

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-356/(ND)/2020

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

In the matter of:

M/s. SKC Infratech Pvt. Ltd.

Registered Office at:

A-117, Chhatarpur Enclave,
Phase- 2, New Delhi- 110074

...Applicant/Operational Creditor

Versus

M/s EOS Hospitality Pvt. Ltd.

Registered Office at:

C- 9/9856, Vasant Kunj,
New Delhi- 110070

...Respondent/Corporate Debtor

Coram:

**SHRI. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER
(JUDICIAL)**

SHRI.RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT

Counsel for Applicant/Operational Creditor :Mr. Arul Prakash and
Mr. Remya Ronald, Adv.

Counsel for Respondent/ Corporate Debtor: Mr. Abhinav Sharma,Adv

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

Date: 28.03.2023

1. This is an application filed by the Applicant, M/s. SKC Infratech Pvt. Ltd. on 20.01.2020, through Ms. Ajai Bansal, Authorised Representative of Operational Creditor, authorised vide board resolution dated 04.10.2019 to initiate Corporate Insolvency Resolution Process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ('the Code') of the Respondent M/s

EOS Hospitality Pvt. Ltd. for the alleged default on the part of the Respondent in clearing the debt of Rs. 1,28,60,384 (Rupees One Crore Twenty Eight Lakhs Sixty Thousand Three Hundred and Eighty Four) till 13.09.2019. The details of transactions leading to the filing of this application as averred by the Applicant/Operational Creditor are as follows:

- That, the Corporate Debtor had entered into an Agreement dated 24.09.2012 with Operational Creditor for civil construction of Hotel at Plot No. A-108, Phase-I, Industrial Estate, Bhiwadi, Rajasthan (hereinafter referred to as "Said Agreement").
- That, on the basis of said Agreement, Operational Creditor employed its resources such as manpower, financial resources, machineries, raw materials etc. for the completion of said project.
- That, the Operational Creditor issued the bills/invoices (RAs) to the Corporate Debtor against the work done in a time-bound and phased manner which were duly acknowledged by Corporate Debtor.

- That, the Corporate Debtor stopped making payment to the Operational Creditor despite of acknowledgement of all the bills/invoices (RAs) raised by Operational Creditor and Corporate Debtor kept making promises to pay the billed amount to Operational Creditor.
- That, upon witnessing non-payment of legitimate dues of Operational Creditor owed by Corporate Debtor, the Operational Creditor was constrained to stop the works of said project in the month of October, 2014 which led to further continuing losses to Operational Creditor due to idling of resources having a huge financial bearing on Operational Creditor.
- That the Operational Creditor was constrained to send a Legal Notice dated 22.07.2015 through its Advocate to Corporate Debtor calling upon the Corporate Debtor to pay the amount of INR 3,96,87,744/- forthwith.
- That certain meetings took place between Operational Creditor and Corporate Debtor at the office of Corporate Debtor in the period succeeding thereafter and then the

Corporate Debtor confirmed its liability for Financial Year 2014-15 on 16.02.2016.

- The Corporate Debtor again made a concrete and unambiguous promise to make the payment owed towards Operational Creditor latest before close of Financial Year 2016-17 i.e, before 31st March, 2017.
- The Operational Creditor was again constrained to send a Legal Notice dated 27.06.2018 through its Advocate to Corporate Debtor calling upon the Corporate Debtor to make the payment of INR 3,96,87,744/- along with interest at 24% per annum besides INR 5,16,00,000/- qua idling of resources and 25,00,000/- qua mental harassment caused to Operational Creditor.
- That the Operational Creditor sensing being cheated, addressed a complaint to Commissioner of Police, Gurgaon vide complaint letter dated 06.08.2018 duly lodged as Diary No.1719/18 bringing out the facts in elaborate manner.
- That thereafter Corporate Debtor addressed an Acknowledgement Letter dated 13.09.2019 vide which the Corporate Debtor unambiguously and unequivocally

undertook to clear off the payment of INR 1,21,06,031/- (Rupees One Crore Twenty One Lakhs Six Thousand and Thirty One only) which the Corporate Debtor acceded/confirmed that the said amount was duly recorded in the books of Corporate Debtor in the running Financial Year including mobilization advance and towards retention money.

