IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.260/BB/2019
U/s. 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

M/s. CloudWalker Streaming Technologies Pvt. Ltd.
503-505, Business Suites 9, S.V.Road,
Santacruz West,
Mumbai – 400 054. - Petitioner/Operational Creditor

Versus

M/s. Flipkart India Private Limited
Buildings Alyssa, Begonia & Clove,
Embassy Tech Village, Outer Ring Road,
Devarabeesanahalli Village
Bengaluru – 560 103. - Respondent/Corporate Debtor

Date of Order: 24th October, 2019

Coram: Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

Parties/Counsels Present:

For the Petitioner : Shri Ajit Anekar along with Ms.Urvi Vaidya

For the Respondent : Shri Dhyan Chinnappa, Senior Counsel along with Shri Chinmay.J.Mirji, Ms.Charitha.V

O R D E R

Per: Rajeswara Rao Vittanala, Member (J)

1. The Company Petition bearing C.P(IB)No.260/BB/2019 is filed by M/s. CloudWalker Streaming Technologies Pvt. Ltd ('Petitioner/Operational Creditor') U/s 9 of the IBC, 2016 R/w 6 of

the I&B (Application to Adjudicating Authority) Rules, 2016 by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Flipkart India Private Limited ('Respondent/Corporate Debtor') on the ground that it has committed default for an amount of Rs.26,95,00,000/-(Rupees Twenty Six Crore and Ninety Five Lakhs Only).

2. Brief facts of the case, as mentioned in the instant Company Petition, which are relevant to the issue in question as follows:

(1) M/s. CloudWalker Streaming Technologies Private Limited ('Petitioner/Operational Creditor) is a Private Limited Company, incorporated under the Companies Act, 1956 and it is engaged in the business of import and supply of LED TVs and is having its registered office at 503-505, Business Suites 9, S.V. Road, Santacruz West, Mumbai 400 054.

(2) M/s. Flipkart India Private Limited ('Respondent/Corporate Debtor) is a Private Limited Company was incorporated on 19.09.2011, under the provisions of the Companies Act, 1956. Its Nominal Share Capital is Rs.1,00,00,000/- and that of Paid-up Share Capital is of Rs.85,08,947/- It is engaged in retail sale of products on their online platform.

(3) It is stated that the Corporate Debtor has contacted the Operational Creditor, and showed keen interest in selling its Products of LED TVs, as the same were having latest technology, features and several allied advantages over the competition. To that end, the Operational Creditor and Corporate Debtor entered into a Supply Agreement dated 29.12.2016. The Operational Creditor had been importing and supplying to the Corporate Debtor from time to time LED TVs in pursuant to purchase orders placed by the Corporate Debtor, as per Clause 2 (a) of the Supply Agreement which

provides for the manner of order placement. The Corporate Debtor placed the Purchase order vide various emails, which are placed at page Nos 43 to 49 at Annexure IV & V of the Petition, which were duly acknowledged by the Operational Creditor. After receiving the said purchase orders, the Operational Creditor imported and procured the required quantities of LED TVs, which were then delivered to the Corporate Debtors at desired location. The Corporate Debtor received delivery of the first few batches of the LED TVs in pursuant to the orders dated 16th January, 2017, 7th March, 2017 and so on and made prompt payment for the same. The LED TVs were sold at a Net Landing Price (NLC). Thereafter, the Corporate Debtor avoided taking delivery of the LED TVs with feeble excuses of lack of warehouse space. The Operational Creditor in good faith warehoused the said LED TVs for a temporary period on behalf of the Corporate Debtor. There was no delay in delivery of the said material, on the other hand, the Corporate Debtor delayed in collecting the LED TVs and in some instances did not collect them at all.

(4) In an attempt to gain more profit out of the goods ordered, coerced the Operational Creditor to offer a discount on the LED TVs, which were already imported and warehoused by the Operational Creditor, on behalf of the Corporate Debtor. The Operational creditor facing huge losses and a liquidity crunch agreed to offer the said discount on the condition that the Corporate Debtor forthwith take delivery of the remaining LED TVs purchased by him and make payment for the same. The Operational Creditor has paid excess customs and duties beyond the NLC since the LED TVs were still in

the customs warehouse, as the Corporate Debtor delayed in providing a delivery schedule and sent several emails, demand for payment for the aforesaid LED TVs procured and imported for the Corporate Debtor from 11th October, 2017 to 1st December, 2017, were raised by the Operational Creditor pursuant to import of the LED TVs based on the Purchase Order Emails but to no avail. As of March, 2018, the Corporate Debtor had failed to collect more than 70% of the stock as ordered by them. Pursuant to the purchases as on 8th December, 2017, the Corporate Debtor was behind payments to the tune of Rs.55.06 Crores.

(5) It is stated that the Operational Creditor facing heavy financial losses issued a notice and invoked the Arbitration Clause of the Supply Agreement. The Corporate Debtor on receipt of the Arbitration Notice threatened to withdraw from the deal entirely and not collect any of the remaining shipments unless the Operational Creditor withdrew the Notice. The Corporate Debtor even sent a letter where they worded the withdrawal letter which they demanded that the Operational Creditor sign and send. There is currently no other dispute or litigation pending before any Court or Tribunal in relation to the present subject matter. The Operational Creditor constrained by various financial issues at this point had no choice but to accept the demands of the Corporate Debtor and continue on its terms. It is stated that the trailing emails dated 6th November, 2017 and 24th September, 2018 related to the warehousing issues allegedly faced by the Corporate Debtor along with arbitrary promise of providing a delivery schedule, demand of withdrawal of Arbitration Notice, demand of price reductions, promises of bearing excess storage and handling costs, etc.

(6) The Corporate Debtor has neither provided any proof of as to how they have incurred charges/losses nor have they filed any dispute before any authority till date. Even after the Operational Creditor agreed to most of the Terms of the Corporate Debtor, the Corporate Debtor failed to collect all the LED TVs ordered, failed to pay the excess charges and costs as promised and failed to honour its commitment. Due to the failure of the Corporate Debtor in fulfilling its commitment the Operational Creditor was forced to unload the uncollected goods at heavily marked down price just so that it could remain afloat.

