



IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.3886/MB/2019

[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:

KBC INFRASTRUCTURES PRIVATE LIMITED

[CIN: U45200AP2007PTC054886]

D.No.1-2-71/1, Venkatadri Towers

J.K.C. College Road

Guntur- 522006

Andhra Pradesh.

...Operational Creditor

VERSUS

SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED

[CIN: U45200MH1943PTC003812]

70 Nagindas Master Road

Fort, Mumbai-400023

Maharashtra.

...Corporate Debtor

Pronounced: 22.10.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Operational Creditor: CS MB Suneel

Corporate Debtor: Adv. Gaurang Mehta a/w Adv. Vidhi Dharja i/b
Dipal Mehta

**ORDER*****[PER: SANJIV DUTT, MEMBER (TECHNICAL)]*****1 BACKGROUND**

- 1.1 This Application bearing C.P.(IB) No.3886/MB/2019 was filed by KBC Infrastructures Private Limited, the Operational Creditor, on 04.10.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Shapoorji Pallonji and Company Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is engaged in the business of supply of various materials used in carrying out infrastructural activities. The Corporate Debtor is into the business of construction, housing and other infrastructure related activities.
- 1.3 The Corporate Debtor approached the Operational Creditor for supply of crusher aggregates and Ready-Mix Concrete and issued Purchase Orders for the same from time to time. Both parties had extensive dealings since FY 2016-17. The Operational Creditor supplied the specified materials detailed in the Purchase Orders and invoiced the Corporate Debtor. However, despite the supply of materials, the Corporate Debtor delayed and defaulted on payments owed to the Operational Creditor.
- 1.4 The Operational Creditor accordingly issued Demand Notice dated 06.09.2019 to the Corporate Debtor as required under Section 8 of the Code seeking payment of its outstanding dues. However, the Corporate Debtor



made only part payment and failed to clear the balance dues of the Operational Creditor.

- 1.5 Consequently, the Operational Creditor filed Application under Section 9 of the Code. As on 30.09.2019, the total outstanding debt owed by the Corporate Debtor to the Operational Creditor amounted to Rs.1,55,97,574/- (One Crore Fifty-Five Lakhs Ninety-Seven Thousand Five Hundred and Seventy-Four Rupees) including principal amount of Rs.1,10,87,225/- and interest of Rs.45,10,349/- at the rate of 18% per annum.

2. AVERMENTS OF OPERATIONAL CREDITOR

- 2.1 The Operational Creditor supplied total materials as detailed in the various Purchase Orders to the Corporate Debtor and had raised several invoices since 2016-17. As per the terms of Purchase Orders, the Corporate Debtor was obligated to settle the invoice amount within 30 days from the date of receipt of material at site i.e., date of receipt of the invoice. However, payments for certain invoices were received after the specified 30-day period, violating the Purchase Order terms. Further, several invoices remained unpaid. The default occurred upon the completion of 30 days of the receipt of the invoice by the Corporate Debtor.
- 2.2 Despite multiple reminders, the Corporate Debtor failed to settle the outstanding invoice payments. This led the Operational Creditor to issue the statutory Demand Notice to the Corporate Debtor on 06.09.2019 in Form-3, specifying the total debt due as on 31.08.2019. The Demand Notice was delivered to the Corporate Debtor on 07.09.2019. Following receipt of this notice, the Corporate Debtor remitted Rs.10,00,000/- on 01.10.2019.



However, no reply was furnished by the Corporate Debtor to the said Demand Notice.

- 2.3 Consequently, the total debt owed by the Corporate Debtor to the Operational Creditor as on the date of Application stands at Rs.1,55,97,574/- including interest of Rs.45,10,349/- @18% p.a. In view of persistent default in payment of its operational dues by the Corporate Debtor, the Operational Creditor has preferred this Application seeking initiation of CIRP in respect of the Corporate Debtor under Section 9 of the Code.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 The Corporate Debtor *vide* its Affidavit-in-reply filed on 20.02.2020 raised the following objections:-

- 3.2 The Corporate Debtor contests the correctness of the claim demanded by the Operational Creditor through the Demand Notice and asserts that substantial business transactions had occurred between both parties since financial year 2016-17. The Corporate Debtor had awarded 26 Purchase Orders to the Operational Creditor against which the Operational Creditor had made supplies under various Tax Invoices. Payments for Crusher Aggregates and Ready Mix Concrete (RMC) materials supplied by the Operational Creditor have been made periodically by the Corporate Debtor. The Corporate Debtor submits that it is entitled to credit for all payments made both before and after filing of the present Application along with other adjustments in the parties' accounts. Further, in view of large and voluminous dealings between the parties since 2016-17, reconciliation of



accounts is necessary to accurately ascertain the exact amount owed by the Corporate Debtor to the Operational Creditor.

