

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
“CHANDIGARH BENCH, CHANDIGARH”  
(Exercising powers of Adjudicating Authority  
under the Insolvency and Bankruptcy Code, 2016)**

**CP (IB) No.7/Chd/Hry/2018**

**Under Section 9 of the  
Insolvency and Bankruptcy  
Code 2016.**

**In the matter of:**

**Shivashakti Elmech Private Limited**, Plot No-3, Aurobinda Villa, Pokhariput,  
Bhubaneswar, Orrisa-751063, India.

...Applicant

Versus

**Drake and Scull Water & Energy India Private Limited**, Unit No.632, 633 &  
634, 6<sup>th</sup> Floor, BPTP Park Centra-Tower-B Building, Sector 30, Gurgaon,  
Haryana, 122001 India.

...Respondent

**Judgment delivered on 30.10.2018**

**Coram: Hon’ble Mr.Justice R.P.Nagrath, Member (Judicial)  
Hon’ble Mr.Pradeep R.Sethi, Member (Technical)**

For the Applicant : Mr. Ashok Kriplani, Advocate

For the Respondent : Mr. Manoj Kumar Garg with Mr. Afzal Suri,  
Advocates for the respondent.

**Per: Justice R.P.Nagrath, Member (Judicial)**

**Judgment**

The petitioner-operational creditor M/s Shivashakti Elmech Private  
Limited has filed this petition under Section 9 of the Insolvency and Bankruptcy

Code, 2016 (for short to be referred hereinafter as the 'Code') to initiate the Insolvency Resolution Process against the respondent-corporate debtor. The application has been filed in Form 5 as prescribed under Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016 (for brevity the 'Rules').

2. The facts of the case are being described from the Annexures mentioned against the columns of the application Form, the documents relied upon by both the parties and the admitted facts by the respondent.

3. The operational creditor is a company incorporated on 19.03.2010 and the application has been filed through Mr. Prasanta Kumar Pattnaik, Director of the operational creditor, to initiate the proceedings under the Code to sign and verify the pleadings and to do all the necessary act in the progress of the case. He has also been authorized to engage the counsel and to represent the operational creditor. Copy of the Resolution is Annexure VII (Page 232). The contents of the application are supported by the affidavit of Mr. Prasanta Kumar Pattanaik aforesaid which is at Annexure IV at page 221 of the paper book. The respondent was incorporated as a company under the Companies Act, 1956 on 16.12.2011 with authorized share capital of ₹70,00,00,000/- (Rupees Seventy Crores Only) and paid up share capital of ₹66,30,61,410/- having its registered office at Gurugram in the State of Haryana and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

4. It is admitted by the parties that they entered into a service agreement dated 15.05.2012 Annexure II/B for laying of the pipeline and all

related civil and earth work activities. For that two work orders were issued. There was a performance guarantee @20% of the Bill against work order No.168 and @10% of the Bill amount against work order No. 166 for one year against the performance of work done by the operational creditor. Pursuant to the above service agreement, the corporate debtor issued work orders dated 11.12.2013 and 16.12.2013 to the operational creditor who is a sub-contractor of the respondent. Copies of the work orders are at Annexure II/C. It is stated that the project was allotted to the respondent-corporate debtor as a contractor by M/s Monnet Ispat Ltd. (page D).

5. The operational creditor completed the works on time to the satisfaction of the corporate debtor and he raised the running bills from 17.07.2012 to 29.09.2014, copies of which are at Annexure II/D from pages 44 to 137 of the paper book. The last bill of the operational creditor was pertaining to the work completed on 16.10.2014 and thus, performance guarantee remained operative till 15.10.2015. It is an admitted fact that the corporate debtor used to deduct 10% and 20% of the running bills amount respectively as the performance guarantee. The respondent-corporate debtor acknowledged the debt and the retention money vide e-mail dated 11.12.2014. The amount due to the petitioner is about ₹46 lacs towards the bills and about ₹96 lacs for the retention money. The petitioner has also placed on record its ledger account of the respondent being maintained by it which is at Annexure II/E.