(7) The Operational Creditor has issued a Demand Notice dated 8th June, 2019 under Section 8 of the Code, which was received by the Corporate Debtor on 13th June, 2019. However, there has been no reply to the same. The Corporate Debtor has not raised any disputes with regard to the amount outstanding to the Operational Creditor at any point in time. It is alleged that the Corporate Debtor, has consistently and persistently failed, omitted and neglected to discharge its admitted and acknowledged debt and liability to the Operational Creditor despite vigorous follow ups, by repeated requests and reminders, adopted by this Operational Creditor and the Corporate Debtor is unable to pay its debts too even after the receipt of statutory notice as required by the Code.

(8) In view of the foregoing, it is apparent that the Corporate Debtor Company is commercially insolvent and is unable to pay its debts. The Corporate Debtor Company is not economically viable and poses a threat to commercially morality. In such circumstances, it is prayed that the

Adjudicating Authority may be pleased to permit the Operational Creditor to proceed against the Corporate Debtor Company in Insolvency Resolution proceedings.

3. The Respondent/Corporate Debtor has opposed the instant Company Petition, by way of filing Statement of Objections dated 25.09.2019, by inter alia contending as follows:

(1) The Company Petition is not maintainable either in law or on facts and it is liable to be rejected with exemplary costs.

(2) It is submitted that the Respondent through its hard work and dedication, has established its goodwill in the Indian Market and has maintained such name by sheer dint of its business plans and professionalism, the Respondent maintains amiable relationship with its customers, vendors and service providers. The Respondent is a profit making Company with sufficient financial strength and is actively doing business in the wholesale B2B (Business to Business) sales. There is no admitted debt or liability in the present instance. The Respondent has already paid an amount of Rs.85,57,00,664/- towards the invoices raised by the Petitioner/Operational Creditor. The Respondent/Corporate Debtor is not liable to make any payment to the Petitioner/Operational Creditor. Therefore, the allegation that the Respondent has no money to pay the Petitioner to meet its current and existing demands/liabilities is baseless, frivolous, bereft of truth and filed with mala fide intentions.

(3) The Petitioner/Operational Creditor had approached the Respondent expressing its desire and interest in establishing a business relation with the Respondent for sale of the Petitioner's Products through the resellers of Respondent. Pursuant to due deliberations between the Petitioner and

Respondent, the parties had entered into a Supply Agreement dated 29.12.2016.The relevant clause from the Supply Agreement, as agreed by the Petitioner is reproduced below for ease of reference:

"Clause 2 – Ordering, planning and delivery schedule"

(a). Flipkart shall, wherever possible, place the Purchase order (which will include quantity, quality and description of the Products ordered threat) for the supply of the Products and the supplier shall acknowledged receipt of the same. Supplier shall reject or request Flipkart for a modification to such purchase order within 2 business days of receipt of such purchase order from Flipkart. The Purchase order shall be deemed to be accepted by the Supplier in the event no communication to the contrary is received by Flipkart as indicated above"

The above Clause 2(a) of the Supply Agreement clearly states that, the Respondent shall place Purchase Order ("PO") for the supply of the products and the Petitioner shall accept or reject the same. All orders for the products are placed with the Respondent by way of Pos' as detailed above. The Respondent submits that the Respondent has received all the products in accordance with the PO raised by them from the period of January, 2017 to April, 2018 and has made prompt payments for the products received by them. The Respondent has no outstanding due amount payable to the Petitioner. Further, the Petitioner has failed to produce any of the PO's or invoices in support of its alleged claims, this clearly shows that the alleged claim of

Rs.26,95,00,000/- is false and the same is denied by the Respondent.

(4) It is further submitted that, the Clause 2(g) of the Supply Agreement states as follows:

"2. Ordering, Planning and Delivery Schedule

(g) *Unless otherwise agreed by the Flipkart in writing, deliveries to the place of destination until their formal acceptance by Flipkart shall be made at the risk and costs of the Supplier, including all expenses of packaging, storage and transportation of products i.e. deliveries shall be from ramp duty and tax paid. Further, supplier shall provide for sufficient shipment insurance at its costs until due delivery. To the extent not otherwise agreed in writing, the Products shall be delivered at the unloading ramp of Flipkart. Flipkart shall have no obligation to pay for or return packing cases, skids, drums or other articles used for packing the Products whether or not reusable. If the Products are to be delivered in installments the Agreement shall be treated as a single contract and not severable".*

As detailed above Respondent is not obligated to indemnify the Petitioner against any risks or costs incurred by the Applicant. Further, it is agreed that the Petitioner shall bear all the expenses of packaging, storage and transportation of the Products. i.e., all deliveries made to Flipkart shall be free ramp, duty and tax paid. The Petitioners claim of Rs.5,25,00,000/- towards Customs charges is denied by the Respondent and it falls to the grounds based on the terms agreed by the Operational Creditor under Clause 2(g) of the Supply Agreement.

a. It is submitted that, the Petitioner has failed to produce any document to show that there is an outstanding due

amount of Rs.13,95,00,000/- payable by the Respondent towards value of goods. The Respondent denies any outstanding due amount of Rs.13,95,00,000/- payable to the Petitioner. The Respondent has cleared all dues payable to the Petitioner for the products delivered by them based on the Po's raised by the Respondent in accordance with the Supply Agreement. The Petitioner's claim of Rs.7,25,00,000/- as interest @12.65% is denied by the Respondent. The Respondent does not have any outstanding due amount payable to the Petitioner. Therefore, there is no interest payable to the Petitioner and moreover, the interest is calculated @12.65% which has been neither been agreed in the Supply Agreement, this absurd amount of interest rate and amount of interest calculated by the Petitioner goes to show that the Petitioner is trying to making wrongful gains for themselves by filing the instant petition.