- 3.3 The Corporate Debtor could not respond to the Demand Notice dated 06.09.2019 due to absence of specific project references therein. Only upon receiving a copy of the Application in October, 2019 did the Corporate Debtor realise that the claimed amounts pertained to various APTIDCO (Andhra Pradesh Township and Infrastructure Development Corporation) Projects undertaken by it in Andhra Pradesh.
- 3.4 Meanwhile, the Corporate Debtor's Water Department, based in Guntur, A.P., received a Legal Notice dated 09.09.2019 from the Operational Creditor's Advocate, demanding Rs.44,86,346/- for certain material supplies. This claim was settled by the Corporate Debtor's Water Department, prompting the Operational Creditor to issue a letter dated 29.09.2019 confirming no further claims against the Corporate Debtor. Consequently, the Corporate Debtor's Contract Department at its Head Office believed that all claims of Operational Creditor had been resolved.
- 3.5 The alleged claims by the Operational Creditor pertain to goods sold and delivered under various Tax Invoices issued by the Corporate Debtor pursuant to the sales contracts outlined in the Purchase Orders. The terms of Purchase Orders do not grant the Operational Creditor the right to claim interest for any payment delays on the Tax Invoices. Therefore, the claim for interest at 18% per annum lacks legal basis and is vigorously disputed by the Corporate Debtor. Further, the Operational Creditor is not only seeking interest on allegedly unpaid and outstanding invoices but also on invoices fully settled by the Corporate Debtor during the Financial year



2017-18, 2018-19 and 2019-20. In any event, the alleged claims for interest on the paid Invoices were never made earlier and the same cannot be construed to constitute a debt payable to the Corporate Debtor to the Operational Creditor.

- 3.6 The Operational Creditor through the Demand Notice, attached a statement purportedly calculating amounts due with interest for the financial years 2017-18, 2018-19 and 2019-20. Allegedly, the Operational Creditor claimed twelve pending Invoices for the financial year 2017-18 totaling Rs.5,16,131/- and for the financial year 2018-19 amounting to Rs.1,12,25,234/-. However, all the twelve Invoices for financial year 2017-18 were paid in August, 2018 itself as evident from perusal of Payment Advices furnished by the Corporate Debtor. Similarly, numerous Invoices for financial year 2018-19, claimed as outstanding by the Operational Creditor have also been paid.
- 3.7 Further, each Purchase Order stipulates that the Operational Creditor will first make payment of the GST component of the Tax Invoices raised on the Corporate Debtor for supplies before demanding reimbursement of the same from the Corporate Debtor by way of Tax Invoices so as to enable the Corporate Debtor to claim input tax credit or refunds. Upon review, the Corporate Debtor discovered that for some Tax Invoices, the Operational Creditor either failed to pay the required GST amount or paid a lesser amount than due, resulting in a shortfall of Rs.15,99,394/- still payable towards GST. However, this amount was already reimbursed by the Corporate Debtor to the Operational Creditor, despite the latter not remitting it to the GST Authorities. Consequently, this excess amount ought to be



refunded to the Corporate Debtor or adjusted against any potential payments owed to the Operational Creditor post reconciliation of accounts.

3.8 Furthermore, the Corporate Debtor had raised two Debit Notes on the Operational Creditor on 31.01.2019 and 06.02.2019 aggregating to Rs.15,26,866/- for which necessary credit had not been given by the latter. These Debit Notes must be adjusted against any amounts found due and payable to the Operational Creditor after the reconciliation of accounts is conducted.

3.9 The Operational Creditor has not given credit to the Corporate Debtor for all payments made till date. The Corporate Debtor had made substantial payments totaling Rs.39,44,443/- during September and October, 2019 remitted from its bank account maintained with the Standard Chartered Bank, Koramangla Branch, Bangalore via RTGS to the Operational Creditor's Andhra Bank account in Guntur Branch. However, the Operational Creditor has made mention of only a single payment of Rs.10,00,000/- made on 30.09.2019 and failed to account for the balance sum of Rs.29,44,443/- remitted to its Bank Account which will have to be considered at the time of reconciliation of accounts.

3.10 Following a change in government in the State of Andhra Pradesh, APTIDCO issued Stop Work Notices around June, 2019 suspending projects and payments to contractors, including the Corporate Debtor. This led to negative cash flows for the Corporate Debtor related to APTIDCO projects, affecting payments to vendors. Despite APTIDCO suspending payments, the Corporate Debtor managed to make payments to the Operational Creditor totaling Rs.39,44,443/- to date.