- That the Corporate Debtor did not make the payment to Operational Creditor despite of unambiguous and unequivocal acknowledgement to repay the legitimate debt of INR 1,28,60,384/- (Rupees One Crore Twenty lakhs Sixty Thousand Three Hundred and Eighty Four).
- Hence, the Operational Creditor issued a Demand Notice under section 8(1) of IBC, 2016, read with clause (a) of sub-rule (1) of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, on 17.10.2019 in accordance with the provisions of Insolvency and Bankruptcy Code, 2016 through speed post as well as courier also at the registered address of the Corporate Debtor which was duly received to the Corporate Debtor on

23.10.2019. Hence, the present application has been filed by the Operational Creditor.

2. Despite several notices to the Corporate Debtor, no one was present on behalf of the Corporate Debtor hence the Corporate Debtor was set ex-parte vide order dated 17.02.2021. Subsequently, Ld. Counsel Mr. Abhinav Sharma, on 13.10.2021 appeared on behalf of the Corporate Debtor and prayed for grant of time in filing vakalatnama and appropriate application for setting aside the ex-parte order and also the reply in the matter. This Tribunal vide order dated 13.10.2021 granted ten days' time to file vakalatnama and application for setting aside ex-parte Order. Thereafter, the Corporate Debtor has filed application having IA No 4915 of 2021 for setting aside ex-parte order dated 17.02.2021 and this Tribunal vide order dated 12.11.2021, granted a week's time for filing reply in the matter and the Counsel for Operational Creditor also prayed for grant of time for filing rejoinder. A week's time was granted for filing rejoinder. Vide order dated 05.01.2022, the Tribunal allowed the application filed by the Corporate Debtor on payment of cost

of Rs. 50,000 to Prime Minister's Cares Fund. The Corporate Debtor paid the cost to Prime Minister National Relief Fund in compliance of order dated 05.01.2022 and filed affidavit 27.08.2022 with the proof of payment. Hence, we set aside the ex-parte order dated 17.02.2021.

3. The Counsel for the Corporate Debtor filed its reply on behalf of the Corporate Debtor as below: -

- That, it is averred by the Corporate Debtor that the Operational Creditor has not approached this Tribunal with clean hands and has suppressed vital and material facts from this Court. Therefore, the application deserves to be dismissed.
- That, the application deserves to be dismissed on grounds of delay and laches. It is also pertinent to mention here that the Operational Creditor has not pursued the application diligently in as much as the Operational Creditor had failed to appear before this Tribunal on 27.01.2020, 04.02.2020 and 31.08.2021 thereby wasting precious time of this Hon'ble Court.
- It is submitted that the application is hopelessly barred by limitation. The Operational Creditor has filed the present

application on the basis of alleged outstanding invoices raised by it upon the Corporate Debtor in the year 2013-14 pursuant to an Agreement dated 24.09.2012 executed between the parties. It is pertinent to mention here that the Operational Creditor is alleged to have raised its last invoice/Running Bill dated 04.02.2014 which has been filed along with the application. That, since the Operational Creditor is basing its claim on invoices raised in the year 2013-14, the present application, which has been filed on 20.01.2020 is barred by limitation. Further, even assuming, though not admitting, that the Corporate Debtor had acknowledged any debt vide letter dated 16.02.2016 and 13.09.2019 respectively, the application is still barred by limitation as the benefit of Section 18 of the Limitation Act, 1963 is not applicable in the facts of the present case.

