



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH  
COURT-IV**

**COMPANY PETITION NO.(IB)-1007/ND/2018**

**Under Section 9 of the Insolvency and Bankruptcy Code, 2016  
read with Rule 6 of the Insolvency and Bankruptcy  
(Application to Adjudicating Authority), Rules, 2016**

**IN THE MATTER OF:**

MR. PAVAN GAUR

**.... Applicant/ Operational Creditor**

**Vs.**

M/s. SCHNEIDER PROTOTYPING INDIA PRIVATE LIMITED

**.... Corporate Debtor**

**CORAM:**

**SH. MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE MEMBER  
(JUDICIAL)**

**DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

**Date of Order: 31.10.2023**

**ORDER**

**PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

The instant application is filed by one Mr. Pavan Gaur (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Schneider Prototyping India Private Limited (hereinafter referred as 'Respondent



Company' or 'Corporate Debtor') for defaulting the payment of Rs.17,53,06,336/- (Rupees Seventeen Crores Fifty Three Lacs Six Thousand Three Hundred Thirty Six Only).

2. The Respondent Company M/s. Schneider Prototyping India Private Limited having CIN:U29219DL2012FTC233842 incorporated under the provisions of the Companies Act, 1956 and having its registered office situated at 204-206, Siddhartha Chambers, Hauz Khas, New Delhi-110016. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

### **AVERMENTS BY THE APPLICANT**

3. Succinctly stated facts of the present case as averred by the applicant are that the Applicant and the Corporate Debtor had entered into an Employment Agreement effective from 01.04.2012, pursuant to which the Applicant was appointed as the Managing Director of the Corporate Debtor for a period of Five (5) years until 31.03.2017, which could be extended subject to mutual agreement. The Applicant during his tenure had worked to the best of his ability to expand the business of the Corporate Debtor and as a direct consequence of his efforts, acumen and managerial abilities, the Corporate Debtor's performance began to peak within the first year itself. The Corporate Debtor in order to reward the Applicant for his exceptional performance had entered into an agreement for 'Right to Subscribe Shares' with the Applicant on 20.12.2013.



4. Moreover, at the time of taking up the employment with the Corporate Debtor, it was recognized by the parties that the value of the Applicant's India Business which he carried to augment the Corporate Debtor's business, it was to be paid to him. The business Agreement dated 18.09.2013, altering the Employment Agreement effective from 01.04.2012, was entered into between the parties wherein the Applicant's business was valued at Rs.5,74,11,750/- as on 31.03.2013 and was to be compounded with interest payable at bank prime lending rate till fully paid. Further, the Applicant submitted that on account of Applicant's exceptional performance, it was agreed that the Applicant's salary would increase from Rs.2,50,000/- per month to Rs.8,35,000/- per month with effect from 19.09.2013 and the said alteration was written out in Corporate Debtor's Director namely Dr. Topf's own handwriting and was duly acted upon by the Corporate Debtor.
  
5. It was submitted that the employment agreement between the Corporate Debtor and the Applicant was not formally renewed and signed off, whether in the same or even the better terms actually agreed upon in September 2013 between the parties, even after 5 years had lapsed since its execution. The Applicant on 08.07.2018, had issued a communication to HR department of the Corporate Debtor requesting to settle his dues, however, no reply is received from the Corporate Debtor. Since, the Corporate Debtor had failed altogether to clear the Applicant's dues in respect of the Applicant's employment, the Applicant was constrained to issue a detailed Demand Notice dated 20.06.2018. In response to the Demand Notice dated 20.06.2018, the Corporate Debtor had issued a notice of dispute, in which frivolous allegations are raised.
  
6. The Applicant submitted that a sum of Rs.17,53,06,336/- (Indian Rupees Seventeen Crores Fifty Three Lakhs Six Thousand Three Hundred and



Thirty Six only) is due and payable by the Corporate Debtor to the Applicant. The bifurcation of the sum of Rs.17,53,06,336/- is as follows:-