3.11 In respect of three specific invoices from the financial year 2018-19 claimed to be unpaid by the Operational Creditor, it is submitted that discrepancies exist. For example, Invoice No.CUS/663/02.07.2018 for Rs.43,982/- has not been accounted for by the Corporate Debtor because the Corporate Debtor does not have any record of this invoice. Another Invoice No.CUS/745/01.08.2018, though shown to be for Rs.44,122/- by the Operational Creditor, had a correct principal amount of Rs.35,547/-, which was fully paid by the Corporate Debtor. Finally, Invoice No.RMC/2069/10.01.2019 for Rs.9,36,000/- was fully settled by the Corporate Debtor *via* RTGS on 15.10.2019, as evident from the Standard Chartered Bank Account statement for October 2019. As regards the remaining Invoices of F.Y. 2018-19 claimed by the Operational Creditor to be unpaid and outstanding, it is submitted that the Corporate Debtor has also made payments aggregating Rs.30,08,443/- to the Operational Creditor during the months of September and October 2019 as is evidenced by way of the debits for these amounts appearing in the Corporate Debtor's statement of Bank Account with the Standard Chartered Bank, Koramangla Branch, Bangalore. In view of above, it is submitted that there is presently no ascertained amount due or payable by the Corporate Debtor to the Operational Creditor.

4. REJOINDER OF OPERATIONAL CREDITOR

4.1 In its Rejoinder dated 23.06.2021, the Operational Creditor has refuted the Corporate Debtor's claim that it was never approached by the Operational Creditor to settle the pending payments. Since May 2019, the Operational



Creditor had sent numerous emails requesting for release of pending payments due to the Operational Creditor. However, no response was received from the Corporate Debtor. In response to the Demand Notice dated 06.09.2019, the Corporate Debtor remitted an amount of Rs.10,00,000/- on 12.09.2019 and assured the Operational Creditor that the balance amount would be paid shortly. Upon repeated reminders, the Corporate Debtor transferred a further amount of Rs.29,44,442/- to the Operational Creditor, promising prompt payment of the outstanding balance. After adjustment, the Corporate Debtor owes Rs.1,26,53,130/- to the Operational Creditor, comprising Rs.81,42,781/- towards principal and Rs.45,10,349/- towards interest. The Corporate Debtor makes a false and misleading statement that the amounts due to be paid during the financial years 2017-18 and 2018-19 are already paid.

- 4.2 It is submitted that previously, certain transactions had taken place between the Operational Creditor and Shapoorji Pallonji and Co-KIPL Sewerage, a separate partnership firm. The matter was subsequently settled between the parties. The Corporate Debtor falsely alleges that the above settled matter pertains to the current outstanding amount due to be paid by the Corporate Debtor to the Operational Creditor, whereas the said settlement took place with Shapoorji Pallonji and Co-KIPL Sewerage which is an entity distinct from the Corporate Debtor. This misrepresentation is an attempt to mislead the Tribunal, reflecting the Corporate Debtor's *malafide* intention.
- 4.3 The Operational Creditor's claim for interest is in accordance with the terms and conditions agreed in the Purchase Order, wherein the Corporate Debtor agreed to clear 100% of the principal amount within 30 days of receipt of



material at the site. Any delay in invoice clearance constitutes default on the Corporate Debtor's part, enabling the Operational Creditor to charge interest. Moreover, as the Operational Creditor is registered as a small enterprise under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act"), the Corporate Debtor is liable to pay interest for delayed payment as per Section 16 of the Act. The claim of the Operational Creditor for a nominal interest of 18% is thus quite valid.

4.4 The Corporate Debtor's claim that payment of GST component by the Operational Creditor was a pre-requisite for settling pending invoices is legally untenable and contrary to business principles. It is submitted that the non-payment of GST does not absolve the Corporate Debtor of its obligation to pay the principal amount mentioned in the invoices. Further, the calculation sheet enclosed as Exhibit "3" is not legible. The Corporate Debtor's claim of the Operational Creditor collecting Rs.15,99,394/- from the Corporate Debtor in advance as GST reimbursement, without remitting it to the authorities, is false, as per the Operational Creditor's books of account which do not reflect any such advance collections. Further, if there is a requirement of reconciliation of the accounts in order to ascertain such excess collection of the GST amount by the Operational Creditor, the Operational Creditor is ready for the same.

4.5 During the course of rendering supplies to the Corporate Debtor at site, the Operational Creditor was required to use the raw materials of the Corporate Debtor for which the Corporate Debtor has raised two Debit Notes amounting to Rs.15,26,866/-. Despite the approval of Debit Notes by the



sales manager of the Operational Creditor, these may be considered null and void as they need to be in the form of invoices containing the GST numbers and other details to be treated as valid. The Corporate Debtor failed to notify the Operational Creditor of this matter, even amidst repeated reminders for pending payments.