- That, Section 18 of the Limitation Act provides as under:

“18”. Effect of acknowledgment in writing. -(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability,

a fresh period of limitation shall be computed form the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed: but subject to the provisions of the Indian Evidence ACT, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation. – For the purposes of this section,-

(a)an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b)the word “signed” means signed either personally or by an agent duly authorized in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

- That, assuming though not admitting, that the Corporate Debtor had executed an acknowledgement dated 16.02.2016 in favour of the Operational Creditor, a fresh period of limitation would have commenced thereon. Thus, the Operational Creditor in such a scenario could have filed appropriate proceedings on or before 16.02.2019. However, no such proceeding was initiated by the Operational Creditor.
- Further, the alleged acknowledgment dated 13.09.2019 cannot extend the limitation period as the same was not given during

the alleged extended period of limitation i.e. between 16.02.2016 and 16.02.2019. Thus, the benefit of Section 18 not being applicable, the Operational Creditor cannot take advantage of the same for pursuing any time barred claim.

- In the case of Sesh Nath Singh & Anr. Vs Baidyabati Sheoraphuli Co-Operative Bank Ltd. & Anr. (2021) 7 Supreme Court Cases 313, the Hon'ble Supreme Court was pleased to hold as under:

“64” Similarly under Section 18 of the Limitation Act, an acknowledgment of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgement is signed. However, the acknowledgement must be made before this period of limitation expires.

- In view of the settled proposition of law, the present application is liable to be dismissed on this ground alone.
- It is submitted that the Corporate Debtor was desirous of constructing a hotel building on a piece of land owned by it situated at A-108, Phase-1, Industrial Area, Bhiwadi, Rajasthan. That, the Operational Creditor was keen to execute

the said work and expressed its willingness and eagerness to execute the said project. The Operational Creditor also assured the Corporate Debtor and it had the necessary qualifications and expertise to execute the works to the satisfaction of the Corporate Debtor. Accordingly, based on the assurances given by the Operational Creditor, the parties entered into an agreement dated 24.09.2012 whereby the Operational Creditor agreed to carry out the construction of the hotel building as per the Drawings, Specifications and Price Schedule of Quantifies agreed between the parties (hereinafter referred to as the “Said Agreement”).

- That as per Clause 2 of the Said Agreement, the contract value was stipulated to be Rs. 11,10,37,450/- (Rupees Eleven Crore Ten Lakhs Thirty Seven Thousand Four Hundred and Fifty). It was also stipulated that the said value may vary as per the actual work done at the site.
- That, pursuant thereto, the Corporate Debtor advanced a sum of Rs. 1,00,00,000/- (Rupees One crore) to the Operational Creditor as mobilization advance. Accordingly, upon receipt of the mobilization advance, the Operational Creditor had

mobilized the site and started execution of the works stipulated under the Said Agreement.

- It is pertinent to mention here that Operational Creditor in the course of carrying out civil works raised its running bills upon Corporate Debtor. That upon certification of the said running bills, the Corporate Debtor duly released all the payments as per the work done by the Operational Creditor. It is submitted that the Operational Creditor has annexed Running Bills and claimed that there remains an outstanding amount of Rs. 1,28,60,384/- (Rupees One Crore Twenty Eight Lakhs Sixty Thousand Three Hundred and Eighty Four) in respect of the said running bills.
- It is submitted that the aforesaid contention of the Operational Creditor is absolutely false and vexatious. It is submitted that the said running bills were duly certified by the Corporate Debtor and payment thereof was released to the Operational Creditor without any delay.
- It is submitted that as per the ledger maintained by the Corporate Debtor, it is abundantly clear that the payments of approx. Rs. 7.6 crores were duly made to the Operational

Creditor thereby discharging its liability, which fact has been concealed by the Operational Creditor. Further, no other Running Bill has been placed on record to substantiate the fact that the Corporate Debtor is liable to pay any amount to the Operational Creditor. It is also important to state that the Operational Creditor has failed to file the relevant bank statements reflecting the payments made into the account of the Operational Creditor and therefore, the application deserves to be dismissed on this ground alone.

- It is submitted that the Operational Creditor is misleading this Hon'ble Court in as much as the Operational Creditor is claiming operational debt for the work which was not executed by the Operational Creditor.
- That, the performance of the Operational Creditor was always found lacking by the Corporate Debtor and there was inordinate delay in execution on the part of the Operational Creditor. As a result, the Corporate Debtor had to incur excessive losses on account of the shoddy work being done by the Operational Creditor.