6. The computation of calculation is attached at Annexure II/G and this calculation shows the outstanding balance payment of the bills to the tune of ₹46,56,996.81 (Page 5) and an amount of ₹96,01,315/- (page 162) of the

retention money total amounting to ₹1,42,58,311.8 and the amount of ₹87,12,700.65 lacs, total ₹2,29,71,012/- towards the interest by adding interest @18% per annum. The date of default is stated to be 16.10.2014 as per the last running bill whereas the date of default as per the corporate debtor's record is 11.12.2014. The bill details, amount and dates of default in tabular form are at Annexure II/E (Page 138 of the paper book).

7. According to the operational creditor, the corporate debtor has also sent e-mail dated 11.12.2014 Annexure II/F by attaching copy of its ledger in respect of the petitioner M/s Shivashakti Elmech Pvt. Ltd. to rely upon the same as an acknowledgment of debt by the respondent-corporate debtor.

8. The petitioner then sent demand notice dated 14.11.2017 Annexure I under Section 8 of the Code in Form No. 3 as prescribed in Rule 5(1)(a) of the Rules. Alongwith the demand notice the invoices and the ledger account statement, e-mail dated 11.12.2014 of respondent-corporate debtor relating to the running bills and the retention money account of the performance guarantee were also sent. The notice was sent to the corporate debtor by registered post on 16.11.2017 and as per the tracking report (page 12) of the paper book, the same was delivered to the corporate debtor on 20.11.2017 with another copy sent at the other address and also as per the postal receipt and tracking report at page 13 showing the date of delivery as 24.11.2017. The Authorized Representative of the petitioner-operational creditor has also filed the affidavit dated 02.12.2017 (Annexure II/A) stating therein that there is no dispute relating to the unpaid operational debt raised by the petitioner-operational creditor.

9. On filing of this petition, copy of the application alongwith the entire paper book was dispatched to the respondent-corporate debtor on 21.12.2017. The postal receipt is at page 235 of the paper book in order to comply with the requirement of Rule 6(2) of the Rules.

10. Notice of this petition was issued to the respondent-corporate debtor to show cause as to why this petition be not admitted.

11. After a couple of adjournments, the respondent filed reply to the application. It is stated that the petitioner-corporate debtor entered into service agreement dated 15.05.2012 for pipe laying and all related civil and earth work activities on the contract reference REF:DSWE/WPIN02/SERVICE/001 and apart from that service agreement, a new PO Ref. SC0166 dated 11.12.2013 for 5000 RMT and its amendment was issued to the petitioner. It is further stated that the petitioner was under an obligation to complete the work of pipe laying in the work project "Intake Water System package 2 x 525 MW Thermal Power at Malibrahmani, Angul, Odisha". During course of execution of the contract work, the applicant was issued 6242.875 meters of pipe whereas the operational creditor laid the pipe to the extent of 4264.268 meters (3068.85 + 1193.418) meters of pipe only. The applicant is stated to be in possession of 1980.607 meters of pipe of the value of ₹21,065/- per meter and so the pipes worth ₹4.17 crores are laying with the petitioner which have not been returned by the applicant till date. The application has been filed to pre-empt the action by the respondent against the petitioner-operational creditor. The details of the pipe issued and utilized as well as details of the pipes in possession of the applicant are given in the document (Annexure R-1) from pages 17 to 134 of the reply. This work was

duly certified by the respondent when the applicant raised RA Bills which also reflected that out of the total 6242.875 meter pipes were issued to the applicant, only 4262.268 meter pipes were used by the applicant and remaining unutilized pipes are lying unused with the petitioner of the aforesaid value. Copies of the bills showing details of the pipes utilized are Annexure R-2 (pages 135 to 161).

12. It is denied that the applicant completed the work rather it misappropriated the pipes issued to it for completion of the project and has also not taken proper care in completing the work and violated provisions of the service agreement (Annexure II/B) dated 15.05.2012 under which Work Order No.1 and Work Order No. 2 were issued.

13. Despite these shortcomings, the respondent-corporate debtor tried to settle the issue and get back the pipes to which the petitioner did not respond despite the verbal assurances.

14. It is further stated that the respondent company has employed hundreds of professionals and is 100% subsidiary of a company of international repute having its corporate office at Dubai. It has multi-country operation with adequate fixed assets and financial capacity to pay its creditors. The press release from official website of the parent company reflecting its unaudited financial results with net profit in Quarter 4 are demonstrating its ability in this regard. The copy of the press release is Annexure R-3.

15. It is also averred that the present dispute involves complicated questions of fact which can be determined only by full trial and it is not a case of crystalized debt.