(5) It is submitted that there are huge disparities with respect to the sums claimed, invoices raised, and illegal demands of the Petitioner. The disputes between the parties are to be adjudicated by a competent civil court upon appreciating the evidence placed on record by the parties against each other's claim. In the absence of full-fledged trial, this Petition cannot be adjudicated and the same deserves to be dismissed. The present Petition is nothing but a sheer abuse of process of law. Despite the receipt of payment by the Respondent in accordance to the invoices raised by the Petitioner, the Petitioner has attempted to misuse IBC at its whims and fancies. The Petitioner is trying to use insolvency proceedings under Section 9 of the IBC, 2016 as a coercive step to arm twist the Respondent to succumb to the illegal demands of

the Petitioner. Moreover, it is trite in law that matters related to disputed transactions involving questions of facts, apart from detailed investigation of evidences and trial of the matter are required to be adjudicated under a Civil Suit before the appropriate Court of law and that the IBC cannot be used as the tool to abuse and threaten bona fide Companies such as the Respondent. The very initiation of the present petition by the Petitioner is with the sole motive of making illegal gains by suppressing material facts and playing fraud upon this Tribunal.

(6) It is submitted that the Respondent has without prejudice to its rights and contentions chosen to not initiate any legal action against the Petitioner due to the deficiency in service and has chosen to withhold payments that was not due as a result of such deficiency in services.

(7) It is stated that, upon delivery of the Products, the Respondent reserves the right to verify and determine whether the products supplied by the Petitioner are in accordance with the PO and the Invoice raised by the Petitioner. In the event, the Respondent determines that the Products received are (i) in a damaged condition, (ii) not in accordance with the Supply Agreement, the Purchase order and/or in the Invoice raised by the Petitioner, and/or (iii) defective or deficient, it shall notify the same to the Petitioner. If there is a difference in the number of Products received by Respondent, the same shall be recorded by the Respondent at the bottom of the Invoice as short supply along with the Respondent's seal and signature.

(8) It is stated that as detailed above the documents provided with regard to Transaction No.1 & 2 clearly show the reason for disparities in the Invoice amount and the payment

amount is due to the short supply of the Products which has been duly noted in the Invoice along with the Respondent's seal and signature. The difference in the number of Products mentioned in the invoice and the number of products received by the Respondent has been noted down at the bottom of the Invoice. It is also stated that a mere reading of the Petition will indicate that the Petitioner is really a claim for damages and not for debt.

(9) The claim of the Petitioner is that he Respondent had placed various purchase orders and that the goods were to be picked up but was not so picked up as promised by it. This caused huge financial losses. Under the Sale of Goods Act, 1930 Section 56 provides for damages for non-acceptance and reads as follows:

> " Section 56 - Damages for non-acceptance—Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance."

(10) It is stated that Respondent has withheld approximately an amount of Rs.42,96,668/- towards deficiency in services by the Petitioner. The Respondent has also relied upon the following judgments in support of his case:

- *Mobilox Innovation Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353 at Para 25*
- *Greenhills Exports (Private) Limited, Mangalore and Ors Vs. Coffee Board, Bangalore., 2001(4) KarLJ 158 at Paras 14, 15 and 16*
- *Ramgad Minerals and Mining Pvt. Ltd and Ors., Vs. Vectra Advanced Engineering Pvt. Ltd., MANU/KA/6261/2018 at Paras 35, 36, 37 & 38*
- *Parmod Yadav and Ors., Vs. Divine Infracon Pvt. Ltd., MANU/NL/0136/2018 at paras 10 and 11.*

4. The Petitioner, has filed Rejoinder dated 13th September, 2019, to the said reply filed by the Respondent by inter-alia contending as follows:

(1) The Respondent, for the first time has raised the issue of deficiency of service, which is a mere afterthought in order to avoid initiation of CIRP, though all the requirements under the Code for initiation of CIRP are satisfied and complied with by the Operational Creditor

(2) The Balance sheet produced at Annexure XI clearly shows that the Corporate Debtor is incurring huge losses and thus statement that it is profit making Company is ex facie false to their own knowledge. Though the Petitioner is not denying that it has received some amounts from the Corporate Debtor for supply of LED TVs, the instant petition is filed for the defaults arise out of non-payment of balance dues, which the Corporate Debtor admitted to have withheld without any justifiable reason.

(3) The Corporate Debtor at no point of time denied about the quantities ordered by them or disputing the invoices raised by the Operational Creditor. As against the admitted amount of Rs. 103,62,00,000/-against invoices, the Corporate Debtor admitted to have paid only 85,57,00,664. Therefore, even as per own admission of Corporate Debtor, 18,04,99,336 is still outstanding from and out of total invoice amount. Therefore, the Petition deserves to be admitted on this sole ground.

(4) The Corporate Debtor though in receipt of reply failed reply to it and pay outstanding amount and did not raise any pre-existing dispute as prescribed under the Code in order to avoid initiation of CIRP. And merely alluding to some form of deficiency in service, without there being any

contemporaneous evidence at this stage after ignoring the demand notice is not sufficient to deny the legitimate claims of the Operational Creditor.

5. Heard Shri Ajit Anekar along with Ms. Urvi Vaidya, learned Counsels for the Petitioner and Shri Dhyan Chinnappa, learned Senior Counsel with Shri Chinmay J Mirji and Ms. Charitha.V, learned Counsels for the Respondent. I have carefully perused the pleadings of both the parties and also the extant provisions of the Code and the rules made there under and various decisions relied upon by the parties as mentioned supra.

6. The case is listed for hearing on admission on 29.07.2019, 19.08.2019, 09.09.2019, 26.09.2019 and on 24.10.2019, and it is adjourned on those dates at the request of the parties, in order to serve the notice and also to give an opportunity to the parties to explore the possibility of settlement of the issue in question as the Corporate Debtor claims that it is solvent Company. However, the Corporate Debtor failed to avail the Opportunity and thus forcing the Adjudicating Authority to consider the case as per merits.