- It is submitted that the Corporate Debtor on numerous occasions pointed out the deficiencies in the services being provided by the Operational Creditor. That vide e-mail dated 19.06.2013, the Corporate Debtor had informed the Operational Creditor regarding delay in execution of the project. The Corporate Debtor duly pointed out that no activity had been undertaken after casting of the banquette lift. The copy of the email dated 19.06.2013 is placed on record by the Corporate Debtor
- That vide email dated 23.03.2013, the Corporate Debtor had informed the Operational Creditor regarding shortage of manpower for carrying out shuttering work. The copy of the email dated 23.03.2013 is placed on record by the Corporate Debtor
- That, vide email dated 04.02.2014, the Corporate Debtor categorically pointed out the delays on the part of the Operational Creditor in executing the work. It was duly conveyed to the Operational Creditor that the rate of progress is extremely slow and that the schedule provided by the Operational Creditor had expired long back.

- That, it can be seen from the above-mentioned emails, that there are sufficient materials placed on record from which it can be deduced that the Operational Creditor did not perform its task diligently and there was inordinate delay on the part of the Operational Creditor. Subsequently, the Operational Creditor abandoned the work causing immense loss to the Corporate Debtor. It is submitted that after abandoning the project (despite receiving substantial monies), the Operational Creditor started badgering the Corporate Debtor to release payments against the alleged outstanding invoices.
- It is submitted that such claims were refuted and denied by the Corporate Debtor being unfounded and baseless as the Operational Creditor had failed to execute the project properly. Thus, there exists a pre-existing dispute between the parties. Further, the defense of the Corporate Debtor is neither feeble nor moonshine in as much as the Corporate Debtor has placed on record the relevant emails reflecting the poor execution of the works by the Operational Creditor. Even otherwise, the Corporate Debtor had duly paid/released the certified payments to the Operational Creditor. It is submitted that the

claims of the Operational Creditor are absolutely baseless and vexatious and the Operational Creditor is not entitled to initiate C1RP proceedings against the Corporate Debtor on the basis of the alleged outstanding invoices. Moreover, it is relevant to highlight here that the Operational Creditor is also seeking repayment of retention money from the Corporate Debtor.

- It is submitted that the Operational Creditor, in normal circumstances, would be entitled to claim the retention money after successful completion of the project and upon the expiry of the defect liability period. In the present case, the Operational Creditor has failed to adduce any evidence or place on record any material document to show that it is entitled to the retention money. In fact, it is an admitted position that the work remained incomplete and stood abandoned post October 2014. It is submitted that the Operational Creditor had left the hotel building in a dilapidated condition resulting in huge losses to the Corporate Debtor. The Corporate Debtor craves leave to place on record the photographs by way of an additional affidavit reveal the condition of the building. It is also pertinent to highlight that that Corporate Debtor had

infused substantial capital into the said project. However, due to the delay caused by the Operational Creditor, as well as, due to the poor execution of the Operational Creditor, the Corporate Debtor was unable to make good on its investment. Resultantly, the project became over budgeted and the same led to defaults on the part of the Corporate Debtor in making payments to the Bank. Consequently, the accounts of the Corporate Debtor declared as Non-Performing Asset. Subsequently, the Operational Creditor never approached the Corporate Debtor claiming refund of the retention money, which even otherwise, it was not entitled to claim, in view of the fact that the work was never completed by the Operational Creditor.

- That the balance sheets/ledger entries filed by the Operational Creditor cannot fasten any liability upon the Corporate Debtor. It is submitted that there is a pre-existing dispute between the parties and as such the application is not maintainable.
- That from the aforesaid facts and circumstances, it is manifest that the application filed by the Operational Creditor is in the nature of recovery proceedings. It is submitted that the Hon'ble

Apex Court as well as the Hon'ble NCLAT recently in the case of M/s Kuntal Construction Put. Ltd. vs. M/s Bharat Hotels Ltd. in Company Appeal (AT) (Insolvency) No. 542 of 2020, have consistently held that *"IBC is not intended to be substitute to a recovery forum and whenever there is existence of real dispute, the IBC provisions cannot be invoked"*. In the present case, apart from the fact that the claims of the Operational are barred by limitation, there exists a real dispute which cannot be adjudicated before this Tribunal. In these circumstances, the application deserves to be dismissed with exemplary costs.

