IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.10 /KB/2020

In the matter of

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

In the matter of:

M/s Geo Source, having its registered Office at Plot No. 306, 307,314 & 315, G.I.D.C. Dholka-382225, Ahmedabad, Gujarat.

… Operational Creditor

Versus

In the matter of:

M/s Phular Construction Co. (Pvt.) Ltd., CIN: U45200BR1989PTC003572, having its registered office at Phular, P.O. Mansoorpur,Via- Bhakhra, District-Vaishali, Bihar.

…Corporate Debtor

Date of hearing :26/04/2022

Order Pronounced on :05/07/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Rasesh Parikh, Adv.] For Operational Creditor

1. Mr. Joy Saha, Sr.Adv.] For Corporate Debtor
2. Mr. Siddhartha Banerjee, Adv.

3. Mr. Suivam Sinha, Adv.

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by M/s **M/s Geo Source,** through its Partner Mr. Utkarsha Parikh, (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process (CIRP) in respect of **M/s Phular Construction Co. (Pvt.) Ltd.,** having its registered office at having its registered office at Phular,, P.O. Mansoorpur,Via- Bhakhra, District- Vaishali,(Bihar) (hereinafter referred as the Corporate Debtor).

3. It is submitted by the Operational Creditor that there was a long drawn business relationship between the Operational Creditor and Corporate Debtor. The Operational Creditor supplied Geo Bags and rope Gabian from time to time against purchase orders issued by the Corporate Debtor. It is submitted that the Corporate Debtor never raised issues regarding the goods supplied by the Operational Creditor. The Corporate Debtor approached the Operational Creditor for purchasing Geo Bags vide email work orders/purchase orders bearing details in the emails received on 16th February,2018 at 17.34 p.m. the Operational Creditor supplied goods against the said purchase order, Tax invoices and challan being No.788,866,865/- dated 25th May,2018, 3rd May, 2018 and 2nd May, 2018 were received by the Corporate Debtor. Thereafter, the Corporate Debtor placed orders from time to time and against such Purchase orders, the Operational Creditor supplied goods, the payment of which is due. The details of the goods supplied, tax invoices are as under:-

Sl.No.	Date	Invoice No.	Amount
01.	28.04.2018	GS/T-043/17-18	666400
02.	30.04.2018	GS/T-044/17-18	666400
03.	30.04.2018	GS/T-045/17-18	666400
04.	18.05.2018	GS/T-067/17-18	726000
05.	18.05.2018	GS/T-068/17-18	484000
06.	24.05.2018	GS/T-073/17-18	605000
		Total	38,14,200/-

4. It is further submitted by the Operational Creditor that in the Tax Invoice issued by the Corporate Debtor, the payment conditions were clearly mentioned and in terms of the said Tax Invoice, the Corporate Debtor was duly bound to make payment within 21 days after submission of bills. The Tax Invoice with Road challans were produced at the delivery location. The Operational Creditor supplied goods to the Corporate Debtor for years now.

5. It is submitted that Six different tax invoices were raised total amounting to Rs.38,14,200/- out of which last goods were supplied vide Tax Invoice dated 24.05.2018 and the last payment received from the Corporate Debtor is Rs.7,35,800/- against the Tax Invoice No. 255 dated 26th March, 2019. It is submitted that amount received was adjusted against the aforesaid bill and after such adjustment of Rs.34,90,318/- (Principal amount) is still remaining unpaid) and the subsequent bills are not cleared.

6. It is submitted by the Operational Creditor that repeated intimations were communicated to the Corporate Debtor requesting them to clear the outstanding amount over telephone but they have only assured that the amount would be cleared in due course. It is submitted that the Corporate Debtor has utilized the said goods for the purpose they were supplied and no question regarding quality or quantity of the said goods were ever raised on behalf of the Corporate Debtor. Under the terms and conditions mentioned in the bills/ Tax Invoice, the Corporate Debtor was liable to pay interest on the

unpaid amount to the tune @ 18% per annum, in case of any default in making payment and that this clause was also accepted by the Corporate Debtor without raising any question. It is submitted that the Corporate Debtor was duty bound to make payment within 21 days from the date of delivery of the goods.