7. Shri Ajit Anekar, learned Counsel for the Petitioner, while pointing out various averments made in the Company Petition and in synopsis, and rejoinder, as briefly stated supra, has further submitted that the debt and default in question are admittedly not in dispute, and even failed to respond to the demand notice. The instant Company Petition is filed in accordance with law, and he has also suggested a qualified Resolution Professional, namely, Mr. Deepak Saruparia, Interim Resolution Professional, Regn. No.IBBI/IPA-001/IP-P00660/2017-18/11689, who has also filed written Consent in

Form-2 dated 31.07.2019, by inter declaring that he is eligible to be appointed as a Resolution Professional in respect of the Corporate Debtor and that there are no disciplinary proceedings pending against him with the Board or ICAI. Therefore, he urged the Adjudicating Authority to admit the case by initiating CIRP as prayed for.

8. Shri Dhyan Chinnappa, learned Senior Counsel for Respondent, on the other hand, has seriously opposed the admission of the case by raising various averments as mentioned in the Statement of Objection and affidavit as briefly stated supra. He has also pointed out that there is no operational debt and he has relied upon Section 5(21) and Section 3(11) of the Code in respect of the debt claim etc. He has also submitted that even though the basic document ie the Supply Agreement dated 29th December, 2016 is not in dispute, several terms of the Agreement are not complied with by the Operational Creditor in order to claim the amount. He has relied upon the following judgements rendered in the following cases:

- *Greenhills Exports (Private) Limited, Mangalore and Ors Vs. Coffee Board, Bangalore., 2001(4) KarLJ 158 at Paras 14, 15 and 16*
- *Ramgad Minerals and Mining Pvt. Ltd and Ors., Vs. Vectra Advanced Engineering Pvt. Ltd., MANU/KA/6261/2018 at Paras 35, 36, 37 & 38*
- *Parmod Yadav and Ors., Vs. Divine Infracon Pvt. Ltd., MANU/NL/0136/2018 at paras 10 and 11.*

In fact the instant case is filed to claim alleged damages rather than to initiate CIRP basing on invoices and purchase orders, the issue of damages/disputes cannot be decided under

the provisions of Code and Civil Court is competent to decide those issues and in support of his contentions, he has relied upon the judgments as cited supra. At the end of his argument, the Learned Senior Counsel expressed his readiness to pay the outstanding amount, if the Adjudicating Authority determines the outstanding amount and will also furnish bank guarantee to the extent.

9. As stated supra, the Corporate debtor has inter-alia contended there is existing disputes between the parties, which are to be adjudicated by a competent civil court upon appreciating the evidence placed on record by the parties against each other's claim. And in the absence of full-fledged trial, this Petition cannot be adjudicated and the same deserves to be dismissed. And it is contended that the Respondent has without prejudice to its rights and contentions chosen to not initiated any legal action against the Petitioner due to the deficiency in service and has chosen to withhold payments that was not due as a result of such deficiency in services. The Corporate Debtor, while admitting that the goods in question was ordered and upon the delivery of the Products, the Respondent reserves the right to verify and determine whether the products supplied by the Petitioner are in accordance with the PO and the Invoice raised by the Petitioner. In the event, the Respondent determines that the Products received are (i) in a damaged condition, (ii) not in accordance with the Supply Agreement, the Purchase order and/or in the Invoice raised by the Petitioner, and/or (iii) defective or deficient, it shall notify the same to the Petitioner. If there is a difference in the number of Products received by Respondent, the same shall be recorded by the Respondent at the bottom of the Invoice as short supply along with the Respondent's seal and signature.

The above contentions/averments on behalf of the Corporate Debtor clearly established that on order made by the Corporate Debtor, the Operational Creditor got imported the goods in question which was duly communicated to the Corporate Debtor too and due to shortages of warehouse facilities by the Corporate Debtor, it could not take delivery of those goods resulting in paying excess excise duty by the Operational Creditor. And the Corporate Debtor cannot simply deny this fact without substantiating contrary. The Corporate Debtor also accepted that it has withheld approximately an amount of Rs.42,96,668/- towards deficiency in services by the Petitioner.

10. With regard to debt and default in question, the parties have exchanged various emails , which are placed at Annexure IV to VII (page no.43 to 81) of the Petitioner, which inter-alia state that due to the shortage of slot, the Corporate Debtor could not lifting the stock. It is relevant to point out here that one email dated 16.10.2017, sent by Shri Jagdish Rajpurohit from M/s. CloudWalker Streaming Technologies Private Limited (Petitioner) to the Shri Santosh U Kamath (CCC-VS) and to Ms. Sakshi Khandelwal (Senior Manager – Business Development) of Flipkart India Pvt. Ltd. (Respondent), which reads as under:

"Dear Santosh,

As discussed during our last meeting with Abhinav, we are awaiting the PO's for 39 and 50 inch models which have arrived last week and are waiting in Customs. ***We won't be able to hold beyond 1 more day as it would then start attracting demurrage charges.*** *Kindly send the PO's today and oblige.*

Regards,
Jagdish Rajpurohit
CloudWalker".

Thereafter, an email reply was also given by Ms. Sita Subramanian from M/s. Flipkart India Pvt. Ltd. (Respondent) dated 06.11.2017 @12.45 P.M, to the CloudWalker Logistics, which reads as under:

"Hi Sushma,

As discussed with Ankur, please raise slot requests for the following quantities at the earliest.

Hi Ankur – As discussed, owing to capacity constraints at out end, we will pick up the following on an immediate basis and the remaining in the 3rd week of November.