16. Another point raised is that the petition has been filed beyond limitation. According to the petitioner-operational creditor the cause of action for the default of debt arose on 16.10.2014, whereas the instant petition was filed in this Tribunal in December, 2017 which is beyond the period of three years from the date of accrual of cause of action. It is further stated that as per Article 12 of the Service Agreement dated 15.05.2012 (Annexure II/B), the Courts at New Delhi have the sole jurisdiction to hear and determine all actions and proceedings in connection with and arising out of the contract and sub-contract.

17. Reference has also been made to e-mail at page 14 and 151-152 of the petition that Vinod Chaurasia, Chartered Account of the petitioner-corporate debtor himself has been proposed as Interim Resolution Professional and therefore, he was already involved in advising and conceiving the matter against the respondent-corporate debtor. He is an interested professional having conflict of interest with that of the respondent. Reference is made to the provisions of the Code which require the Resolution Professional to act as an independent person and thus, Mr. Chaurasia should not be involved in the matters in which he was already providing consultations prior to the filing of the application.

18. There is also an arbitration clause in Article 15 of the agreement for the parties to settle the disputes and differences for which remedy has not been exhausted. The correctness of the e-mails Annexure II/F is also disputed. It is denied that the respondent-corporate debtor confirmed the outstanding amount. It is stated that e-mail at Annexure II/F at page 149 of the paper book, is between Mr. Satyapriya Rout, the Accountant of the respondent and Mr. Gautam D Mishra, the Project Manager of the respondent which is a confidential communication

between the two officials of the respondent which have been misused by the applicant. In this way, the petitioner has indulged in criminal act for which the respondent has reserved the right to initiate the criminal proceedings against the petitioner's Directors and the officials responsible. It is also denied that the petitioner is entitled to any retention amount. The petition was therefore, prayed to be dismissed.

19. When the matter was listed on 23.04.2018, the respondent's counsel submitted that certain objections have been raised by the petitioner's counsel with regard to the non-filing of the legible copies of the bill and vouchers and another set thereof were supplied to the learned counsel to the petitioner. It was also directed that the respondent shall file copies of the same alongwith the supporting affidavit by the next date. By diary No.1396 dated 03.05.2018, the respondent filed the fair and legible copies of the stores issued vouchers in respect of the pipes issued to the respondent w.e.f. 08.06.2012 to 27.07.2014 describing the details of the pipe, its quality, unit price per meter and the amount running into 105 pages i.e. 1 to 105 of this affidavit. Alongwith this, the list of the SIV of the materials supplied to the petitioner for WPIN-02 MPCL and pipeline project from pages 106 to 108 of this affidavit is also attached.

20. In the rejoinder, it is stated that the record of ERW pipes issued to the petitioner filed now with diary No.1396 dated 03.05.2018 did not tally with the record earlier filed with the file and the stores issued vouchers are missing against the dates of issue of ERW pipes from 19.08.2014 to 30.09.2014 filed with the reply to the petition without furnishing any explanation. It is again admitted that the first contract was for 5000 RMT of pipe laying and in second contract the



applicant laid pipe measuring 1193.418 RMT. It is denied that the petitioner laid only 4262.268 RMT of pipe or the pipes worth ₹4.17 crores are lying with the petitioner. It is stated that the respondent has mainly referred to RA Bill No. 19th of the petitioner at page No. 138 of the paper book which is attached as Annexure RA/1 which is nothing but a release of hold amount in RA Bill No. 7th of the petitioner. The petitioner has used 5000 RMT of the pipe in the Work Order No.1 and also used pipe measuring 1193.418 RMT for Work Order No.2 so in total the petitioner used 6242.875 RMT and the remaining pipe to the extent of 49.457 RMT is still lying at the work site of the client.

21. We have heard learned counsel for the parties and perused the record quite carefully.

**Whether there was pre-existing dispute?**

22. A petition filed by the operational creditor is to be admitted if no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility as provided in Clause (d) of Section 9(5)(i). As per sub-clause (ii)(d) of Section 9(5), if the notice of dispute has been received by the operational creditor or there is a record of dispute in information utility the petition is to be rejected.