- a) A sum of Rs. 3,98,21,515/- towards arrears of salary and other legal and contractual dues such as LTA, insurance premiums, bonus, car reimbursement, and P.F., etc. The salary payable to the operational creditor as per the employment agreement and the subsequent alteration thereof, aggregated to a sum of Rs. 11,63,49,914/-, out of which an amount of Rs. 4,46,78,399/- was booked as paid to the operational creditor in the books of account of the corporate debtor. The arrears therefore aggregated to Rs. 7,16,71,515/-; but, some arrears of salary amounting to Rs. 4,80,43,582/- were booked as paid by the corporate debtor, and the amount actually paid after deduction of TDS was a sum of Rs. 3,18,50,000/-. Hence, a sum of Rs. 2,36,27,933/- remained due and payable to the operational creditor towards arrears of salary. Moreover, since the amount that was deducted from the payment made, towards TDS, was not actually deposited by the corporate debtor, the Operational Creditor has added back the said sum amounting to Rs.1,61,96,582/- and computed the aggregate payable to the applicant towards arrears of salary as being Rs.3,98,21,515/-.
- b) Another sum of Rs.1,64,59,433/- is also payable towards full and final settlement of all dues at the stage of closure of employment of the operational creditor on 7th June, 2018. This includes the amount payable in lieu of notice period of 90 days, amounting to a sum of Rs. 69,25,509/-, and the amount payable towards earned leave accumulated up to 60 days, aggregating to Rs. 38,13,569/-, as well as gratuity payable for the period of employment, i.e. 6 years, 2 months, and 7 days, amounting to Rs. 57,20,354/-.
- c) Additionally, an amount of Rs. 11,90,25,388/- towards valuation of the operational creditor's India business, i.e. of his business, business opportunities, customer base, skilled manpower, machinery on right to use basis, etc., all which he had carried with him when he took up employment with the corporate debtor. The said was agreed in September, 2013, as being a sum of Rs.5,74,11,750/-, and interest was payable thereupon at the



Indian bank interest rate. The operational creditor has therefore taken the SBI prime lending rate, for the period between 19" September. 2013, and 1 April, 2018, and averaged the same at 14.05% payable monthly When thus calculated, this amount aggregates to Rs. 11.90.25.388/-.

7. The Applicant had submitted an additional affidavit dated 09.05.2023, wherein final outstanding amount due is submitted as Rs.3,59,51,670 as per the Statement of outstanding employment dues as per the employment agreement for the following claims as set out below:
- Past Salary Dues of Rs.1,20,39,779/-
  - Full and Final Settlement of Rs.56,65,724/-.
  - Balance Gratuity amount of Rs.27,86,667
  - TDS not reflected in Form 26AS amounting to a total amount of Rs. 1,79,23,318/-

### **REPLY BY THE CORPORATE DEBTOR**

8. The Corporate Debtor had filed its reply and submitted that there are no admitted, crystallised Operational Debts due and payable, under the Employment Agreement for the following three reasons –
- the sums claimed / computed by him are not in consonance with the Employment Agreement;
  - certain sums (welfare claims) are not operational debts, and
  - as per the Applicant's own assertions and documents, he has been paid sums vastly in excess of the actual dues under the Employment Agreement, which must be adjusted against any sums if at all found payable notwithstanding the above reasons.
9. The Corporate Debtor submitted that Applicant's claim in the Section 8 Notice was for a total alleged debt of Rs.17,53,06,336/-, wherein the Applicant had laid out its bifurcation of the claims made under various



heads i.e., (a) Rs. 3,98,21,515/- [Arrears of salary and contractual benefits]; (b) Rs. 1,64,59,433/- [Full and Final Settlement of Dues]; (c) Rs. 11,90,25,388/- [Valuation of transfer of India business, compounded with Indian Bank lending rate interest], but failed to explain the basis of its computation or substantiate its claim with supporting documents. Further, the said claim is arising from alleged Hand Written Agreement of 18.09.2013 entered between Dr Henry Topf (Group Chairman) and the Applicant. The fact that this document was missing in the Section 8 Notice is a fact fatal to the claims under the Section 9 petition, which alone is a ground for dismissing it.