FSN	Model	NLC	Nelam-angala	Hydera bad	Che-nai	Bhiwa-ndi	Ahmed -abad	Kolkat -a	Noida	Luha -ri	Patn a	Total
TVSEYD EJHUCE 5ACH	CLOUD TV 39SH	22500	43	33	46	36	25	15	10	45	3	256
TVSEYD EJPKHM ZC49	CLOUD TV 50SH	32400	35	27	37	29	20	12	8	36	3	206
TVSEYD EJ6TMY QDQZ	CLOUD TV 50SU	37000	35	27	37	29	20	12	8	36	3	206

Again, Shri Jagdish Rajpurohit, from M/s. CloudWalker (Petitioner) has sent an email reply dated 06.11.2017 @17.00 P.M to Ms. Sita Subramanian of M/s. Flipkart India Pvt. Ltd. (Respondent), which reads as under:

"Hi Santosh,

The slots received are for half of the qty which we both agreed on when additional price support was given.

Please inform urgently by when is the balance qty being given slots as you know we have special call specifically based on qty. assured as per our discussion and also confirmed by your email on 23rd October..

We are already running way behind scheduled with this inventory and further delay will put us in huge trouble. Awaiting your kind reply.

Regards,

Jagdish Rajpurohit."

In response, Shri Santosh Kumar, from M/s. Flipkart India Private Limited (Respondent) sent an email dated 06.11.2017 @ 17.25 P.M to Shri Jagdish Rajpurohit, which reads as under:

"Hi Jagdish,

I understand the issue. We are right now fighting for in-warding of stocks and have been able to get slots as confirmed. This has been enabled with launch in mind. For the remaining stocks we will confirm exact scheduled for the same by tomorrow".

11. On 01.12.2017, Shri Jagdish Rajpurohit from M/s. CloudWalker (Petitioner) sent an email to Ms. Sita Subramanian (BGM-VS) from M/s. Flipkart India Pvt. Ltd., (Respondent), which reads as under:

"Hi Sita,

With reference to the pickup view for the inventory in hand for Nov-Feb we have now executed the shipments for November as per orders received. Please see attached excel sheet for status of the pickup plan given by FK to us at the start of the month.

However there is a shortfall of approx. Rs.50 Lacs in the November Pick up. *As you know the new NLC around is linked to FK pickup plan and was agreed not to be below these numbers. I know this is the first month of the plan but I am just raising a flag here since we are now entering December and there is a pickup plan of* ***Rs.47,416,000*** *from FK which we are planning to execute and I requests you to please support in this by including the shortfall also in December so we come on track.*

We are now facing a an acute situation of full inventory and no cash flow for the past 2 months *due to the non-pick up which is also raising concerns from out bank with whom we have shared your pickup plan and have to ensure this is achieved to avoid problems with them besides lowering our interest payouts on*

the inventory which is now breaking our backs and is giving us tremendous problems.

We also faced issues to execute the November order with PO's and slots being difficult to get where it took more than a week only to normalize the process. In view of this ***I suggest that December orders be processed and informed at the start itself so we can plan the month right now and be able to execute the orders in time and efficiently".***

Warm regards and awaiting your kind reply.

The above correspondence, clearly established that the Petitioner imported goods in question as per purchase orders made by the Corporate Debtor and it is the Corporate Debtor, who has committed default to take some of goods due to its inability to lift them and thus committed default.

12. As stated supra, the Corporate Debtor admittedly did not raise any dispute with regard to alleged deficiency in service or brought to the notice of Operational Creditor about alleged breach of terms of Supply Agreement in question. Clause 8 of Agreement deals with particulars of delivery and clause 8(b) confer power on the Flipkart (Corporate Debtor) to terminate the Agreement, if the Operational Creditor commits breach of terms of the Agreement. It is not the case of Corporate Debtor that it has terminated the Agreement in question and even it did not respond to statutory Demand Notice issued to it. And all the alleged defence is being raised by the Respondent only by way of statement of objection to the instant petition. And it is settled position of law that in order to avoid to initiate CIRP, in an Application/Petition filed, under Section of 9 of the Code, there should be pre-existing dispute. The facts and circumstances as detailed supra, there is no pre-existing dispute. On the Contrary, the Corporate Debtor

agrees to pay and has also accepted that it has withheld at least an amount of Rs. 42,96,668/- which is due to be paid to the petitioner. The Respondent has also not invoked Arbitration Clause, available under clause 18 of Agreement, if any deficiency/breach of Agreement committed by the Petitioner as alleged by the Respondent exists. Moreover, the defence now raised, as stated supra, on behalf of Corporate Debtor, as rightly pointed out by the Learned Counsel for the Petitioner, is an afterthought and those defenses are baseless and not tenable, and thus they are liable to be rejected.

13. In support of the petition, Mr. Jagdish Rajpurohit, Director and Authorized signatory of the Operational Creditor Company, has filed an Affidavit dated 28th June, 2019, by inter alia stating that the Operational Creditor has issued a Demand Notice in Form -2, dated 08.06.2019, under Section 8 of the Code to the Respondent, and the same was received by the Respondent on 13.06.2019. However, the Respondent did not choose to respond the said demand notice. Therefore, the Respondent has failed to bring the notice of the Petitioner/Operational Creditor an existence of a dispute or a pendency of suit or arbitration proceedings filed before the service of the Demand Notice. There is no substantive proceeding initiated by the Corporate Debtor either before or after receipt of demand notice. Furthermore, the Respondent/ Corporate Debtor has failed to repay the unpaid operational debt as specified in the Demand Notice sent by the Petitioner/ Operational Creditor. Another supporting affidavit dated 8th July, 2019 confirming the same. The Operational Creditor has claimed for total of amount of Rs. 26.95 Cr. Consisting of Rs. 13.95 Cr. towards goods, Rs.5.25 Cr. towards customer charges, Rs. 7.75 cr. towards interest @ 12.65 % on delayed payment till

31st March, 2019. A copy of Ledger Account (Customs duty) for the period 15th December, 2017 to 18th April, 2019 is filed in support of payment said customs duty. The Respondent cannot simply deny the payment of customs duty for the goods imported for it by the Petitioner.

14. It is also relevant to point out here that some of the cases similar to the instant case was dealt with by this Adjudicating Authority and those judgements were questioned before the Hon'ble NCLAT, as per Section 61 of Code. One of the case is filed by filed by M/s. Next Education India Pvt. Ltd. Vs. M/s. K12 Techno Services Pvt. Ltd., vide CP (IB)No.114/BB/2017, which was dismissed by this Adjudicating Authority, vide Order dated 20.12.2018, by inter-alia adverting as under:

> ***"13...*** *The Hon'ble Supreme Court in the case of B.K.Educational Services Pvt. Ltd.Vs. Parag Gupta and Associates[1], has inter alia held that provisions of Limitation Act will apply to proceedings or appeals before NCLT/NCLAT. Section 238A of the Code make provisions of Limitation Act would apply to proceedings under the Code. As stated supra, debt in question fell on various dates on and after October, 2011 and there is no explanation for the laches and delay on the part of the petitioner. Moreover, as per the terms and conditions as stipulated in the Master License Agreement in question, the debt in question itself is subject to various compliances as stated supra.*
>
> *The Hon'ble Supreme Court of India, in a recent case, in Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited[2], has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down whenever there is existence of real dispute, the IBC provisions cannot be invoked.*

[1](2018) SCC Online SC 1921
[2](2018) 1 SCC 353)

Accordingly, C.P.(IB)No.114/BB/2017 is hereby dismissed. However, this order will not come in the way of the Petitioner seeking other remedies available to it under any other law. No orders as to costs".

Aggrieved by the said order, the Petitioner has filed an Appeal before the Hon'ble NCLAT, New Delhi, in Company Appeal (AT) (Insolvency) No.98 of 2019, and the Hon'ble NCLAT, New Delhi, vide its order dated 01.08.2019, by setting aside the order of this Adjudicating Authority, has remitted the case to the Adjudicating Authority by interalia observing as follows:

"The Appellant – M/s. Next Education India Pvt. Ltd. (Operational Creditor) filed an application under Section 9 of the 'Insolvency and Bankruptcy Code, 2016' against M/s. K12 Techno Services Private Limited (Corporate Debtor), the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench by impugned order dated 20th December, 2018 rejected the Application on the ground of 'existence of dispute'.

The Appellant brought on record (Form 5) of 'debt' and 'default'. It is also brought on record the Demand Notice U/s. 8(1) of the 'I&B Code' was issued on 8th August, 2017. The Adjudicating Authority on the ground that the Respondent has filed reply on 8th September 2017 to the Demand Notice noticed that several disputes had been raised. They have also annexed several correspondences about the defective services provided by the Appellant. However, when we asked, the learned Counsel for the Respondent could not lay hand on any of the correspondence to show that prior to Section 8 notice, the Respondent (Corporate Debtor) intimated that there were defective services provided by the Appellant.

It is a settled law that if any dispute is raised prior to the issuances of the invoices or Demand Notice U/s. 8 (1) of the I&B Code with regard to quality of services or goods or pendency of the suit or arbitration, in such case one may take the plea that there is an 'existence of dispute' but if any dispute is raised after issuance of

Demand Notice U/s. 8 (1) that cannot be termed to be a 'pre-existing dispute'.

We find that the Adjudicating Authority has failed to notice the aforesaid issue and observed that 'debt' in question is not only serious dispute but also barred by limitation and laches and not discussed under which provision the 'Master Service Agreement' with
'Sri Gowtham Academy of General and Technical Education' was consequently issued on 8th February, 2016 and the reply to the Demand Notice was issued on 8th August, 2017.

For the reasons aforesaid, we set aside the impugned order dated 20th December, 2018 and remit the case to the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench for admitting the Application U/s. 9 of the 'I&B Code' after notice to the 'Corporate Debtor'. We allow the 'Corporate Debtor' to settle the claim before its admission, if it so chooses. The appeal is allowed with aforesaid observations and directions.

15. In another case, this Adjudicating Authority has rejected the Company Petition bearing CP (IB)No.25/BB/2018 filed by M/s. Gupshup Technology India Pvt. Ltd. Vs. M/s. Interpid Online Retail Pvt. Ltd., and it was rejected by an Order dated 08.11.2018, which inter-alia reads as under:-

"Hence, C.P. (IB)No.25/BB/2018 is hereby rejected by exercising powers conferred on this Adjudicating Authority under Section 9(5)(1)(a) of the IBC 2016. However, this rejection order will not come in the way of Petitioner to invoke any other remedy available under any other law. No order as to costs".

And aggrieved by said order, the Petitioner has filed an Appeal before the Hon'ble NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No.23 of 2019 and the Hon'ble NCLAT, New Delhi, vide its order dated 25.07.2019, has set aside the order of

this Adjudicating Authority, and thus remitted the case to the Adjudicating Authority by inter-alia observing as follows:

"M/s Gupshup Technology India Pvt. Ltd. (Operational Creditor) filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') against 'M/s Interpid Online Retail Pvt. Ltd.' ('Corporate Debtor') which having rejected by Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, by order dated 8th November, 2018, the present appeal has been preferred by the Appellant.

2. According *to the Appellant, it entered into Agreement with Respondent – M/s. Interpid Online Retail Pvt. Ltd., on 8th October, 2014. The Agreement was for a period of one year and as per Clause 3.2 of the Agreement, it would get auto renewed for further period of one year each unless terminated by either party. As per Clause 4.2 of the Agreement, the Appellant would send monthly invoices to the Respondent for the fees accrued in the previous month in accordance with the terms set out in Schedule 3. Thereafter, the Respondent would verify the invoices from the Appellant and thereafter pay such valid invoices within 15 business days. Further, as per Clause 4.5 of the Agreement, the Respondent was liable to pay interest at the rate of 1.5% per month on any sums overdue after a period of 15 business days from the receipt of a valid invoice.*

3. *In between 2014-2015, the Appellant provided the said services to the Respondent from time to time for which the Appellant raised invoices at the end of every month towards the consumption of the said service in terms of the aforesaid Clause. The Appellant continued to provide services to the satisfaction of the Respondent and the Respondent did not raise any complaints about the services rendered by the Appellant or about the invoices raised by the Appellant in the years 2014, 2015 and 2016.*

4. *It is stated that for the first time Respondent defaulted in making the payment towards the invoices on 16th June, 2015 and had not*

made any payment towards the debt since then, as a result of which its services were discontinued after July, 2015.