4. The Operational Creditor has filed rejoinder to the reply of the Corporate Debtor stating that:

- That, the reply filed by the Corporate Debtor is nothing but an ulterior attempt from evading the payment of the lawful and legitimate outstanding of the Operational Creditor.
- That the Corporate Debtor, along with its reply, has annexed e-mails dated 19.06.2013, 23.03.2013 and 04.02.2014 on which the Corporate Debtor has tried to raise the alleged dispute. However, it is submitted that in the RA Bill No. 9 dated 04.02.2014, which was received by the Corporate

Debtor on 11.02.2014, the Corporate Debtor has itself acknowledged the outstanding payment of Rs. 7,57,61,568/- subject to deduction of payments already made by it along with applicable taxes etc. Thus, it can simply be averred that the disputes as alleged to have been raised by the Corporate Debtor have been raised belatedly with malafide intention and to evade the lawful and legitimate outstanding of the Operational Creditor.

- That, the Corporate Debtor has also acknowledged the outstanding amount of Rs. 1,01,06,029/- (Rupees One Crore One Lakh Six Thousand and Twenty Nine), including mobilization advance and credit balance of Rs. 20,00,002/- (Rupees Twenty Lakhs and Two) vide its Balance Confirmation dated 13th September 2019 for the year ended 31st March 2019 i.e., from 01.04.2018 to 31.03.2019 followed by its ledger accounts, which clearly reflects that the outstanding of the Operational Creditor was duly acknowledged by the Corporate Debtor.
- It is submitted that present application is well within the limitation. It is further submitted that the Corporate Debtor

has duly acknowledged the debt of the Operational Creditor on 16.02.2016 and 13.09.2019 vide Acknowledgement Letters issued by the Corporate Debtor as attached to the Petition. Not only this, the Operational Creditor refers to the Balance Sheet of the Corporate Debtor for the financial year ended 31.03.2019 as downloaded from the MCA website which categorically shows the outstanding amount of the Operational Creditor with its name also mentioned at the footnotes of the said Balance Sheet. The said Balance Sheet states the name of the Operational Creditor along with the exact amount as has been stated in the Demand Notice and the Petition to be due and outstanding as on two dates i.e., on 31.03.2019. Therefore, the application of the Operational Creditor in view of the said acknowledgements under Section 18 of the Limitation Act, 1963 by way of Balance Sheet, is well within the limitation period.

- It is a matter of record that the last invoice raised by the Operational Creditor was on 04.02.2014. Further, the first acknowledgement was given by the Corporate Debtor on 16.02.2016 and thereafter issuance of the ledger accounts

on 01.04.2018, whereby the debt of the Operational Creditor was duly acknowledged and thereafter vide Balance Confirmation dated 13.09.2019, whereby the Corporate Debtor has duly acknowledged the debt of the Operational Creditor. Not only this the balance sheet for the year ended 31.03.2019 states the name of the Operational Creditor along with exact amount as has been stated in the Demand Notice and the Petition to be due and outstanding as on two dates i.e., on 31.03.2018 as well as on 31.03.2019 which clearly establishes that there are continuous subsequent acknowledgements and therefore, the present application filed by the Operational Creditor is well within the limitation period.

- It is not disputed that the running bills were duly certified by the Corporate Debtor, however, it is denied that the payment thereof was released to the Operational Creditor without any delay. It is submitted that there was an outstanding amount of Rs. 1,28,60,384/- due on the part of the Corporate Debtor which it had duly acknowledged by issuance of Balance Confirmation dated 16.02.2016, Ledger Account dated

01.04.2018, Balance Sheet for the year ended 31.03.2019 and the Balance Confirmation dated 13.09.2019.