23. In the instant case, admittedly from the end of the year 2014 till the filing of this petition, the respondent has not raised any issue with regard to non-completion and non-utilization of the whole of the length of pipe which was issued to the petitioner for performance of the work. The dispute now sought to be raised is an attempt to make it a complicated issue of fact required to be determined in a full trial would be going against the settled principles on the issue as laid-down by

the Hon'ble Supreme Court. Hon'ble Supreme Court in **Mobilox Innovations Private Limited Versus Kirusa Software Private Limited (2018), 1 SCC 353**

held as under:-

*“51. 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 defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence 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.”*

24. Therefore, what is important is that the existence of the dispute and/or the suit or arbitration proceedings must be pre-existing i.e. it existed before the receipt of the demand notice or invoice as the case may be. There is not an iota of document to show that before filing of the reply in the instant petition, the respondent ever sent any e-mail or notice to the petitioner alleging misappropriation of the pipe issued to the petitioner or non-completion of the work as per agreement or even lodging an FIR despite the fact that the alleged misappropriation is stated to be of huge value of more than ₹4 crores. There was no response forthcoming from the respondent as to why such a dispute was not

raised earlier despite the expiry of more than about three years before this petition was filed.

25. The matter, therefore, is to be examined in the light of the aforesaid settled principle of law. As per the bills raised by the petitioner from time to time from RA-1 to RA-19, it is quite apparent that the project work involved/related to various items which included earth work, pipe fabrication and erection and optional concrete work. No dispute has been raised by the respondent in the instant case with regard to the execution of rest of the work. Only dispute raised during the course of arguments is relating to non-utilization of the costly item of pipe issued to the petitioner by the respondent. The document Annexure R-1 contains the details of the pipes issued to the petitioner for utilization and the details of the unutilized pipes from Pages 17 to 134. So far as the quantity of the pipes supplied to the petitioner, there is no dispute from the petitioner.

26. It is admitted by learned counsel for the parties that both the Work Orders pertain to the same project. The learned counsel for the respondent during arguments submitted that so far as quantity of the pipes utilized under Work Order No. 2, there is no dispute of its proper utilization but so far as the other Work Order is concerned, there is non-utilization of the pipe supplied to the extent of 5000 meters which has not been accounted for. For establishing non-utilization to the extent of 1980.607 meters, the respondent has mainly relied upon last RA Bill 19 dated 28.08.2014 at Page No. 135 of the reply which is showing utilization of 3068.184 meters of the pipe only as verified by the respondent. We are unable to agree with the above contention of the respondent as the respondent has failed to place on record copies of the bills from RA 1 to RA 19 in

order to support the above contention. The petitioner on the other hand has filed on record various RA Bills and it would be important to refer to some of those bills. The RA Bill No. 7<sup>th</sup> dated 21.01.2013, the pipe has been utilized for fabrication to the tune of 3068.85 meters and this RA bill is duly verified by the respondent. This document is from Pages 72 to 74 of the petition.

27. RA Bill No. 8<sup>th</sup> dated 13.02.2013 is at Page 75 of the paper book and at page 76 is the bill containing all the details and upto this date 3676.4808 meters of the pipe having been utilized has been verified. Thereafter, the subsequent bills have also been annexed. We would straightway refer to RA Bill No.14 dated 19.06.2013 at Page 99 of the paper book and the work done by the petitioner after the issuance of RA 13th Bill is at Page 100. It shows the previous quantity of pipe used to the tune of 4203.023 meters and by adding the quantity utilized in this Bill, the total quantity for utilized was 4687.273 meters as at Page 100 which is verified by the respondent.

28. It was vehemently contended that there is no record of utilization of about 5000 meters of the pipe. To repel this contention, the petitioner has placed on record a certificate issued by the respondent which is also signed by the representative of the petitioner and this certificate clinches the matter about utilization of 5000 meters of pipe and the details of the rest of the work have been mentioned at the foot note of this bill. This certificate is attached with documents filed by diary no. 1002 dated 03.04.2008 to which no counter was filed.

29. The most important evidence however, is the ledger accounts of both the parties. The copy of the ledger account of the petitioner with regard to the transactions between the parties is Annexure II/E from Pages 138 to 141

showing outstanding amount towards the corporate debtor as ₹46,56,996/- and page 142 shows the outstanding amount, retention amount to the tune of ₹96,01,315/- total of which comes to ₹1,42,58,311.89.