5. *On 15th April, 2017, the Respondent acknowledged the debt and informed that they were expecting some funds from its investors, which was delayed and it was the reason for non-payment of the outstanding dues.*

6. *The record of the services carried out as on 5th September, 2017 shows that the Respondent availed the services through the SMS Dashboard and had its own dedicated user name and password for logging. However, the Respondent in their email dated 5th September, 2017 sought details of email logs and other supporting documents in order to verify the invoices.*

7. *The Appellant issued a Demand Notice under Section 8(1) on 24th October, 2017 and for the first time the Respondent in its reply under Section 8(2) by intimation dated 3rd November, 2017 raised false and frivolous allegations.*

8. *After completion of more than 10 days, the Appellant filed an application under Section 9, which has been dismissed by the Adjudicating Authority with following observations: -*

> *"7. As per the provision of Section 9, an application can be admitted if the Application/Petition is filed under Section 9(2), there is no repayment of unpaid Operational Creditor, no notice of dispute has been received by the Operational Creditor, etc. As stated supra, admittedly, the Petitioner got issued a legal notice dated 11.10.2017 by claiming for Rs.57,86,148/- consisting of five invoices starting from 31.05.2015 to 31.07.2015 claiming for total amount of Rs.74,08,377/-. Out of which respondent paid Rs.16,22,229/- and the remaining outstanding balance was 57,86,148/-. The Respondent vide its email dated 5th September, 2017, requested the petitioner to furnish supporting documents in support of its claim, followed by specific reply dated 24th October, 2017 to the above legal notice, by inter alia, raising dispute of claim.*

Therefore, it is clear that when the Respondent has disputed the amount, as the amount is more than Rs. 1 lakh, the application under Section 9 cannot be rejected.

From the aforesaid provision of the Limitation Act, it is clear that the application is maintainable within three years from the date when the right to apply accrues. Since, the Insolvency and Bankruptcy Code, 2016 has come into effect since 1st December, 2016, we hold that the application is not barred by limitation.

The Adjudicating Authority while passing the order, failed to appreciate the facts and erroneously held that there is a pre-existing dispute and the claim is barred by limitation.

For the reasons aforesaid, we set aside the impugned order dated 8th November, 2018 and remit the case to the Adjudicating Authority for passing appropriate order taking into consideration the records submitted by the Appellant in the light of decision of Hon'ble Supreme Court in "Innoventive Industries Ltd. Vs. ICICI Bank and Ors.", after notice and hearing the Respondent. In the meantime, it will be open to the Respondent ('Corporate Debtor') to settle the claim with the Appellant. Appeal is allowed with aforesaid observations and directions. No costs.

16. In another case, filed by M/s. Pedersen Consultants India Pvt. Ltd. Vs. M/s. Nitesh Estates Limited, this Adjudicating Authority has dismissed the Company Petition (IB)No.35/BB/2018 vide Order dated 05.10.2018, with the following reasons:

"Hence, by exercising powers conferred on the Adjudicating Authority U/s. 9(2)(ii) of IBC, 2016, C.P.(IB)No.35/BB/2018 is hereby rejected. However this order will not come in the way of Petitioner filing appropriate proceedings before Appropriate Court, having jurisdiction over the matter".

And aggrieved by both the parties, the Petitioner has filed an Appeal before the Hon'ble NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No.720 of 2018 and the Hon'ble NCLAT, New Delhi, vide its order dated 24.07.2019, has set aside the order of this Tribunal and thus remitted the case to the Adjudicating Authority with the following directions:

"The Appellant- 'Pedersen Consultants India Pvt. Ltd.'- ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against 'M/s. Nitesh Estates Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru, discussing the claim and counter claim of the parties, rejected the application by impugned order dated 5th October, 2018 with following observations:

> *"7. The above narration of facts discloses that there are various disputed question of fact with regard to the alleged debt and default raised in the Petition. The contention of the respondent that the defense raised by the respondent is moonshine cannot be accepted. On the other hand, the Petitioner Company itself could not prove that the debt and default in question is beyond doubt. The Tribunal, cannot enter into enquiry with regard to the disputed questions, in a case filed under the IBC, 2016, which is summary in nature, and the issues to be primarily decided basing on the principles of natural justice. As stated supra, there are several clauses in the agreement in question, and the respondent, on the contrary made claim against the petitioner. Ultimately, the parties in the first instance have to reconcile their own statement of accounts before approaching the Tribunal to invoke provisions of IBC, 2016. The Petitioner, instead of finalising the disputed amounts, has filed the instant Company Petition on untenable grounds. The question of excess payment, and set-off as claimed by the respondent has to be examined in an appropriate proceeding in a case filed in accordance with the*

law, and the issue cannot be adjudicated in the instant Company Petition. Therefore, we are of considered opinion that there is a dispute with regard to debt in question, and thus it is not a fit case to admit."

2. The Respondent- 'M/s. Nitesh Estates Limited'- ('Corporate Debtor') has taken plea that it has informed the Appellant by e-mail dated 27th February, 2017 that there are serious issues with respect to the engagement with the Appellant, but such e-mail does not relate to any pre-existing dispute. Whatever the stand taken by the 'Corporate Debtor' before the Adjudicating Authority, are afterthought which is after receipt of Demand Notice under Section 8(1) of the 'I&B Code' issued on 14th July, 2017.