- 4.6 Following the direction of this Tribunal on 08.11.2019, the Operational Creditor submitted a Memo with a copy of the Ledger A/c statement, confirming receipt of Rs.39,44,443/- and showing an outstanding debt of Rs.1,26,53,131/- (comprising Rs.81,42,782/- towards principal and Rs.45,10,349/- towards interest) owed by the Corporate Debtor.
- 4.7 The Corporate Debtor acknowledges experiencing negative cash flows due to payment suspension by APITDCO, leading to difficulty in payments to vendors, including the Operational Creditor. This implies that the Corporate Debtor is in a state of insolvency, warranting admission into CIRP.
- 4.8 The Operational Creditor confirms receiving Rs.52,57,989.20/- from the Corporate Debtor but has accounted for it on a FIFO basis against previous invoices due for payment. The Corporate Debtor's assertion that this amount corresponds to specific invoices is false. Regarding the Corporate Debtor's claim of not having record of Invoice No.CUS/663/02.07.2018 for Rs.43,982/-, the Operational Creditor provides evidence of receiving a partial payment of Rs.18,482.50/- for this invoice, which contradicts the Corporate Debtor's statement. Similarly, the Corporate Debtor's claim of the correct principal amount for Invoice No.CUS/745/01.08.2018 being Rs.35,547/- is false, as the enclosed invoice states the due amount as Rs.44,122.06/-. Regarding Invoice No.RMC/2069/10.01.2019 for Rs.9,36,000/-, the



Operational Creditor clarifies that the payment was made by the Corporate Debtor only after the issuance of the Demand Notice. However, the Operational Creditor acknowledges giving credit for Rs.9,36,000/- paid by the Corporate Debtor against the total amount due.

- 4.9 In its reply dated 30.03.2022 to the Additional Affidavits of the Corporate Debtor dated 20.01.2021 and 21.02.2022, the Operational Creditor submitted that pursuant to the exercise of reconciliation between the parties and with a view to substantiating its claim, the Operational Creditor had provided copies of the invoices which were misplaced in the database/records of the Corporate Debtor. However, the Corporate Debtor had denied the Operational Creditor's claim which indicates *mala-fide* intention of the Corporate Debtor. It is submitted that absence of purchase order number on the invoice does not invalidate the invoices as the same were raised against materials supplied by the Operational Creditor and were duly acknowledged by the Corporate Debtor. Reference is made to judgement of Hon'ble NCLAT in the matter of ***Risa International Ltd. vs. Tanya Enterprises Pvt. Ltd.*** [CA (AT) (Ins.) No.1017 of 2020] wherein at Para No.30, it was observed that if the invoices on record bear the stamp of the corporate debtor by way of acknowledgment, it is sufficient to admit the application. It is contended that without any proper reconciliation, the Corporate Debtor had remitted an amount of Rs.60,57,814/- on 11.02.2022 in accordance with its own hypothetical calculations. After considering the various remittances made by the Corporate Debtor, it is claimed that an amount of Rs.65,95,316/- still remained due to be paid by the Corporate Debtor.



4.10 In its further reply dated 17.09.2022 to the Additional Affidavit of the Corporate Debtor dated 13.06.2022, the Operational Creditor has placed on record copies of 19 invoices which were claimed to be not available in the database of the Corporate Debtor. It is submitted that the said invoices were duly acknowledged by the personnel of the Corporate Debtor which is conclusive proof of supply of materials. As regards the two Debit Notes, the Operational Creditor *vide* email dated 25.10.2021 has asked the Corporate Debtor to furnish copy of Original Invoices along with delivery challans of materials which the Corporate Debtor had never provided.

4.11 In its Written Submissions, the Operational Creditor submits that the Corporate Debtor had never raised any dispute about the invoices enclosed to the Demand Notice before the service of the said Demand Notice. Therefore, there is no pre-existing dispute about the amount due to be paid to the Operational Creditor. Upon service of the Demand Notice, the Corporate Debtor had acknowledged the amount due to be paid and had even made part payment. Thus, the Corporate Debtor's claim of pre-existing dispute is only a moonshine defence unsupported by tangible materials or evidence. Likewise, the Corporate Debtor's claim that it had paid the total amount due to the Operational Creditor as per its books of account is a false statement as an amount of Rs.65,95,316/- is still due to be paid by the Corporate Debtor to the Operational Creditor. It is also submitted that the Operational Creditor's claim of interest is in accordance with the terms of Purchase Orders read with Section 16 of the MSMED Act. Reliance is placed by the Operational Creditor in this regard on the order of co-ordinate



Bench at Mumbai in the matter of *Tanya Enterprises Pvt. Ltd. vs Risa International Ltd.* [CP (IB) No.4137/MB/2018].