10. Moreover, in the 9 May, 2023 Computation, the Applicant had revised his claim to Rs. 3,59,51,670/-, allegedly based on the Employment Agreement and the alleged approved Business Plan, which is bifurcated as: (a) Rs. 1,20,39,779 [Past Salary Dues]; (b) Rs. 56,65,724 [Full and Final Settlement]; (c) Rs. 27,86,667 [Gratuity + Interest @8% as per Order], and (d) Rs. 1,79,23,318 [TDS not reflected in Form 26AS]. The admissibility of a petition under Section 9 of the IBC must be judged at the stage of the Section 8 Notice, and the Section 9 petition. The Corporate Debtor submitted that the figures / sums claimed by the Applicant have been changed through the pleadings, and the 9 May, 2023 Computation as relied by the Applicant has many new sums which were never stated either in the Section 8 Notice or the present Petition.
11. The Corporate Debtor submitted that the employment agreement (clause 5.2 (v)) provides for provident fund contribution to the extent of 8.33% of the salary and on this basis an amount of Rs. 25,32,778/- would be payable to the applicant as per his Employment Agreement as against which the Corporate Debtor has already paid an amount of Rs. 88,200/- to the Applicant and only an amount of Rs. 24,44,578/- is outstanding,



which none the less have to be set off/adjusted against all sums that the Applicant has taken in excess and refund to the Corporate Debtor.

12. Further, the Corporate Debtor submitted that there are contractual disputes arising from employment contracts, accordingly, they cannot be considered as admitted debts amounting to an Operational Debt. There exists a dispute between the parties, prior to the Section 8 Statutory Demand Notice dated 20.06.2018 as to the sums demanded by the Applicant upon his resignation on 07.06.2018.
13. The Corporate Debtor submitted that the Corporate Debtor in response to the Applicant's resignation email dated 07.06.2018 had categorically and summarily denied all claims made by the Petitioner in that email. Therefore, at this stage itself, the salary claims made by the Petitioner have been disputed.
14. Moreover, it was submitted that the Applicant's resignation came at the heels of an internal investigation to the sums illegally siphoned off by the Applicant which led to initiation of the forensic audit and therefore, any payment of final settlement shall be only done after the completion of forensic audit. The further actions taken by the Corporate Debtor against the illegal acts of the Applicant are (a) filing of a Criminal Complaint dated 07.09.2018; (b) filing of a complaint registered as an FIR dated 14.11.2018 under Sections 420 and 406 of the Indian Penal Code, 1860 (IPC) which led to filing of a charge sheet dated 17.12.2019; (c) filing of a Complaint with the Economic offences Wing, New Delhi; (d) Suit for recovery filed on 10.04.2022.



## **REJOINDER BY THE APPLICANT**

15. The Applicant had filed rejoinder wherein the submissions of the Corporate Debtor are rebutted and submitted that since the Applicant's employment related dues were withheld, the Applicant had issued a detailed communication to the Corporate Debtor on 07.06.2018, vide which, after again setting out the pending dues, he tendered his resignation. The corporate Debtor, without in any way disputing this communication, had immediately accepted Applicant's resignation vide email in reply issued on 07.06.2018, and affirmed that "*HR would get in touch for his full and final settlement*". However, on the same day the Corporate Debtor had addressed another very brief email to the Applicant, and made a bare and general denial of the contents of the Applicant's email dated 07.06.2018. Further, on the next day, i.e., 08.06.2018, the Corporate Debtor had wrote to the Applicant regarding working out details of his full and final settlement of due. However, the Corporate Debtor never settled the dues of the Applicant till date.
16. Moreover, the applicant submitted that the Corporate Debtor has levelled general and frivolously unsubstantiated allegations in its Reply to the Section 9 Application, but what is significant is that no disciplinary action was ever taken against the Applicant, also no show cause notices were issued, or proceedings initiated, or employment terminated in terms of the Employment Agreement. Hence, the Corporate Debtor did not dispute the Applicant's claim.

## **ANALAYSIS AND FINDING**

17. We have heard the Learned Counsel for the parties and perused the averments made in the Application, Reply, Rejoinder and Written submission filed by the parties. The present case is a case with plethora of claims and counter claims made by both the parties which in total gives rise



to complex issues. However, this Adjudicating Authority's jurisdiction is limited to the test of the ingredients which have to be satisfied, in particular with the mandate of Section 9(5) of the Code, 2016 which are as follows:-

- (i) Whether there is an "operational debt" as defined in Sec. 5(20) of the Code exceeding the pecuniary threshold limit as envisaged under Section 4 of the Code, 2016?
- (ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and
- (iii) Whether there is 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 in relation to such dispute?

18. We notice that in the present facts of the case, the present application under Section 9 of the Code, 2016 was filed and registered on 10.08.2018, therefore, the pecuniary threshold limit of Rs.1 Lakh as envisaged under Section 4 of the Code, 2016 before the Notification No. S.O. 1205(E), dated 24.03.2020 will be applicable in the present case.

19. The Hon'ble Supreme Court in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 para 34]**, have categorically laid down what the Adjudicating Authority has to examine in an Application under Section 9, which is as follows:-

*"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

- (i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and*
- (iii) Whether there is 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 in relation to such dispute?*



*If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”*

20. Sans irrelevant facts, the claim in the present application arise on account of non-payment of the Applicant’s claim in respect of service(s) rendered by the Applicant in pursuance of the Employment Agreement dated 01.04.2012 entered with the Corporate Debtor. The operational debt claimed to be due by the Applicant in the Affidavit dated 09.05.2023 after deducting the amount belatedly received towards gratuity in April, 2023, during the pendency of the petition amounts to Rs.3,59,51,670/-. The bifurcation of the claim of the Applicant arising out of the Employment Agreement dated 06.05.2012 is extracted below:-

Claim 1 : As per Employment Agreement dated May 6th, 2012 and included in approved Business Plans				
S. No.	Description	Claim 1		
		Principal Amount	Interest As Applicable	TOTAL
1	Past Salary Dues	₹1,20,39,779		₹1,20,39,779
2	Full and Final Settlement	₹56,65,724		₹56,65,724
3	Gratuity calculation as per Order (Interest @ 8% as per Order)	₹20,00,000	₹7,86,667	₹27,86,667
4	TDS not reflected in Form 26AS for FY 2017-18	₹97,65,071		₹97,65,071
	- Interest payable u/s 234A as per IT Act		₹6,83,550	₹6,83,550
	- Interest payable u/s 234B as per IT Act		₹59,56,650	₹59,56,650
	- Interest payable u/s 234C as per IT Act		₹4,93,131	₹4,93,131
5	TDS not reflected in Form 26AS for FY 2018-19	₹8,23,226		₹8,23,226
	- Interest on refund u/s 244A as per IT Act		₹2,01,690	₹2,01,690
	SUB-TOTAL	₹3,02,93,801	₹81,21,688	₹3,84,15,489
	Payment received from Tull and Co.			-₹24,63,819
	<b>CLAIM BASED EXCLUSIVE ON EMPLOYEMENT AGREEMENT</b>		<b>₹3,59,51,670</b>	



21. With regard to the Corporate Debtor's contention of counter claims against the claim of the Applicant, even for a moment, we assume that there is a counter-claim of the Respondent against the Applicant/Operational Creditor, then the same cannot be adjudicated under an application filed under Section 9 of IBC, 2016. Here, it is worthwhile referring to the Judgment of the Hon'ble NCLAT passed in the matter of **Deepak Gupta Vs. Ved Contracts Pvt. Ltd. & Ors. in Company Appeal (AT) (Insolvency) Nos. 1262 of 2019, dated 19.11.2019,** wherein while upholding the Adjudicating Authority's decision of admitting the application of the Operational Creditor filed under Section 9 of IBC, 2016, the Hon'ble NCLAT observed as follows:-

*"3. Learned Counsel for the Appellant submits that in the accounts of three consecutive years, it is shown that the amount is payable to the 'Corporate Debtor' and there are claims and counter claims, which has not been adjudicated by the Adjudicating Authority. However, such ground cannot be accepted as the disputed question relating to claims and counter claims cannot be determined by Adjudicating Authority in an application under Section 9 of the I&B Code."*

22. Further, as regards the contention of the Corporate Debtor that there are no admitted, crystallised Operational Debts due and payable as the Corporate Debtor does not owe any sums to the Applicant rather, the Applicant owes significant sums to the Corporate Debtor, this Adjudicating Authority finds that the Corporate Debtor in its Audited Balance Sheet for the period ending 31.03.2019 had admitted the amount of Rs.4,18,577/- as Salary payable to the Applicant as at 31 December, 2018. Further, the Corporate Debtor had filed an affidavit dated 04.07.2023 in response to the Applicant's affidavit dated 09.05.2023, wherein the Corporate Debtor had admitted its liability of Rs.24,44,578/- outstanding towards the Provident Fund but claimed set off against the said admitted Provident Fund liability on the basis of



counter claims. The relevant note is extracted hereunder for ready reference:

*"However, since the employment agreement (clause 5.2 (v) provides for provident fund contribution to the extent of 8.33% of the salary the figures in column C have been stated accordingly. On this basis an amount of Rs ₹ 25,32,778 would be payable to Pavan Gaur as per his Employment Agreement as against which SPIN has already paid an amount of ₹ 88,200 to Pavan Gaur and only an amount of ₹ 24,44,578. This amount would none the less have to be set off/adjusted against all sums that Pavan Gaur has taken in excess and refund to SPIN."*

23. We have already referred to the Hon'ble NCLAT's judgement in **Deepak Gupta Vs. Ved Contracts Pvt. Ltd. & Ors.** wherein it has been laid down that the question of claims and counter claims cannot be decided by the Adjudicating Authority under an application filed u/s 9 of the Code. The same principle has been reiterated by Hon'ble NCLAT Principal Bench in **Rakesh Kumar Vs Flourish Paper & Chemicals Limited & Anr. in Company Appeal (AT) (Insolvency) No. 1161 of 2022**, dated 27.09.2023 that a counter-claim cannot be adjudicated in a section 9 application. Accordingly, the contention of the Corporate Debtor based on counter claim/set off cannot sustain.

24. Further, the Hon'ble NCLAT in **Nandamuri Meenalatha V M/s. Quality Steels and Wire Products Company Appeal (AT) (CH) (INS.) No. 11 of 2023 04.07.2023** had observed as follows :

*"80. It must be borne in mind that an 'Exact Sum of Claim' of an 'Operational Creditor', is not relevant for an 'Admission' of an 'Application', of course, during the course of 'Corporate Insolvency Resolution Process', the exact 'Claim Amount', can be determined, by an 'Interim Resolution Professional' / 'Resolution Professional', and in the instant case, 'Parties', are free to approach the 'Interim*



*Resolution Professional' / `Resolution Professional', in the course of `Corporate Insolvency Resolution Process'.*

\*\*\*\*\*"

25. Also, this Adjudicating Authority is of the considered view that under the insolvency framework, it is already settled that under the provisions of the Insolvency & Bankruptcy Code, 2016, the aspect of existence of 'Default', takes a prime seat, and the reasons supposed to be projected by the opposite side viz., fraud, siphoning off, forgery and fabrication is of no avail unless supported by substantial evidence. The Hon'ble NCLAT in **Mr. Joseph Jayananda v. M/s. Navalmar (UK) Ltd & Others [Company Appeal (AT) (Ins.) No. 718/2020 ; 07.04.2021; para 8]** observed as follows :

*“8. Given the above discussion, we find that the Corporate Debtor owes a debt of more than Rupees One Lac, i.e. above the threshold limit, and it committed default in discharging the same. It also appears that there was no pre-existing dispute. The Corporate Debtor's main contention is that the amounts paid by the Operational Creditor and its financial statements do not match. It is not for the Adjudicating Authority to ascertain, investigate, or fix the exact amount of liability at the admission stage. After the admission of the petition, it is the duty of the Resolution Professional to collate the claims and ascertain the liability.”*

26. It is pertinent to note that once the Debt above the pecuniary threshold is shown as due, it is for the Corporate Debtor to establish that there are no Outstanding Dues to be paid to an Operational Creditor/Applicant u/s 9 of the Code. In this connection, it is not out of place, for this Adjudicating Authority, to make a significant mention that the Corporate Debtor, had not placed on record any conclusive document to show that the amount due to the Applicant has been paid. The sum and substance of the Corporate Debtor's defence is that the amount due to the