30. The other important factor is the copy of e-mail sent by Mr. Gautam D Mishra to Mr. Satyapriya Rout, both the representatives of the respondent-corporate debtor at Page 149 Annexure II/F. It is admitted in the reply that Mr. Satyapriya Rout is the Accountant of the respondent and Gautam D. Mishra is its Project Manager. It is however, alleged that this was a confidential communication between the officers of the company and misusing the same by the petitioner company or its Chartered Accountant is a criminal act. With this e-mail the copy of the e-mail of the respondent-corporate debtor was also annexed. Copy of the ledger account of the respondent is at Pages 153 to 162 of the paper book. That is totally a different issue.

31. At page 150 of the paper book which is part of e-mails shows the ledger account of operational creditor being maintained by the corporate debtor. Page 156 of the paper book shows balance amount as exactly ₹46,56,401.31 as payable to the petitioner for the bills which are at Page 158 also admitting the retention amount to the tune of ₹96,01,315/- It may be stated that alongwith the demand notice, e-mail of the corporate debtor dated 11.12.2014 which was sent by Mr. Satyapriya Rout to Mr. Gautam D Mishra with the ledger account of the petitioner being maintained by the respondent was also sent. There is even no denial in the reply that this is not the copy of the ledger account of the respondent except the simple denial that the respondent has not confirmed the alleged outstanding amount. It is pertinent to note that the respondent has failed to file its

own ledger account of the petitioner being maintained by it with no plausible explanation. This by itself tantamounts to the admission of the case of the petitioner.

32. Keeping in view the settled principle of law on the subject as laid down by the Hon'ble Supreme Court, this is not a case for contending that there is existence of a dispute which would lead to the admission of the petition and this aspect is held in favour of the petitioner.

**Whether the petition is barred by limitation?**

33. Another question raised was that according to the petitioner, the cause of action finally arose on 16.10.2014 whereas this petition was filed on 05.12.2017 and therefore, the petition would be barred by limitation. In the recent judgment of the Hon'ble Supreme Court in **B.K. Educational Services Private Limited vs. Parag Gupta and Associates, Civil Appeal No. 23988 of 2017 decided on 11.10.2018**, it has been held that the Limitation Act is applicable to the applications filed under Sections 7 and 9 of the Code from the inception of the Code and Article 137 of the Limitation Act gets attracted "*The right to sue, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.*"

34. It would be pertinent to refer to copy of the ledger account being maintained by the respondent from Pages 153 to 158. At Page 156 where the balance outstanding amount is shown in the ledger account being maintained by

the respondent, the last entry is dated 09.12.2014 which is in the nature of acknowledgment on debt in writing by the respondent to start a fresh period of limitation. So far as the retention amount is concerned it is an amount lying with the respondent which was undisputedly @ 10% and @ 20% against bills respectively. At page 158 of the paper book the ledger book of the respondent shows the total of the amount to the tune of ₹96,01,315/- which has also been claimed to the above extent by the petitioner. The last date of performance guarantee under the agreement was to expire on 16.10.2015. So in any case, the present petition/application cannot be said to be barred by limitation.

**Whether the existence of the arbitration clause bars this petition?**

35. The non-invocation of the arbitration clause cannot be of any help to the respondent because of the overriding effect of the provisions of the Code as per Section 238 which reads as under:-

*“Provisions of this Code to override other laws.—The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

Therefore, this contention is also overruled.

36. The petitioner in the application has claimed the interest over the outstanding amount @ 18% per annum which comes to ₹87,12,700/-. Similar was the rate of interest claimed in the demand notice. The learned counsel for the petitioner has not referred to any clause in the service agreement whereby the defaulting party was required to pay interest @ 18% per annum or that they agreed to a particular rate of interest. Even in the RA Bills there is no rate of

interest for the delayed payment mentioned. The payment terms have been mentioned in the service agreement as under:-

- a) *80% shall be paid in 30 days from the date of certification of invoice as per monthly progress.*
- b) *5% shall be paid in 30 days from the date of completion of Pipe laying limited to scope of contract.*
- c) *5% shall be paid in 30 days from the date of successful start of commercial operation or 1 year of handing over of work to Employer whoever ends earlier.*
- d) *10% retention shall be released in 30 days from the date of completion of defect liability period, which may be replaced with equivalent bank guarantee valid up to defect liability period.*

So in these circumstances, the Tribunal would permit the interest @ 10% of the principal amount due over ₹46,56,401/- w.e.f. 01.01.2015 and at the same rate over the amount of ₹96,01,315/- w.e.f. 01.11.2015. If the petitioner is still aggrieved and seeks to claim the higher rate of interest he may have the remedy before the Civil Court.