7. It is submitted that the Operational sent a Demand Notice through their advocate on 7th August, 2019 demanding the outstanding amount. In reply to the said demand notice, the Corporate Debtor raised questions regarding quality of goods supplied and denied the liability to pay the said amount. However, in the said reply dated 16.09.2019 supply of goods were not denied. It is submitted that the supply of goods have been admitted by the Corporate Debtor but has raised question regarding quality and quantity of the goods supplied. It has also been alleged that objections regarding quality and quantity had been raised fraudulently and the Corporate Debtor does not have any document to prove that objection regarding quality and quantity of goods were ever raised.

8. It is submitted that the Operational Creditor in its Demand Notice under Section 8 of the Code demanded the unpaid operational debt from the Corporate Debtor within 10 days from the date of communication of the said notice. A reply was communicated to the Operational Creditor denying its liability to pay the debt. But the Corporate Debtor has failed to bring to the notice of the Operational Creditor any record of pendency of any suit or Arbitration proceedings filed by the Corporate Debtor or any repayment of the unpaid operational deb by the Corporate Debtor. The Corporate Debtor has raised only certain technical issues, which are frivolous in nature because no such dispute had been raised at the time of the delivery of the goods or soon thereafter. It is submitted that in spite of unequivocally admitting and acknowledging the operational debt in writing, the Corporate Debtor has not made any payment to the Operational Creditor. Therefore, the Operational Creditor has claimed a sum of Rs.34,90,318/- as Principal amount and interest of Rs.3,66,483/- as on 1st November, 2019. The Operational Creditor

further submits that the Corporate Debtor does not have the financial source to pay the debt and has become commercially insolvent.

9. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit.

10. **In reply to the petition**, the Corporate filed replied affidavit of Pranav Kumar, one of the Directors of the Corporate Debtor denying and disputing the every statement and allegation made in the petition. It is submitted that the application is wholly misconceived and clear abuse of process of law and therefore, deserves to be dismissed.

11. It is submitted that the Corporate Debtor does not owe even a single penny to the Operational Creditor. It is submitted that there always existed serious disputes and difference in between the Operational Creditor and the Corporate Debtor at all material times as regards the quality of the material supplied and delivered. There was a pre-existing dispute in between the Operational Creditor and the Corporate Debtor over the price of the goods. It is stated that in view of the pre-existing disputes and differences in between the Operational Creditor and the Corporate Debtor, there was no occasion or justification for the Operational Creditor to approach this Adjudicating Authority for a disputed claim. It is submitted that for the first time in February, 2016, the Operational Creditor had submitted a quotation to the Corporate Debtor indicating the particulars of the materials proposed to be sold and delivered and the price of such materials including taxes and transportation. It is submitted that the Operational Creditor intended to sell and deliver to the Corporate Debtor, needle punch Geo Textile Bags of 1m x 0.7m dimension @ Rs.57 per unit inclusive of all taxes and transportation charges. The Operational Creditor also proposed to sell and supply to the Corporate Debtor, PP Rope Gaban of 1.8mx 1.8m x 0.5m dimension @ Rs.1200 per unit. It was also made clear that by the Operational Creditor that the prices quoted by it would be inclusive of not only the taxes but also the transportation charges up to the site of the consignee.

12. **In the Rejoinder**, the Operational Creditor to the reply filed by the Corporate Debtor, the Operational Creditor has submitted that the Corporate Debtor had purchased and consumed the goods supplied by the Operational Creditor and dispute is now being raised is an afterthought only to defeat present petition. It is submitted that the dispute raised is only moonshine and frivolous as it is raised only service of demand notice under section 8 of the Code and therefore, it does not qualify to be "Pre-existing dispute" as envisaged under section 8 of the Code. The Corporate Debtor has failed to point out any instance of contentions raised in its affidavit in reply. It is submitted that there has to be dispute raised by the Corporate Debtor before service of notice under section 8 of the Code. In the present case, the Corporate Debtor has failed to point out any communication whereby it has raised dispute whether about the price, quality or quantity of the goods supplied by the Operational Creditor rather the goods supplied by the Operational Creditor being consumed by the Corporate Debtor and therefore there cannot be any dispute as alleged by the Corporate Debtor. The contents of para 10 to 16 of the reply relate to transactions entered into between the Operational Creditor and the Corporate Debtor in year 2016-2017 whereas the present petition is founded on goods supplied in the year 2018 and those transactions are independent of transactions entered into 2016 & 2017. Therefore, the contents of paras 10 to 16 of the reply affidavit are not relevant.