5. **SURREJOINDER BY CORPORATE DEBTOR**

- 5.1 The Corporate Debtor in its Surrejoinder filed on 27.08.2021 refutes all claims made in the Rejoinder by the Operational Creditor and also deals with the new allegations made by the Operational Creditor in the Rejoinder. It is submitted that the Operational Creditor has for the first time disclosed certain "new (alleged) facts and documents" which were neither pleaded nor relied upon in the Application/Demand Notice addressed to the Operational Creditor under the Code. Hence, the same amounts to setting up a new case by the Rejoinder which is not permissible.
- 5.2 The Operational Creditor has admitted, *inter alia*, that it had not given credit to the Corporate Debtor for various payments made and other adjustments as highlighted in the Affidavit in Reply. Thus, the balance amount, if any, payable to the Operational Creditor cannot be determined without the reconciliation of accounts being undertaken by the parties.
- 5.3 The Corporate Debtor submits that email correspondence since March 2018, highlighted by the Operational Creditor, is irrelevant to the alleged outstanding invoices. It denies any assurance of payment, insisting that any such assurance would be contingent upon reconciliation of accounts so as to determine the actual liability.
- 5.4 According to the Corporate Debtor, no reconciliation of accounts has ever been undertaken between the parties and various payments and adjustments have not been credited to the Corporate Debtor as admitted by



the Operational Creditor. It is submitted that payment of Rs.10 lakhs was not made in response to the Demand Notice and subsequent payments were made in the regular course of business. The Corporate Debtor denies owing any specific amount towards principal or interest as alleged by the Operational Creditor. It is reiterated that the balance amount, if any, payable to Operational Creditor cannot be ascertained without undertaking the exercise of reconciliation of accounts.

- 5.5 The Corporate Debtor refutes the claim that it attempted to portray the settlement between the Operational Creditor and Shapoorji Pallonji and Co. - KIPL Sewerage as relating to the alleged claims made by the Operational Creditor and submits that such allegations are false.
- 5.6 The Corporate Debtor contends that it never agreed to pay interest for delayed payments, as neither the Demand Notice nor the Application made reference to the provisions of the MSMED Act to support the Operational Creditor's claim for interest. Moreover, the reference in Item 6 of Part V of the Application to the Interest Act, 1978 contradicts the claim for interest at 18% per annum, as Section 16 of the MSMED Act specifies interest at a lower rate.
- 5.7 As regards the two Debit Notes, the Corporate Debtor submits that the Operational Creditor had full knowledge of them and accepted them without condition, as evidenced by an email dated 26.02.2019. Therefore, it is too late for the Operational Creditor to claim that the Debit Notes are invalid due to not being in the form of an invoice, especially since all necessary details, including GST numbers were provided.



- 5.8 The Corporate Debtor argues that the 26 Purchase Orders were separate contracts relating to different projects and project sites over a period of time, constituting separate causes of action. Combining them into a single claim under the Demand Notice amounts to misjoinder of causes of action which is impermissible.
- 5.9 The Corporate Debtor clarifies that it did not admit to being in a state of insolvency. The negative cash flows were experienced by specific project sites due to the suspension of work and payments by APTIDCO and not by the Corporate Debtor as a whole. Despite this, the Corporate Debtor continued to make payments to the Operational Creditor. Therefore, the contention that the Corporate Debtor admitted to insolvency is incorrect.
- 5.10 The Corporate Debtor contends that the Demand Notice was premature since the balance amount owed to the Operational Creditor had not been finalised through reconciliation of accounts. The Operational Creditor's admission of the need for reconciliation before determining the balance amount reinforces this argument.
- 5.11 With regard to the appropriation of the amount paid by the Corporate Debtor in August 2018, the Corporate Debtor submits that the Operational Creditor was instructed to adjust this amount against specific invoices listed in the payment advice. Therefore, the Operational Creditor's appropriation of amount of Rs.52,57,989/- paid by the Corporate Debtor in August, 2018 on FIFO basis is incorrect. As per the Payment Advice dated 14.08.2018 issued by the Corporate Debtor, the said amount was to be adjusted against the 137 invoices listed in the Payment Advice and the Operational Creditor was bound to act accordingly. Likewise, regarding the adjustment of



Rs.9,36,000/- against the alleged total outstanding mentioned in the Operational Creditor's statement, the Corporate Debtor denies the Operational Creditor's entitlement to adjust this amount in such a manner. The payment was specifically made against a particular invoice and the Operational Creditor should have adjusted it accordingly. The Corporate Debtor clarifies that payment of Rs.10,00,000/- by its Hyderabad Regional Office to the Operational Creditor on 11.09.2019 was made without knowledge of the Demand Notice, as it came to their notice later. Therefore, the said payment of Rs.10,00,000/- and subsequent payments of Rs.29,44,442/- were made in the regular course of business and not in response to the Demand Notice.

