence of the partnership, the copy of the partnership deed is filed showing the name of the Petitioner as one of the partners. The contention of the Counsel for the Corporate Debtor is that no document showing that the person who signed on the petition is a partner as on the date of filing of the Petition is filed. In my considered opinion, when

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there is evidence to show that the Operational Creditor is a partnership firm and that the person who filed the petition and signed on the same is a partner, the burden would be on the party contending that the said partner ceased to be a partner in the said partnership firm. In the absence of such proof the presumption that the persons shown in the partnership deed are partners, would operate.

Order 30(2) of Civil Procedure Code is as under:

Where persons sue or are sued are partners in the name of their firm under Sub- Rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice such pleading or other document is signed, verified or certified by any one of such persons."

In this case there is an authorization given by the Managing Partner of the Operational Creditor authorizing the signatory of the Application. Hence, the said ground raised by the Petitioner/ Corporate Debtor does not find any ground. The judgment relied upon does not have any bearing on this issue and hence not discussed.

In view of the power under Order 31 (2) of CPC, any partner can sign on any document. Hence the question of special authorization does not arise. Nevertheless such authorization to file this petition is given in this case.

II. Whether the Petitioner is an Operational Creditor within the meaning of Section 5 (20) of IBC, 2016.

This point is also raised in the above mentioned I.A.No.1/2021 and is answered as follows:

> "The contention of the Petitioner's Counsel is that the Respondent/Operational Creditor is only an agent of HPe and he does not have any right to move this Application under Section 9 of IBC unless he has specific authorization in that regard. On the other hand the contention of the Counsel for the Operational Creditor is that the agreement between the Operational Creditor and Corporate Debtor is independent and that the Operational Creditor is not an agent of the HPe. He is only a Channel Partner to HPe. He contends that a Statement of Work (SoW) was signed only by the Operational Creditor and Corporate Debtor and HPe is not a party to the SoW. The Counsel for the Operational Creditor draws the

attention of the Tribunal to the contents of the SoW, wherein, under the head statement of work under clause (2) it is mentioned that it is being entered into between the M/s.Hewlett Packard Enterprise channel partner entity illustrated bill (K Computers), Pi and identifies the flexible capacity service, K Computers will perform for Pi. It is also mentioned that statement of work (SoW) unless signed by both the parties will expire in 30 days from the date of issue. It can be seen that the parties to the said statement of work (SoW) are K Computers and Pi. The contention of Counsel for the Operational Creditor is that the provision of service for K Computers to Pi is an independent contract between K Computers and the Corporate Debtor and the work taken up under the statement of work has to be performed by K Computers without intervention of the HPe and payments under the said statement of work are to be made only to K Computers. The Statement of Work no doubt shows that the HPe has the responsibility for deploying the equipment for its own use, in order to give service to Pi and that the site survey would also be done by HPe. But the correspondence with regard to the completion of the work under SoW has been between the K Computers and Pi. The Counsel for the Operational Creditor contends that the Corporate Debtor has acknowledged the debt and the liability to discharge the same, but only sought for the payment to be made after E-Pragathi Authority pays to the Corporate Debtor. He also relies on the reply notice issued to the demand notice issued by the Operational Creditor, wherein, Pi stated that HPe and K Computers shall collectively involve and execute for E-Pragathi Authority directly for the said project, that the Corporate Debtor was not paid by the E-Pragathi Authority to that project and for the said reason there has been a delay in the payment of the amount. It is also stated that due to Covid-19 there is a down fall in most of the businesses including that of the Corporate Debtor and they are facing issues to receive payments or making payments to K Computers. The Corporate Debtor undertook to process the payments to K Computers as and when he gets paid by E-Pragathi Authority. It is also mentioned therein that during the course of the discussions and negotiations the company representative of Operational Creditor has been invited by HPe. But no one turned up for the discussion. That a part, the reply notice would suggest that K Computers i.e., Operational Creditor is not an agent of HPe and that negotiations for the payments due from the Corporate Debtor to the Operational Creditor are only being monitored by HPe. The other contention of the Counsel for the Corporate Debtor is that the amount claimed by the Operational Creditor is exaggerated and that the HPe has only claimed Rs.3 Crores and odd while the Operational Creditor claimed Rs.9 Crores and Odd. In answer to the said contention the Counsel for the Operational Creditor submits that the E-mail which the Counsel for the Corporate Debtor relies on, is sent by the HPe to Savex on 09.06.2020 mentioning the amount which was due to HPe from Savex. He contends that only a copy was marked to the Operational Creditor and Corporate Debtor in order to keep the matter informed but that does not reflect the amount which was claimed by the HPe as due from the Corporate Debtor. A perusal of the said E-mails dated 09.06.2020 would support the contention of the Counsel for the Operational Creditor.

The Counsel for the Operational Creditor contends that the Corporate Debtor has specifically recognised the ability of the Operational Creditor to perform the service mentioned in the SoW at Clause 5.0. A perusal of the said Clause shows that the customer therein i.e., Corporate Debtor herein acknowledged the ability of K Computers to provide services in accordance with the terms of the agreement and the associated statements of work. Hence, from the above it can be concluded that K Computers is not an agent of HPe and that it is only a channel partner and that it has rendered services to the Corporate Debtor independently.

The Contention that the Channel Partner agreement between the HPe and K Computers is not produced before the Tribunal need not be given much weight as the documents produced by either parties and the reply notice more particularly would show that services were rendered by the K Computers to Pi independently."