13. Operational Creditor denied all the allegations in reply to the averments of the petition, which have been denied and disputed by the Corporate Debtor. It is submitted that the outstanding invoices were served immediately in April-May, 2018 after the supplies were affected by the Operational Creditor to the Corporate Debtor and therefore, to contend that the goods purchased were "unsettled price term" is not only an afterthought but also a malafide contention to defraud the Operational Creditor.

14. It is denied by the Operational Creditor that upon supply made by the Operational Creditor in the year, 2018, the Corporate Debtor raised any dispute with respect to price of the goods and consequently, the Operational

Creditor reduced the price of the goods. The Corporate Debtor has failed to adduce any letter or communication either from Corporate Debtor or thereafter, from the Operational Creditor to the Corporate Debtor.

15. It is submitted that as per the Ledger Account Annexure-C, last six invoices have remained unpaid. The aggregate amount outstanding is Rs.38,14,200/- and after discount of Rs.3,46,900/-and therefore, net amount outstanding is Rs.34,19,318/-.It is submitted that each and every payment made by the Corporate Debtor is reflected in the Ledger Account maintained in the books of the Operational Creditor. The Corporate debtor has failed to produce evidence to show that goods supplied by the Operational Creditor were of inferior quality. The letters written by Yashasvi Impex and Virendera Textiles also cannot be used to prove the point that goods supplied by the Operational Creditor were of inferior quality. It is submitted that Yashasvi Impex and Virendera Textiles are business rivals of the Operational Creditor. If the goods were of inferior quality then instead of consuming the goods, the Corporate Debtor should have returned the goods to the Operational Creditor. It is denied that the Operational Creditor agreed to provide material @ Rs.700/- inclusive of taxes and transportation charges. All other averments in the reply affidavit are disputed by the Operational Creditor.

16. **During the course of arguments,** the Ld. Counsel for the Operational Creditor has supplied goods and six bills have remain unpaid, copies whereof are annexed as Annexure -B (pages 14-21). The goods were supplied in April,2018 to May 2018 and they were consumed by Corporate Debtor without any demur. The amount outstanding for these invoices is Rs.34,90,318/- which is at Annexure-C (Page-22).

17. It is submitted that till issuance of notice under Section 8 of the Code, there was no complaint whatsoever raised by Corporate Debtor to Operational Creditor with respect to supply of goods covered by invoices at Annexure-B.

18. It is submitted that the notice in Form 3 was issued on 07.08.2019 (page-46) and it was replied to after prescribed period of 10 days on

16.09.2019 (page 52) by the Corporate Debtor. In the reply to statutory notice, Corporate Debtor did not complain with respect to supply made for invoices based on which Form 3 & 4 was issued. Corporate Debtor complains about price inclusive of GST for the supplies made in February 2018 & 1st week of April,2018. It is stated that such contentions cannot be countenanced, as the alleged dispute cannot be even before the supply made by Operational Creditor as supplies are made from 28.04.2018. Apart from this, without prejudice to the contention as above, it is stated that no such dispute is raised before issuance of statutory notice under section 8 of the Code and therefore, there is no 'pre-existing' dispute between the parties.

19. It is further submitted that the affidavit in reply filed by the Corporate Debtor upto paras 17 deals with transactions before the placing of purchase order dated 16.02.2018, and therefore, not germane to the present adjudication as it is not concerning unpaid invoices based on which Form 3 & 4 are issued.