5.12 Thus, the Corporate Debtor contends that there is currently no ascertained or crystallised debt owed to the Operational Creditor, and therefore, the Operational Creditor is not entitled to file the Application for initiation of insolvency proceedings against the Corporate Debtor.

5.13 The Corporate Debtor has also furnished its Written Submissions along with a compilation of judgements in support of its case. It is submitted that reconciliation of accounts qualifies as a pre-existing dispute between the parties in terms of Section 8 of the Code, as held by the Hon'ble Apex Court in ***Sabarmati Gas Limited Vs. Shah Alloys Limited*** [AIR 2023 SC 288]. Referring to the judgment of Hon'ble NCLAT in the matter of ***Anshul Vashistha Vs. M/s. Jayhind Steel Traders & Anr.*** [CA (AT) (INS.) No. 656 of 2020], it is submitted that where accounts are yet to be reconciled, the Adjudicating Authority cannot sit down to settle the account and calculate the debt dues. Reliance is placed on the judgment of Hon'ble NCLAT in the



matter of ***Krishna Enterprises Vs. Gammon India Limited*** [(2018) SCC OnLine NCLAT 360] wherein it has been held that claim for interest does not constitute operational debt. It is also submitted that claim under multiple purchase orders constitutes misjoinder of cause of action and cannot be permitted, as held by Hon'ble NCLAT in the matter of ***International Road Dynamic South Asia Private Limited Vs. Reliance Infrastructure Limited*** [(2017) SCC OnLine NCLAT 218]. Finally, it is submitted that initiation of CIRP for an alleged claim in dispute against a well-established and functioning Company should be dismissed in favour of other civil remedies, as held by the Hon'ble Supreme Court in the matter of ***K. Kishan Vs. Vijay Nirman Co. Private Limited*** [(2018) 17 SCC 662] and the Hon'ble NCLAT in the matter of ***Vinod Mittal Vs. Rays Power Experts Private Limited & Anr.*** [(2020) 219 Company Cases 523].

- 5.14 There is no debt payable by the Corporate Debtor in respect of the 19 disputed invoices listed in the computation sheet at Annexure "B" of the Operational Creditors' Additional Affidavit dated 17.09.2022. These invoices are of F.Y. 2017-18 and allegedly issued more than five years ago. Despite repeated requests, the Operational Creditor was unable to furnish purchase order number for each of the disputed invoices along with proof of delivery and royalty passes or royalty slips in respect of material delivered under such invoices. The said 19 disputed invoices were not part of the alleged claim made by the Operational Creditor in the Demand Notice. These invoices were neither admitted nor accounted for by the Corporate Debtor. Thus, the Operational Creditor *vide* its Additional Affidavit dated 17.09.2022 has agitated fresh and new claims which are not only barred by law of



limitation but are also seriously disputed by the Corporate Debtor. There is clearly dispute regarding the very existence of the alleged debt relating to the aforesaid 19 invoices.


6. **ANALYSIS AND FINDINGS**

6.1 Upon due consideration of the pleadings as well as written submissions along with the materials available on record and hearing the Ld. Counsel for the Operational Creditor and Corporate Debtor, our findings in the matter are as under:-

6.2 It is well-settled that while considering an application under Section 9 of the Code, the Adjudicating Authority will have to determine-

- (i) Whether there is an 'operational debt' as defined under Section 5(21) exceeding the threshold limit under Section 4 of the Code;
- (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 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 of the aforesaid conditions is lacking, the application would have to be rejected [*Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353*]. It is also a settled proposition of law that an application under Section 9 of the Code has to be mandatorily



admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) are satisfied.

6.3 Further, an application under Section 9 of the Code, *inter alia*, requires strict proof of debt and default. The applicant must prove with credible evidence and materials that there is an 'operational debt' owed to it by the Corporate Debtor and that there has been a default in payment of such debt on the date on which it fell due and payable. Coming to the facts of the present case, it is observed that while the Operational Creditor claims the amount of operational debt in default to be Rs.1,55,97,574/- including interest as per the Application, the Corporate Debtor vehemently disputes the same and submits that the issuance of Demand Notice dated 06.09.2019 by the Operational Creditor even before undertaking the exercise of reconciliation of accounts was premature and such Notice cannot sustain. We have taken due note of the facts that there were voluminous transactions under almost 1300 invoices pertaining to three financial years, i.e., 2017-18, 2018-19 and 2019-20 in respect of which running account was maintained by the parties; that different accounting systems were followed by both the parties and that while the Operational Creditor had adopted the FIFO system of accounting, the Corporate Debtor maintained accounts on the basis of Invoice-wise payments made by it. Besides, the Corporate Debtor vociferously contended that the Operational Creditor had not given it credit for various payments/ adjustments/debit notes. In these circumstances, we find merit in the Corporate Debtor's contention that it was imperative to carry out the exercise of reconciliation of accounts between the parties so that the balance amount payable to the Operational Creditor could be ascertained.