37. With regard to the question of territorial jurisdiction which as per terms the agreement has been chosen as New Delhi, we are of the view that the provisions of the Code have an overriding effect and against the corporate debtor a petition under the Code can be filed only within the jurisdiction of the NCLT where the registered office of the corporate debtor is located.

38. Now, before parting with the judgment, it would also be necessary to deal with the objection raised by the respondent that the Resolution of the corporate debtor dated 16.10.2017, Annexure VII, authorizing Mr. Prasanta Kumar Pattnaik, Director of the company to file the petition before this Tribunal was attested by Mr. Pattnaik himself has been rectified by filing another copy of the same resolution which is attested by another Director, by Diary No. 1002



dated 03.04.2018 and the documents are supported by the affidavit dated 28.03.2018 of Mr. Pattnaik.

39. Now, coming to the question of the appointment of the interim Resolution Professional. The operational creditor is not obliged to propose the name of the Resolution Professional to be appointed as Interim Resolution Professional. This is evident from Section 9(4) of the Code which says that operational creditor **may** propose a Resolution Professional to act as an Interim Resolution Professional. In the instant case in Part III of application in Form 5, the operational creditor has proposed the name of CA, Mr. Vinod Kumar Chaurasia, a registered Resolution Professional to be appointed as the Interim Resolution Professional. The written communication has been filed in Form 2 as required by Rule 9(1) of the Rules. Under sub-section (3)(b) of Section 16 of the Code where the application for corporate insolvency process is made by an operational creditor and a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him. The learned counsel further submits that written consent in Form 2 is as per the required performa and few of the undertakings inter-alia are as under:

- (i) He shall maintain integrity by being honest, straightforward and forthright in all professional relationships,
- (ii) He shall act with objectivity in his professional dealings by ensuring that his decisions are made

without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not,

(iii) He shall maintain complete independency in his professional relationships and shall conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.

(iv) He shall ensure that confidentiality of the information regarding to insolvency resolution process, liquidation or bankruptcy process, as the case may be is maintained at all times.

40. The learned counsel for the respondent vehemently contended that Mr. Chaurasia whose name has been proposed has acted in this case in a manner that his credentials with regard to fairness of his functioning as Interim Resolution Process is not beyond suspicion. The petitioner has relied upon an e-mail from Chartered Accountant, Mr. Vinod Chaurasia aforesaid dated 14.11.2017, which he has admittedly addressed to Advocate Mr. Ashok Kriplani, who has been engaged as a counsel for the petitioner. With this e-mail, the correspondence between the officials of both the companies dated 05.11.2014 and 14.11.2017 have been forwarded. In the e-mail from Mr. Gautam D Mishra, Representative of the corporate-debtor sent to the operational creditor on 14.11.2017 at 6:28 PM, the correspondence between Mr. Gautam D Mishra and

the representative of the respondent-corporate debtor and the operational creditor dated **05.11.2014** was also forwarded.

41. It was subsequent to that the instant petition was filed by the operational creditor in the Registry on 05.12.2017. The written consent furnished by the Resolution Professional is dated 04.12.2017 though he was entering into the correspondence on behalf of the operational creditor to engage a counsel. We cannot expect impartiality or independence from such kind of person and therefore, the request to appoint him as Resolution Professional of Section 60(3) of the Code cannot be acceded to.

42. The learned counsel for the respondent also referred to certain interim orders passed during pendency of this case when Mr. Chaurasia aforesaid had been putting in his appearance on various dates. He was present on the very first date when the case has listed on 15.01.2018 and on 01.02.2018, 06.03.2018, 15.03.2018, 06.04.2018, 23.04.2018, 03.05.2018 and 25.05.2018 regularly. The cumulative effect of the aforesaid facts and circumstances is that Mr. Chaurasia the proposed Resolution Professional cannot be termed as an independent person and rather before the institution of this application, he had been communicating with the counsel for the petitioner. In view of the above, we are of the considered view that some other registered Resolution Professional should be appointed in this case.