20. It is submitted that in para 17, Corporate Debtor acknowledges the purchase order that is also placed on record by Operational Creditor at page 13 of the petition. There is no evidence produced to support the averments in para 20 & 22. In fact, petitioner has charged lesser amount than amount at which Corporate Debtor has placed purchase order i.e. Rs. 700/- & Rs. 57.62/- as against the amount of Rs. 1,100/- & Rs. 60.50/-. The contentions urged by Corporate Debtor orally during the hearing of 06.04.2022 & 26.04.2022 about alleged dispute as lesser amount is charged, does not stand scrutiny because firstly, there is no grievance made by Corporate Debtor to this effect before issuance of notice under section 8 of the Code. Secondly, there is no such contention raised by Corporate Debtor in affidavit in reply to this effect. So oral submission to this effect is without pleading.

21. It is submitted that with respect to contention about short supplies, it is stated that no such notice is given by Corporate Debtor for bills in question to Operational Creditor before notice under section 8 of the Code is served

upon Corporate Debtor. Apart from this, there is no evidence to suggest that there was short supply for bills in question.

22. **During the Course of argumen**t, the Ld. Counsel for the Corporate Debtor submitted that the Corporate Debtor is a solvent and profitable company. Particulars of the solvency of the Corporate Debtor will appear from:-

" Three Preceding Financial Years details as follows:-

Financial year	2016-17	2017-18	2018-19
Turnover	55,77,131.74	66,30,59,692	10,30,591,145
Profit % (Percentage)	5.93%	6.18%	9.93%
Profit Amount	3,30,48,256	4,09,77,447	10,23,26,077

23. It is submitted that having regard to the fact that the Corporate Debtor is a highly solvent and profitable company there exists no basis to push the same into insolvency on the basis of a disputed claim.

24. It is submitted that recovery of a disputed claim is in any event not contemplated under the provisions of Section 9 of the Insolvency and Bankruptcy Code. In this regard, the following decisions are relied upon:-

1. *Pratiksh Promod Rai -Versus- Mylaw Learning Resources Pvt.Ltd. CP (IB) No. 195/MB/2019, (NCLT Mumbai)*
   Proposition-
   a. *The Operational Creditor must prove that the Corporate Debtor is not finally sound (Para 14)*
   b. *IBC is not a Recovery Forum (Para 15)*
2. *Mobilox Innovations versus Kirusa Software Pvt. Ltd. -2018 1 SCC 353, Paras 33,34,37,42 to 45, 51,54 at page 404*
   " 54…We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).."
3. *Transmission corporation of Andhra Pradesh -vs- Equipment*

Conductors and Cables – MANU/SC/1192/2018 PARA 10.

25. It is submitted that the transactions between the parties are for a period commencing from 19th February 2016 and ending on 24th May, 2018 (pages 70-71: 102-104 and 175-176 of AR).

26. It is submitted that existence of pre-existing disputes is from long before the date of the notice under section 8 as will appear from letters dated 09.05.2016 (page 62 of AR) "….. is not as per the specification (specification as per your test report) which you were providing us for the work and you have told that you will take back the consignment but yet you have not."

27. It is submitted that the existence of the said credit notes is not disputed by the Operational Creditor. The Credit Notes were issued by the Corporate Debtor inasmuch as there were disputes with regard to quality and short supply.The issuance of credit notes itself is irrefutable evidence with regard to pre-existing disputes.

28. It is submitted that the Corporate Debtor is engaged in the business of civil construction and undertakes the execution of Government project. Principals and clients of the Corporate Debtor including Government Division and departments have raised numerous disputes about the substandard quality of the materials. This will inter alia appear from:-

a. Letter dated 23.03.2018 issued by Executive Engineer Flood Control Division- 02 Jhanjharpur, Bihar (Page 134 of). An unofficial English translation of the said letter is as follows:-
" Most of the gabions replaced in pursuance of order dated 22.03.2018 have been found to be of inferior quality. In the course of investigation at the construction site, it has been observed that most of the gabions at the go-down at construction site are of inferior quality. It has been informed by Mr. Rajni Bhushan- a representative of the Company that the gabions are of Geo Source Ahmedabad."

b. Letter dated 31.03.2018 from Yashasvi Impex (page 143).

c. Letter dated 27th February 2018 from Virendra Textiles (page 144).

29. It is submitted that the Purchase Orders issued by the corporate debtor to the Operational Creditor provide that the rate of supply of bags would be Rs.57 per bag and the rate for supply of Rope would be Rs. 1200 per gabion of Rope. The rate of supply of bags would be Rs. 60.50 per bag and the rate for supply of rope would be Rs. 1100 per gabion.

30. It is submitted that it will, however, appear that having regard to the substandard quality of goods supplied the operational creditor agreed to accept far lower rates which demonstrates pre-existing disputes with regard to both quality and rate. It is submitted that although the transactions between the parties spans between 19th February,2016 to 24th May, 2018 and covers 102 invoices, but the petition is confined only to six invoices at pages 6 and 7 (Part IV of the petition).

31. It is submitted by the Ld. Counsel for the Corporate Debtor that the Operational Creditor cannot select six invoices out of a total number of 102 invoices and raise a claim in respect thereof. The transaction between the parties from 19th February 2016 to 24th May 2018 constitute one single series of transactions and the respective claim of the parties against each other will have to be determined in respect of the entire gamut of 102 transaction between 19th February ,2016 and 24th May, 2018.

32. It is submitted that in any event the said six bills have also been raised at a rate below the agreed rate and such concession and reduction in price (though not agreed to by the corporate debtor) clearly indicates the existence of disputes with regard to both quality and rate. It is submitted that in between 17th February,2018 and 24th May, 2018, the Operational Creditor raised a total 40 invoices upon the corporate debtor. The Corporate Debtor has made payment to the operational creditor of a total sum of Rs.2,47,35,800/- as will appear from ledger, statement at pages 175 and 176

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of the AR as well as page 54 of the petition. Thus, assuming without admitting that the said six bills forming the subject matter of the CP is payable, a total claim of the Operational Creditor in respect of six bills cannot exceed a sum of Rs.2,14,200/-

33. The Corporate Debtor has tried to convince us that there were pre-existing disputes as regards short supply, price and quality but we are not at all convinced with the arguments of Ld. Counsel for the Corporate Debtor because the short supply and other alleged dispute do not relate to the transaction in question. For taking advantage of any complaint with regard to quality, short supply or price it should be relatable to the transactions in question with regard to which the Operational Creditor has filed the petition. In this matter all the so-called pre-existing disputes regarding short supply quality or price cannot be put in the category of pre-existing disputes because all of them cannot be said to be relating to the transactions in question. If the Corporate Debtor had previously made a complaint but consumed the goods and made payments and again placed orders on the Operational Creditor, in spite of alleged complaints, the Corporate Debtor cannot be allowed to use the previous complaints for future transactions.

34. The Corporate Debtor cannot be allowed to take benefit of any earlier complaints made in the past, which transactions had already been paid for and settled, maybe even by issuance of credit notes. In the business, so many transactions take place and complaints made as regard the goods supplied. A Corporate Debtor can take advantage of the goods or specific supplies made with regard to which complaint/ dispute has been raised prior to service of notice under section 8 of the IBC. The disputes or complaints raised long before in the past cannot be allowed to be made use of in every future transactions. If such a tendency is encouraged, it will cause havoc in the business circles.

35. On the one hand, the Operational Creditor has proved its case of

outstanding debt and the default and on the other hand, the Corporate Debtor in spite of its best efforts to bring this matter in the category of pre-existing dispute has failed to do so.

36. We are, therefore, of the considered view that this petition has to be admitted and we, therefore, pass the following orders:-

O R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.

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

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of 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 Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) 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;

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 (54 of 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.

v) 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.

vi) 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.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where 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.

ix) The Operational Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, so, we appoint **Mr. Rajesh Kumar Agrawal, IRP** having Reg. No. **IBBI/IPA-001/IP-PO1023/2017-2018/11722** email ID.rajesh521@yahoo.com to act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

x) **Mr. Rajesh Kumar Agrawal,** is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xii) The Operational Creditor/Applicant is directed to deposit **Rs.2,00,000/- (Rupees Two Lacs only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

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

38. List the matter on **22/08/2022** for filing of **Progress Report**.

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

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 5th day of July, 2022

PJ