3. The Adjudicating Authority has not rejected Section 9 application on the ground of pre-existing dispute, but rejected it on the ground that it, cannot enter into enquiry with regard to the disputed claim.

4. The Learned Counsel for the Respondent has disputed the contention of the Petitioner and the debt in question is a disputed and has pointed the averments stated in additional Statement of Objections as briefly stated above. The case is covered by the Apex Court judgement rendered in the Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited case. Therefore, this C.P.(IB) No.35/BB/2018 is liable to be dismissed."

5. In an application under Section 9, it is always open to the 'Corporate Debtor' to point out existence of dispute, if any. Such existence of dispute should be that of a period prior to the issuance of the demand notice under Section 8(1) of the 'I&B Code'.

6. In "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353", the Hon'ble Supreme Court held that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. The Hon'ble Supreme Court further observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice 7 of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or 8 send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form.

Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the 9 unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under subsection (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution 66 professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the

proviso (Section 9(5)(ii)(a)). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b)), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c)). It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility (Section 9(5)(ii)(d)). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected (Section 9(5)(ii)(e))".

From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist prior to issuance of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt', the application under Section 9 cannot be rejected and is required to be admitted.

9. In "Innoventive Industries Ltd. v. ICICI Bank and Anr.— (2018) 1 SCC 407", the Hon'ble Supreme Court while explaining the provisions of Section 9 observed and held:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of

"claim", we have to go back to Section 3(6) which defines "claim" to mean 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). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records

of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing- i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

10. From the aforesaid findings, it is clear that the claim means a right to payment even if it is disputed. Therefore, merely because 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.

11. In the present case, as we have observed that there is no record to suggest pre-existence of dispute with regard to the services rendered by

the Appellant, we hold that the application under Section 9 should not have been rejected by the Adjudicating Authority on the ground that the dispute about the quantum of payment cannot be determined.

12. The Respondent disputed that the alleged debt is not the amount as shown in the Form. However, on mere dispute of amount, the application under Section 9 cannot be rejected, as in terms of Section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank and Anr." (Supra) noticed the definition of 'claim' and held that even if the right of payment is disputed, the Code gets triggered the moment default is of rupees one lakh or more (Section 4). In the circumstances, in absence of any pre-existing dispute, it was not open for the Adjudicating Authority to reject the application under Section 9.

13. For the reasons aforesaid, we set aside the impugned order dated 5th October, 2018 and remit the case to the Adjudicating Authority to admit the application under Section 9 after notice to the Respondent, so that the Respondent may get an opportunity to settle the matter prior to the admission of the application. The appeal is allowed with aforesaid observations and directions. No costs.

17. So as far the willingness of the Respondent to settle the issue in question is concerned, both the parties have not come with any concrete settlement of the issue. Moreover, it is open to the parties to settle the issue, even after admission of the case, by filing an Application U/s. 12 A of Code. However, the instant Petition cannot be kept it pending for settlement of the issue, as the case was filed as early as on 22nd July, 2019, and the Adjudicating Authority has granted several opportunities to the parties to settle the issue especially the Corporate Debtor claimed it is solvent Company and initiating CIRP against it, would have serious devastating effect on its operations. The Code, under provisions of section 9, inter-alia prescribes time lines for either

for admission or rejection of case for 14/7 days, as the case may, therefore, the Adjudicating Authority cannot keep the case pending for the that purpose.

18. The above facts and circumstances of the case, when examined in the light of extant provisions of Code and the law, as discussed supra, leaves no iota of doubt that the Corporate Debtor has committed Debt and default in question, which is established by the Petitioner. And there is neither pre-existing nor post-existing dispute made out by the Corporate Debtor. The Adjudicating Authority is satisfied that the instant Application/petition is complete proviso 2 of Section 9 of the Code ; there is no payment of operational debt; the demand notice in question is delivered and no notice of dispute was received by the Petitioner; a qualified Resolution Professional by name Mr. Deepak Saruparia, bearing IP Regn. No. IBBI/IPA-001/IP-P00660/2017-18/11689, is suggested as Interim Resolution Professional to conduct the CIRP in respect of Corporate Debtor. He has also filed his written consent dated 31.07.2019 in Form-2, by inter alia stating that he is an insolvency professional registered with Indian Institute of Insolvency Professionals of ICAI having registration Number IBBI/IPA-001/IP-P00660/2017-2018/11689; he is currently qualified to practice as an insolvency professional; there are no disciplinary proceedings pending against him with the Board etc. Therefore, the Adjudicating Authority is of considered opinion the said Resolution Professional is provisionally eligible to be appointed as IRP and the instant petition is fit case to admit by initiating CIRP, appointing IRP, imposing moratorium etc in respect of the Corporate Debtor.

19. In view of the above facts and circumstances of the case, by

exercising powers conferred on the Adjudicating Authority, U/s 9(5)(i) and other extant provisions of the IBC, 2016, the Adjudicating Authority passed the following orders:

(1) C.P.(IB)No.260/BB/2019 is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Flipkart India Pvt. Ltd., Corporate Debtor;

(2) Mr. Deepak Saruparia, bearing IP Regn. No. IBBI/IPA-001/IP-P00660/2017-18/11689 is hereby as Interim Resolution Professional, in respect of the Corporate Debtor to carry on the functions as per provisions of Code and various rules issued by IBBI from time to time.

(3) 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 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 Securitization 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 transaction as may be notified by the Central Government in consultation with any financial regulator.

g. The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process.

h. The IRP is directed to follow all extant provisions of the IBC, 2016 and the Rules including fees rules as framed by the IBBI from time to time to carry out the CIRP process as expeditiously as possible.

i. The Board of Directors and all the staff of the 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 the IBBI.

j. The IRP is directed to file his progress reports to the Tribunal from time to time about the steps taken in pursuant to the CIRP. The IRP is further directed to take expeditious steps so as to complete the process of CIRP within the stipulated time.

(4) Post the case for report of the IRP on **25.11.2019**.

RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL

Raushan