- 6.4 At this juncture, reference may be made to the judgement of Hon'ble Supreme Court in ***Sabarmati Gas Limited*** (*supra*) wherein it was held that reconciliation of accounts means “*an adjustment of amounts so that they agree, especially by allowing for outstanding items*”. Since accounts were not reconciled in that case, the Hon'ble Court held that there was a pre-existing dispute between the parties and confirmed the dismissal of the petition under Section 9 of the Code. During the present proceedings, it is observed that both parties made an attempt for reconciliation of their accounts, but the same could not be completed due to lack of cooperation and collaboration between the parties. In the absence of proper reconciliation, the Corporate Debtor made balance payment of Rs.60,57,814/- as per its books of account to the Operational Creditor on 11.02.2022 and claimed that all payments due to the Operational Creditor towards principal debt had been remitted and that there was no amount due and payable to the Operational Creditor any more. We are not persuaded to accept the plea taken up by the Operational Creditor that merely because the Corporate Debtor had never raised any dispute about the invoices or the amount owed before the service of the statutory Demand Notice, it is prevented from raising the question of dispute in the current proceedings before this Tribunal. The statutory scheme under Sections 8 and 9 of the Code does not indicate that in case reply to Demand Notice is not given within the specified time, the Corporate Debtor is precluded from bringing relevant materials before the Adjudicating Authority in reply to Section 9 Application so as to establish that there are pre-existing disputes which may lead to rejection of Section 9 Application.



- 6.5 In order to prove the existence of operational debt and default, the Operational Creditor has annexed to the Application copies of 26 Purchase Orders, over 1290 tax invoices, Demand Notice dated 06.09.2019 and emails sent to the Corporate Debtor requesting for release of payment. However, copy of the Ledger Account of the Corporate Debtor as appearing in the books of account of the Operational Creditor for the three financial years 2017-18 to 2019-20 has not been placed on record. The principal amount of debt in default is shown at Rs.1,10,87,225/- in Part-IV of the Application. Subsequent to the filing of the Application, the Corporate Debtor made payments amounting to Rs.29,44,443/- in the month of October, 2019 and balance payment as per its own books of account of Rs.60,57,814/- to the Operational Creditor as on 11.02.2022. After deducting these two payments, the revised amount of debt in default comes to Rs.20,84,968/- (Rs.1,10,87,225- Rs.29,44,443- Rs.60,57,814). However, it is noticed from the record that the Operational Creditor has not given any credit to the Corporate Debtor till date on account of two Debit Notes dated 31.01.2019 and 06.02.2019 amounting to Rs.15,26,866/- raised by the Corporate Debtor towards provision of materials/admixture to the Operational Creditor. Moreover, in Part-IV of the Application, the Operational Creditor has not mentioned any specific date of default except the calculation sheet at Annexure-4 which calls for reconciliation of accounts in order to determine the date of default.
- 6.6 It is pertinent to note that the Operational Creditor categorically admits in its Rejoinder that during the course of rendering supplies to the Corporate Debtor at site, it had used the raw materials of the Corporate Debtor for



which these Debit Notes had been raised. It is also noticed that the Operational Creditor *vide* its email dated 26.02.2019 addressed to the Corporate Debtor had accepted the Debit Notes. Therefore, we find that failure of the Operational Creditor to give credit for the aforesaid two Debit Notes amounting to Rs.15,26,866/- is a matter of dispute between the parties arising much before the issuance of the Demand Notice on 06.09.2019. We also find that such pre-existing dispute raised by the Corporate Debtor is far from being a moonshine defence and that the same is duly supported by tangible materials and evidence.

6.7 The Operational Creditor has furnished the details of pending 67 invoices pertaining to the period from July, 2017 to June, 2019 amounting to Rs.20,84,967/- *vide* Annexure-B of its Reply dated 16.09.2022/17.09.2022 to the Additional Affidavit dated 13.06.2022 filed by the Corporate Debtor. At the time of hearing of the Application, a chart containing following comments of the Corporate Debtor on the said Annexure-B (inadvertently mentioned as Annexure-2 in the chart) was tendered by the Ld. Counsel for the Corporate Debtor:-

- i) The Invoices at Sr. Nos 1 to 12 aggregating Rs.2,84,098/- (rounded off) do not form part of the claim made by the Operational Creditor in terms of Demand Notice dated 06.09.2019 and also by way of the Application, as can be verified from **Annexure-4** of the Application.
- ii) The Invoices at Sr. Nos. 13 to 22 totalling Rs.2,73,000/- (rounded off) are expressly shown as paid on Page Nos. 46, 51, 56 to 58, 60, 68 and 71 of **Annexure-4** of the Application.