The above would answer this point in favour of the Operational Creditor.

III. <u>Whether there is any pre-existing dispute between the parties.</u>

This aspect was decided in the above mentioned I.A.No.1/2021 with the following findings:

> "The dispute which is projected as the pre-existing dispute is with regard to the downsizing capacity. The Counsel for the Operational Creditor submits that as per the agreement details the committed capacity is 100% and even if the consumption is less than 100% the payment should be for 100%. He contends that if downsizing is required the present agreement has to be terminated and a fresh agreement has to be entered into between the parties. The contention of the counsel for the Corporate Debtor is that it has been repeatedly pointing to HPe that the invoicing did not reflect the actual capacity utilization and therefore was incorrect. The billing by the Operational Creditor at the instance of HPe was at full load despite the Corporate Debtor using mere 15% of the total capacity at one point of time as per the requirement of the project team. Even at peak volume the

utilization never went beyond 50% of the supplied capacity. He also submits certain E-mails were exchanged in that regard and the HPe informed that it has signed itself but being provided to access the actual load being utilized. There is an E-mail addressed by the HPe dated 21.08.2019, reiterating that flexible service contract has no provision to convert from fixed to consumption (variable billing). Therefore, it is also stated that during the contract discussion the team of the Corporate Debtor has requested on going with fixed model. It was intimated through the said E-mail that unfortunately no changes are possible to the current contract.

A perusal of the contract would show that it was agreed for fixed model. Hence, it now being projected as a dispute cannot be permitted. It is only a request made to convert it to the variable model which was declined by the HPe as per the terms of the contract. Apart from that the said dispute is not raised in the reply notice issued by the Corporate Debtor. Hence, it can be safely concluded that there is no pre-existing dispute between the parties." Same would be the conclusion here.

IV. Whether the Corporate Debtor is due any amount to the Operational Creditor and whether Corporate Debtor has committed any default in discharging debt.

The contention with regard to the amount i.e., due is based on the discrepancy between the amounts mentioned in the demand notice and in the letter dated 09.06.2020.

Answer to the said contention raised by the Corporate Debtor is that the letter dated 09.06.2020, is addressed by the HPe to Savex Technologies Pvt Ltd, which reflects the amount which is due from Savex Technologies Pvt Ltd to HPe. It is not an amount which is due from this Corporate Debtor to the Operational Creditor. A perusal of the said letter would make it clear that the submission made by the Petitioner's Counsel is correct. The Counsel for the Corporate Debtor also relies on a judgement of the **NCLAT** in ***Company Appeal (AT) (Insolvency) No.718/2020 between Mr.Joseph Jayananda vs. Navalmar (UK) Ltd.***, wherein it was held as follows:

> "*Given the above discussion, we find that the Corporate Debtor owes a debt of more than one Lac, i.e., above the threshold limit, and it committed a default in discharging the same. It also appears that*

there was no pre-existing dispute. The Corporate Debtor's main contention is that the amounts paid by the Operational Creditor and its financial statements do not match. It is not for the Adjudicating Authority to ascertain, investigate, or fix the exact amount of liability at the admission stage. After the admission of the Petition, it is the duty of the Resolution Professional to collate the claims and ascertain the liability."

In the demand notice undisputedly the amount claimed is Rs.**9,72,14,511**/- and in the reply issued to the said demand notice the contention is that the amount as mentioned in the notice given by the HPe is Rs.3,91,47,677/-. But the said stands explained by the contents of the notice issued by the HPe which is addressed to the Savex Technologies Pvt Ltd and not to the Corporate Debtor. There is a clear acknowledgement of debt in the reply notice wherein the Corporate Debtor undertook to release the payments as and when it gets paid by E-Pragathi Authority. It also mentions that as per SoW, the Company is liable to pay K Computers costs towards materials supplied for the said project, on quarterly basis. Now, to contend that K Computers is not an Operational

Creditor would be in conflict of the said contention of the reply notice. As regards the contention pertaining to Form 4 is concerned, it is filed by the Corporate Debtor itself, which bears the signature of the Operational Creditor. It would lend support to the contention that non attachment of Form 4 occurred due to, clerical error and it was rectified later.

Hence, the contention with regard to the difference in the amounts contended in the demand notice and notice issued by the HPe only seems to be a moon shine defence. The Counsel for the Operational Creditor further strengthens his case on the premise that GST was claimed by the Corporate Debtor which shows that payments were made to Operational Creditor by the Corporate Debtor and the same would show that services were provided by Operational Creditor. Verification of the record supports the said contention. The delivery challan and invoices pertaining to the claim amount are filed. Hence it can be safely concluded that the Corporate Debtor owes a debt to the Operational Creditor and has committed default of payment of the said debt.

V. <u>To what result.</u>

In the result, the Company Petition is admitted. The Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence. The Operational Creditor has suggested one name i.e., Mr. Pesaladinne Madhusudan Reddy as Insolvency Resolution Professional (IRP). Hence, the Tribunal is inclined to appoint the above proposed IRP as prayed for.

i. Mr. Pesaladinne Madhusudan Reddy**, (Registration No. IBBI/IPA-002/IP-N00926/2019-2020/12982)**, having office at 10-2-401 to 403/502, Tirumala Classic Apts, Road No.8, Street No.3, West Maredpally, Nehru Nagar, Secunderabad, Telangana -500026; e-mail: **pmreddy2000@gmail.com**; Mobile: +91 **8939835749** is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.

ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections

13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.

iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.

v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.

vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu