IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

T.C.P. 387/I&BP/2017

Under Section 9 of I&BC, 2016

In the matter of:

Nabh Interior .... Petitioner

vs.

MMS Infrastructure Ltd.
...Respondent

Order delivered on: 04.12.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: **Ms. Neha Mehta, Advocate**

For the Respondents: **Mr. B.S. Mahajani, Advocate**

Per B.S.V. Prakash Kumar, Member (Judicial)

ORDER

Oral order dictated in the open court on 21.11.2017

1. It is a winding-up Petition initially filed u/s 433, 434 &439 of Companies Act, 1956 filed before Hon'ble High Court of Bombay against the Corporate Debtor for the Corporate Debtor defaulted in making payment of ₹31,62,671towards the services rendered by the Petitioner herein, hence this Winding-up petition against this Company. While it was pending before Honorable High Court, Bombay since the jurisdiction to hear those matters being covered under Insolvency & Bankruptcy Code, 2016 come into force on 1-12-2016 conferring subject matter jurisdiction to NCLT; this matter was transferred from Honorable High Court of Bombay to this NCLT, Mumbai. In pursuance thereof, the Petitioner herein having filed Form – 5 within the stipulated time, this Company Petition is hereby heard treating it as Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016.

2. The case of the Petitioner herein is, the Corporate Debtor issued Purchase/work Order on 17.1.2013 to the petitioner for doing Interior decoration as part of the regular assignment for a total amount of ₹31,62,671, against which, two invoices raised on 8.8.2013 and 13.7.2014 for the amount as mentioned above. To further support the claim of the Petitioner herein, it has filed the Creditor/petitioner Ledger Account maintained by the Corporate Debtor confirming ₹31,62,671.79 as debt outstanding payable to the petitioner, which is tallying with the invoices amount. In addition to the proof mentioned above, the Petitioner has also filed a copy of the cheque issued by the Corporate Debtor to the Petitioner for an amount of ₹21,00,000 on 23.9.2015.

3. Looking at the Company Petition filed by the operational creditor/Petitioner, the Corporate Debtor filed reply disputing the claim the Petitioner made against this Corporate Debtor. The Purchase Orders and invoices claimed to have been created Contract of the parties have not been filed along with the Petition, therefore, this Bench will not get jurisdiction to decide this case solely basing on the Ledger Account annexed to this Company Petition which is disputed by the Corporate Debtor herein. On perusal of the Company petition and the averments placed by the Corporate Debtor, the point for determination is of whether the Petitioner has proved its case as mentioned u/s 9 of I&B Code?

4. Since it is a case filed under Sec.433, 434 and 439 of Companies Act, 1956, at that time, there was a choice for filing reply and rejoinder to these proceedings and also to file documents looking at the denial made against each other. By looking at the denial come from the Corporate Debtor, the Petitioner filed the Purchase Orders issued by the Corporate Debtor on the Petitioner for providing services and also the invoices raised against the Corporate Debtor for the services rendered by the Petitioner to the Corporate Debtor. Today, this Corporate Debtor, as against those purchase orders and invoices in tallying with the ledger confirmation sent by the debtor to the petitioner for the year for the year 2014-2015, could not say that

no Purchase Orders issued by the debtor and invoices raised by this operational creditor against this debtor basing on the purchase orders issued by the debtor.

5. Moreover, the Corporate Debtor himself made a statement in its reply that excess payment of ₹2,18,034.50 as on 31.3.2015 and ₹25,010.50 as on 21.3.2016 was made to the Petitioner, by this averment, it is evident to say that running account has been maintained in between them, because on running account only there could be a possibility of making excess payment. Whereas on scrutiny of documents, the defense above set up is not in conformity with the annexure filed with the reply, because all those purchase orders and invoices raised against those purchase orders are in between the petitioner and Corporate Debtor's parent company, namely Maestros Mediline Systems Limited, if at all any excess payment it must be in relation to its parent company, it can't be held as excess paid by the debtor. On examination of the reply as well as documents filed by the debtor, it appears that the defense setup by the debtor is not consistent with annexure filed by it. Only one slip in this case is, the Petitioner filed the Purchase Orders and invoices subsequent to filing Form-5 filed by the Petitioner. There is an error in the petition that the purchase orders and invoices raised against the parent company of the debtor were filed along with the winding up petition, coincidentally this fact has been further confirmed in the annexure filed by the debtor showing Maestro giving purchase orders to the petitioner. Having seen the same documents filed by the debtor and by seeing the petitioner subsequently filing purchase orders and invoices for the amount shown in the petition, we believe the petitioner filing purchase orders given by the Maestro has inadvertently happened.

6. Since the Purchase Orders and Invoices are matching with the Ledger Account of the Petitioner herein maintained by the Corporate Debtor, we are of the view that the Petitioner herein accomplished in establishing its case by filing Purchase Orders disclosing the contract between the Petitioner and the Corporate Debtor, thereafter invoices

making demand for payment of the claim amount for the services rendered. For the figures showing in the Ledger Account i.e. page 26 of the Company Petition being in conformity with the Purchase Orders and the Invoices raised by the petitioner, it is hereby held that the Petitioner has placed proof of existence of debt and occurrence of default by the corporate debtor.

7. The Corporate Debtor says that a reply was sent to the winding-up notice u/s.434 of the Companies Act, 1956, whereas the Petitioner Counsel says she has never received any such reply as claimed by the Corporate Debtor Counsel and no acknowledgement receipt or tracking report has been filed to prove that reply has been received by the petitioner. As to proof, it appears that when the debtor counsel made an attempt to get proof, the Postal Authority has categorically mentioned that since it is a time barred complaint; the information sought by the debtor is not available. Even assuming reply was given by the Corporate Debtor, if we look at the averments of the copy of reply notice, there is no material establishing existence of dispute except bare denial notice, therefore such denial cannot become basis for believing dispute is in existence before filing this case.

8. The Corporate Debtor Counsel raised an argument citing two decisions in between ***Sudhir Papers v/s. Kivisansho Packaging Pvt. Ltd. 2016 (198) Company Cases (Karn) and Surat Goods Transport Service v/s. Golkonda Engg. Enterprises Ltd. 2012, 169 Company Cases 24 (AP) to say*** that winding-up Petition cannot be used as device for recovery of money, nor it be allowed to be misused as a pressure tactic against the company. In these it has been further held that confirmation of the outstanding balance of amount in accordance with the books of account of the debtor company, did not per se amount to any admission of further amount to pay despite notice, because no material had been placed on record indicating that net worth of the company was negative in value or otherwise substratum of the company was lost and the company had become dysfunctional, therefore, it is not a fit case for Winding-up.

9. On reading these two citations, it is clear that these two Petitions are decided u/s. 433(e) of Companies Act, 1956. Now this Petition has been dealt with under Insolvency & Bankruptcy Code. Under I&B Code, it need not be seen whether the company is unable to make payment or that the relief sought has bonafides or not. The only criterion to be looked into is as to whether debt and default are in existence as on the date of filing case. Under Section 9 of the Code, if corporate debtor brings it to the notice of operational creditor that debt is in dispute, then such claim cannot lie under section 9 of the Code. To see how this clause "existence of dispute" plays out, we have to read the judgment of Honorable Supreme Court delivered in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited (September 21st 2017),*** as to this, the para relevant is as below:

> ***"54. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."***

10. In this case, it is not a dispute about quality of service, not about breach of warranty. As to existence of debt, it is not the case service has not been provided; it is not the case money has been paid against the services provided and it is also not the case part payment has already been made. It is only a lame assertion that the petitioner was paid in excess to the payment to be made, but the documents upon which the debtor relied upon are not relevant to this case, it is a transaction between the parent company of the corporate debtor and the petitioner, therefore such weird defense cannot become a ground under existence of debt, therefore considering it as spurious defense, this Bench hereby rejected the ground defense raised by the debtor.

11. Under Companies Act, 1956, duty is cast upon the Petitioner to prove inability of the Company in making payment to petitioner. Here no such duty is cast upon the petitioner to prove inability of the company in repaying its debt. In this case, since the Petitioner has filed Purchase Orders, Invoices and Ledger Account maintained by the Corporate Debtor establishing debt and default, therefore we are of the opinion that debt and default are in existence against this debtor.