6.8 On verification from record, the comments of the Corporate Debtor are found to be correct. This shows that the Operational Creditor is trying to agitate new claims *vide* Invoices at Sr. Nos.1 to 12 pertaining to Financial Year 2017-18 at this belated stage without complying with the provisions of Section 8(1) of the Code, and, accordingly, such fresh claims cannot be legally permitted or entertained under the Code. As far as Invoices at Sr. Nos.13 to 22 pertaining to the period December, 2017 to July, 2018 are concerned, it is evident that having already received payment against these invoices, the Operational Creditor is trying to mislead by claiming such invoices to be still unpaid or outstanding. All these clearly show that the Operational Creditor has not approached this Tribunal with clean hands. Such conduct on the part of the Operational Creditor brings into question the very authenticity and genuineness of the entire claim made in the Application.

6.9 As regards the Operational Creditors' claim for interest of Rs.45,10,349/- at 18% per annum to be treated as 'operational debt', it is observed that neither the Purchase Orders (PO) nor the Tax Invoices contain any stipulation for charging of interest. In the absence of mutual agreement or any promise to pay interest for delayed payment, the Operational Creditors' claim for treating the said interest as operational debt cannot be sustained, because such interest does not arise out of any provision or supply of goods or services. The claim of interest so made rests primarily on the status of the Operational Creditor as an MSME enterprise. It is true that MSMED Act specifically states that interest shall be paid on delayed payments irrespective of whether there is an express agreement or not to that effect.



However, it is now settled in the context of the Code that if interest is not agreed upon between the parties, it cannot form a part of 'operational debt' within the meaning of Section 5(21) of the Code and that no such interest can be claimed in an application under Section 9 of the Code. Interest under Section 16 of MSME Act can be claimed before the MSME Facilitation Council (MSEFC) in terms of Section 18 of the MSME Act. Thus, the correct forum for such claims shall be the MSEFC and not this Tribunal. In this view of the matter, the Operational Creditor's reliance on the order of co-ordinate Bench of this Tribunal in *Tanya Enterprises Pvt. Ltd.* (supra) will be of no help. It is settled that NCLT is not a forum to resolve the disputes pertaining to interest claims of an MSME entity. Therefore, the claim of the Operational Creditor for treating the interest amount of Rs.45,10,349/- as part of 'operational debt' is found to be legally untenable and is accordingly rejected.

6.10 It is well-established that the Code cannot be used as a recovery mechanism or as a substitute for debt enforcement procedures. In this connection, it is now recognised that NCLT is not a debt collection forum and that it is not the object of the Code that CIRP should be initiated to penalise solvent companies for non-payment of disputed dues claimed by an Operational Creditor. As held by the Hon'ble Apex Court in the matter of ***K. Kishan*** (supra), "*the object of the Code, at least in so far as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist*". As a genuine dispute as to the amount of debt owed by the Corporate Debtor to the Operational Creditor exists



between the parties in the instant case, it will not be a fit case for admission of the Application.

6.11 In view of the above discussions, we find that the documentary evidences furnished by the Operational Creditor are not adequate to substantiate the existence of operational debt as claimed to be due and payable by the Corporate Debtor in the Application. Thus, it clearly emerges that the Operational Creditor has failed to establish the existence of a crystallised and undisputed operational debt exceeding the prescribed threshold limit under Section 4 of the Code due and payable by the Corporate Debtor which is the *sine qua non* for admission of an application under Section 9 of the Code.

6.12 On the other hand, the Corporate Debtor has been able to establish the existence of a genuine pre-existing dispute between the parties with regard to the amount owed which satisfies the guiding principles or tests laid down by the Hon'ble Supreme Court in **Mobilox** (supra). The dispute so raised by the Corporate Debtor is found to be not a mere feeble legal argument or an assertion of facts unsupported by evidence. It is not spurious, hypothetical or illusory and the grounds for it are real and not frivolous or vexatious.

6.13 In these circumstances, we are of the considered view that the present Application filed by the Operational Creditor under Section 9 of the Code lacks merit and deserves to be rejected.



ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.3886/MB/2019 filed under Section 9 of the Code by KBC Infrastructures Private Limited, the Operational Creditor, for initiating CIRP in respect of Shapoorji Pallonji And Company Private Limited, the Corporate Debtor is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Operational Creditor to pursue such other remedies as may be available in accordance with law.

Sd/-

**SANJIV DUTT
MEMBER (TECHNICAL)**

Deepa & JNK

Sd/-

**K. R. SAJI KUMAR
MEMBER(JUDICIAL)**