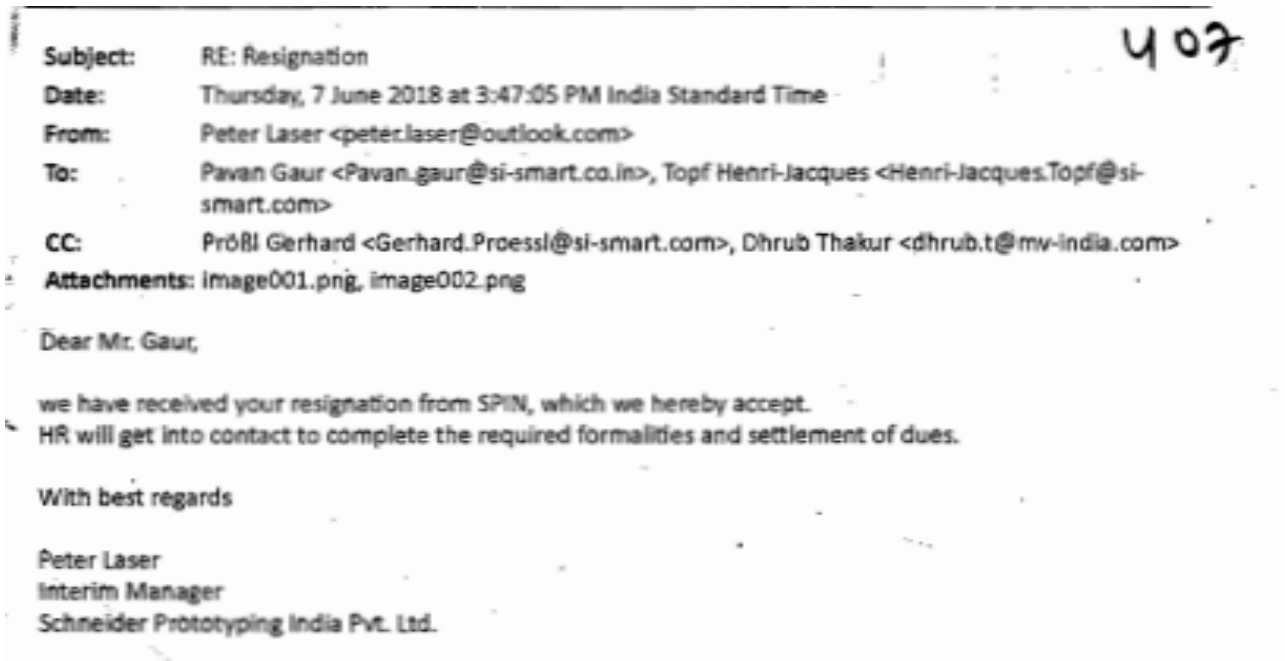
Applicant has been set off by the Corporate Debtor towards the counter claims as raised by the Corporate Debtor.

27. In view of the aforesaid discussion and the judgements referred to above, this Adjudicating Authority, without delving into the exercise of determining the exact quantum of the Operational Debt is of the considered view that there exists an operational debt above the threshold limit of Rs.1 Lakh and the same is 'due and payable' by the Corporate Debtor. **Hence, the first two mandatory conditions regarding the existence of 'Debt' above the pecuniary threshold limit and its 'default' are answered in the affirmative.**

28. As to the question of determining whether there was any discernible pre-existing dispute surrounding the debt claimed to be due and payable between the parties before the issuance of statutory demand notice dated 20.06.2018 issued by the Applicant under Section 8(1) of the Code, 2016, there is no second opinion about the primordial fact that there was an Employment Agreement on 01.04.2012 between the Parties, in pursuance of which the applicant remained in employment with the Corporate Debtor, and tendered his resignation on 07.06.2018 via e-mail to the Corporate Debtor. The Corporate Debtor in response to the Applicant's resignation, had replied on 07.06.2018 at 3:47 p.m. wherein the Corporate Debtor had accepted the resignation of the Applicant and informed that the HR will get into contact to complete the required formalities and settlement of dues. The Corporate Debtor again vide e-mail dated 07.06.2018 at 4:41 p.m. had communicated to the Applicant that, "*Subsequent to my earlier message accepting your resignation and for records sake, please be informed that we disagree in summary with allegations and claims made in your letter.*" In order to appreciate the



facts, the e-mail trail dated 07.06.2018 between the Applicant and the Corporate Debtor is extracted overleaf:-



**[Corporate Debtor e-mail dated 07.06.2018 sent at 03:47 p.m.,  
accepting the Applicant's resignation]**



**[Corporate Debtor e-mail dated 07.06.2018 sent at 4:41 p.m.,  
applicant's claim is summarily rejected]**



29. On a careful perusal of the e-mail correspondence, it is clear that on the date of the Applicant's resignation no communication regarding any 'internal investigation' against the applicant was made and the resignation was immediately accepted by the Corporate Debtor. Later, a summer disagreement was communicated. We are of the view that a mere summary denial of the claims of the Applicant cannot qualify to be a pre-existing dispute. Accordingly, we do not feel adequately persuaded to subscribe to the submission made by the Corporate Debtor that the e-mail correspondence dated 07.06.2018, would constitute a pre-existing dispute.