43. It would also be appropriate to refer to the IBBI (Insolvency Professional), Regulations, 2016. The eligibility of Resolution Professionals has been given in Regulation 4 of these Regulations. The Explanation to this Regulation says that, for determining whether an individual is fit and proper under

these Regulations, the Board may take account of any consideration as it thinks fit, including but not limited for the following criteria:-

- (i) Integrity reputation and character,
- (ii) absence of convictions and restraint orders, and
- (iii) competence, including financial solvency and net worth.

44. So, we proceed to consider this case as if no Resolution Professional has been proposed and to appoint the Interim Resolution Professional in terms of Clause (a) of sub-section (3) of Section 16 of the Code. The demand notice Annexure I is dated 14.11.2017, and Mr. Chaurasia forwarded the e-mail correspondence between the parties to Mr. Kriplani Advocate on 14.11.2017 itself. Therefore, even waiting for 10 days period to expire as required in the demand notice that Mr. Vinod Chaurasia was actively involved in the process.

45. Section 16(3)(a) of Code as under:-

*a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;*

46. Sub-section (4) of Section 16 says that the Board shall, within 10 days of receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of Interim Resolution Professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

47. In this regard, the IBBI has already convened vide its letter file No. IBBI/IP/EMP/2018/01 dated 28<sup>th</sup> June, 2018 that instead of referring the matter to the IBBI for the purpose of appointment of Interim Resolution Professional/Liquidator the Board has invited expression of interest from qualified Insolvency Professionals who are registered with the Board as per the guidelines prepared by the Board which is valid from 01.07.2018 to 31.12.2018, has been enclosed with the said letter. So from the said list we appoint Ms. Nisha Malpani, Sr.No. 3, IBBI/IPA-001/IP-P00058/2017-18/10136, e-mail ID: [nisha.malpani@outlook.com](mailto:nisha.malpani@outlook.com), a registered Resolution Professional to be appointed as Interim Resolution Professional. Her credentials have been checked by the Law Researcher and there is no adverse comment against her on the website.

48. In view of the above the instant petition is admitted and we declare the Moratorium in terms of sub-section (1) of Section 14 of the code as under:-

- (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.

49. It is further directed that 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. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

50. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or pass an order for liquidation of corporate debtor under Section 33 as the case may be.

51. In view of the above, the following directions are issued in respect of the appointment of the Interim Resolution Professional:-

- i) Appoint Ms. Nisha Malpani, resident of D-190, Rosewood City, Rosewood Villa, Sector 50, Gurgaon, Haryana, 122 018, having Registration No. IBBI/IPA-001/IP-P000584/2017-2018/10136 and email address [nisha.malpani@outlook.com](mailto:nisha.malpani@outlook.com), as an Interim Resolution Profession;

- ii) The term of appointment of Ms. Nisha Malpani, shall be in accordance with the provisions of Section 16(5) of the Code;
- iii) In terms of Section 17 of 'the Code', from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the 'Corporate Debtor' shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the 'Code', including taking control and custody of the assets over which the 'Corporate Debtor' has ownership rights recorded in the balance sheet of the 'Corporate Debtor' etc. as provided in Section 18 (1) (f) of the 'Code'. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the 'Corporate Debtor';
- iv) The Interim Resolution Professional shall strictly act in accordance with the 'Code', all the rules framed

thereunder by the Board or the Central Government and in accordance with the 'Code of Conduct' governing his profession and as an Insolvency Professional with high standards of ethics and moral;

- v) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the 'Code' read with Section 15 calling for the submission of claims against 'Corporate Debtor';
- vi) It is hereby directed that the 'Corporate Debtor', its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the 'Corporate Debtor' as a going concern and extend all cooperation in accessing books and records as well as assets of the 'Corporate Debtor';
- vii) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the



financial position of the corporate debtor constitute a committee of creditors and shall file a report, certifying constitution of the committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the committee within seven days of filing the report of constitution of the committee; and

- viii) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

A copy of this judgment be supplied to both the parties and the Registry shall also send copy of this judgment to the Interim Resolution Professional at her e-mail address forthwith.

Pronounced in open court

Sd/-  
(Pradeep R.Sethi)  
Member (Technical)

Sd/-  
(Justice R.P.Nagrath)  
Member (Judicial)

October 30, 2018  
Yashpal