12. The Corporate Debtor has relied upon Section 34 of the Indian Evidence Act to say that entries in the books of account reflecting confirmation of debt alone shall not be sufficient enough to fasten this liability upon the debtor, unless and until supported by other evidence. The case of the debtor counsel is since purchase orders and invoices not being filed along with Ledger Account reflecting confirmation of claim amount, ledger account shall alone become sufficient evidence to decide this case in favor of the petitioner. To believe that debt and default in existence, the petitioner having furnished not only confirmation from the debtor but also the purchase orders establishing contract between them and the invoices disclosing debt and demand in existence, for it is not the case of the debtor, payment has been made, we believe the petitioner proved its case to the hilt. Since the debtor counsel himself said that admission

in the ledger account confirmation will not alone sufficient evidence under Indian Evidence Act, if such admission is taken as an act during the ordinary course of business, that fact is certainly relevant to believe that the debtor acknowledged and confirmed this debt by sending it to the petitioner, such confirmation normally happens when yearly audit happens. Because these entries come into existence during the course of business therefore they are relevant to prove evidence against the person who has been maintaining such books of account. Here, since the Corporate Debtor counsel has raised this point, now it has become duty of this Bench to clarify as to what evidentiary value would be accrued to the creditor ledger account maintained by the Corporate Debtor side comes before this Bench. If at all such document comes before this Bench from the party denying transaction, it will not only be relevant but also will tantamount to admission from the side of such party, here it is the Corporate Debtor who issued ledger account and it is the same person fighting against the claim made by the petitioner, therefore, this Bench, considering that this Ledger Account of the Petitioner maintained by the Corporate Debtor as additional proof to the invoices and Purchase Orders placed by the Petitioner negating the defense setup by the Corporate Debtor, admits this petition.

13. The Corporate Debtor counsel has raised an objection saying that he has not received Form-5 copy and the statutory demand notice as well. When the Corporate Debtor himself says that he sent reply notice to the notice sent by the Petitioner, how come this Counsel could set up this defense that section 434 notice under Companies Act 1956 has not been received by it? It cannot be so. As to service of Form – 5 upon the debtor is concerned, when the Corporate Debtor himself presents before this Bench with reply along with voluminous documents to defend the case, how could this debtor counsel say that Form has not been received by the debtor, henceforth petition to be dismissed? Once the debtor counsel presented and argued on every point, even if assumed Form-5 not served upon the debtor, it makes no difference, what all opportunity

to argue the case on informed basis has already been availed by the debtor, hence this argument pales into insignificance.

14. A new proposition that has come up for argument is since rejoinder affidavit has been filed by the petitioner, the debtor should also be given time to file sur-rejoinder, otherwise the debtor would be put to sufferance. This Bench has not given any such directions to complete pleadings like in the cases other than cases falling under Insolvency & Bankruptcy Code, because there is no procedure under this Code to file pleadings, except to give the particulars against each of the columns given in the Forms under this Code. The reason behind it is, to do away addition or subtraction to the hard facts reflecting from the documents and also to cut short the delay in disposing cases, otherwise, as in the past, it would be repetition of companies remaining unviable and creditors remain stuck in the litigation for years for their money, by the time money comes to them, time value of their money will be almost nil. This case has been filed long before, many hearing dates come in between; therefore, there is no point to wait for sur-rejoinder to come from the debtor.

15. In view of the reasons mentioned above, we hereby admit this case by declaring moratorium u/s 14 of the Code with the following directions:

(a) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property

by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(b) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(d) That the order of moratorium shall have effect from 04.12.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

16. Accordingly, this Petition is admitted.

17. This Bench makes a reference to the Insolvency and Bankruptcy Board of India (IBBI) for the recommendation of Insolvency Professional for appointment as Interim Resolution Professional.

18. The Registry is directed to forward a copy of this order to IBBI and post this matter after receipt of reply from IBBI for the appointment of IRP.

19. The Registry is hereby directed to communicate this order to both the parties.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)