30. The Hon'ble Supreme Court in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353**, have clearly laid down the law that the 'existence of dispute' must be Pre-Existing' i.e. it must exist before the receipt of the Demand Notice or invoice as the case may be. In 'Mobilox Innovations' (Supra) the Hon'ble Supreme Court has observed as follows;

*"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 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. ....”*

31. As is borne out of the record, the Corporate Debtor had conducted the Forensic Audit only after the Applicant had resigned from the Corporate Debtor, and it is the submission of the Corporate Debtor that on the findings of the Forensic audit report, the Corporate Debtor is of the opinion that the Applicant had siphoned and pilfered substantial moneys from the Corporate Debtor by raising false demands and resultantly, the criminal proceedings are initiated by the Corporate Debtor against the Applicant. Further, the Corporate Debtor in its reply to the present application and during the arguments had submitted that, “the Petitioner had taken more from SPIN than what was admitted/acknowledged under the Employment Agreement.”
32. Be that as it may, this does not detract from the fact that the criminal complaints, EoW Complaints and the alleged sett-off/ counter claims by the Corporate Debtor against the Applicant’s claim are only raised after the issue of the Statutory Demand Notice dated 20.06.2018. Accordingly, we are not inclined to agree that a valid dispute has been pointed out by the Corporate Debtor prior to receipt of statutory demand notice with regard to the quality of services provided by the Applicant and which, would constitute a pre-existing dispute before the issuance of the Demand Notice. In sum, no real pre-existing dispute is discernible and the email relied upon by the Corporate Debtor is just a bald statement of 'summary' 'disagreement' to the points raised by the Applicant in his letter of resignation. This feeble statement cannot be taken as a dispute as it is not supported by any credible evidence whatsoever. Pertinently, Hon'ble Supreme Court in *Mobilox supra* , para 51, laid down that an assertion of fact unsupported by evidence is not a dispute. **Hence, in the instant**



**case, the third condition regarding Pre-Existence of Dispute before the issue of the Statutory Demand Notice is answered in negative.**

33. Thus, having regard to the conspectus of facts of the present case and the judgements cited (supra), this Adjudicating Authority is of the considered view that the corporate debtor is in default of payment of the outstanding operational debt above the pecuniary threshold owed to the applicant and the mandatory requirements as prescribed under Section 9(5)(i) of the Code, 2016 are satisfied. Therefore, the present company application **(C.P. No. (IB)- 1007/(ND)/2018) stands admitted and the CIRP is hereby initiated against M/s. Schneider Prototyping India Private Limited.**
34. The applicant in Part -III of the application has proposed the name of Mr. G. Jaishankar, having IBBI Reg no. IBBI/IPA-001/IP-P00953/2017-2018/11573 as the IRP. This Adjudicating Authority, on perusal of the IBBI Database, find that the proposed IRP namely Mr. G. Jaishankar, having IBBI Reg no. IBBI/IPA-001/IP-P00953/2017-2018/11573 is not holding a valid Authorisation for Assignment ('AFA'). Accordingly, this bench appoints Mr. Praveen Kumar Jain having registration number IBBI/IPA-001/IP-P-02022/2020-2021/13110 and email id – Praveen\_2817@yahoo.co.in as the Interim Resolution Professional of the corporate debtor from the Panel of Insolvency Professionals for the period July 1 – December 31, 2023 as forwarded by IBBI vide letter no. IP-12011/1/2020-IBBI dated 04.07.2023. The appointed IRP is directed to submit his consent in Form-2, valid AFA and disclosure about non-initiation of any disciplinary proceedings against him, within three (3) days of pronouncement of this order.



35. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Praveen Kumar Jain to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.
36. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

*“(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 IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*



37. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.
38. The Interim Resolution Professional shall perform all his functions as contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and carry out the proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.
39. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.



40. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.
41. Accordingly, the instant application filed under Section 9 of the Code, 2016 bearing C.P.(IB)/1007/2018 stands **admitted**.

**Sd/-**

**(DR.BINOD KUMAR SINHA)  
MEMBER (T)**

**Sd/-**

**(MANNI SANKARIAH SHANMUGA SUNDARAM)  
MEMBER (J)**