- The Corporate Debtor is relying upon the ledger maintained by the Corporate Debtor himself which has been referred to in the said reply, but whereas, no ledger account has been placed on record by the Corporate Debtor, which shows the malafide intention of the Corporate Debtor.
- It is stated that the Corporate Debtor has defaulted in clearing the outstanding amounts of the Operational Creditor due to which the Operational Creditor had to stop the work.
- It is denied that the application filed by the Operational Creditor is in the nature of recovery proceedings.
- It is denied that apart from the fact that the claims of the Operational Creditor are barred by limitation or that there exists a real dispute which cannot be adjudicated before this Tribunal. It is a matter of record that after sending the Demand Notice by the Operational Creditor, no reply of the said Demand Notice was ever received by the Operational Creditor.

- That based on the abovementioned contentions the present application filed by the Operational Creditor is liable to be dismissed.
5. We have heard the Ld. Counsels for the Operational Creditor, Corporate debtor and also the pleadings of both the parties and documents filed in support of pleadings.
 6. The Corporate Debtor has raised the following objections with respect to the application filed by the Corporate Debtor.
 - I. That the application filed by the Operational Creditor is barred by limitation
 - II. That there exists a pre-existing dispute between the parties.
 7. With respect to issue of limitation, the Operational Creditor has placed of record Balance Confirmation letter dated 16.02.2016 and another Balance Confirmation letter dated 13.09.2019 and the Operational Creditor has also place on record the Balance Sheet of Corporate Debtor for Financial Year ending on 31.03.2019, wherein the name of Operational Creditor is mentioned in footnotes of Other Current liabilities. The amount of the Operational Creditor is mentioned in two parts, first debt amount is INR 1,01,06,029 (Rupees One Crore One Lakh Six

Thousand and Twenty Nine) and 20,00,002 (Rupees Twenty Lakh and Two) (Retention Money). The amount as mentioned above has been duly acknowledged by the Corporate Debtor in the Balance Sheet for the date as on 31.03.2018 and 31.03.2019. Further, it is well settled principle that the entries made in the Balance sheet amounts to acknowledgement of debt as per section 18 of Limitation Act, 1963. We are supported by the judgement of Hon'ble Supreme Court in *Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr. 2021 SCC Online SC 543* the Hon'ble Supreme Court has made the following observation in para 118 which reproduced as under: -

“It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In *Asset Reconstruction Company (India) Limited v. Bishal Jaiswall* (supra) authored by Nariman, J. this Court quoted with approval the judgments, *inter alia*, of *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff*, [“*Bengal Silk Mills*”] and in *Re Pandem Tea Co. Ltd.*, the judgment of the Delhi High Court in *South Asia Industries (P) Ltd. v. General Krishna Shamsher Jung Bahadur Rana* and the judgment of Karnataka High Court in *Hegde Golay Ltd. v. State Bank of India* and **held that an acknowledgement of liability that**

is made in a balance sheet can amount to an acknowledgement of debt.”

It is evident from the entry in the balance sheet itself that the Corporate Debtor has acknowledged the outstanding amount. Since the Corporate Debtor has acknowledged the debt in the balance sheet is as on 31.03.2019, the limitation commences from 31.03.2019 and the present application has been filed on 20.01.2020, so the present petition is well within the limitation period. The second contention raised by the Corporate Debtor is that there exist a pre-existing dispute between the Operational Creditor and the Corporate Debtor, The Corporate Debtor has relied on email communication made by the Corporate Debtor to the Operational Creditor on 23.03.2013, 19.06.2013, 04.02.2014, wherein the Corporate Debtor has repeatedly requested the Corporate Debtor to expedite the work and has complained to the Operational Creditor with respect to the quality of work done by the Operational Creditor and it is undisputed fact that the work has been delayed and till date the construction has not been completed. The question of repayment of retention money will not arise since the

construction is not completed and further it has been alleged by the Corporate Debtor that due to delay in construction the project became non-viable. The Corporate Debtor has already released payment of INR 7,57,61,568/- and for the remaining amount it is evident from the documents place on record by the Corporate Debtor that there exists a pre-existing dispute between the parties and it is mandate of law that if there exists a pre-existing dispute between the parties the Adjudicating Authority must reject the application under section 9(5)(ii)(d) reliance can be placed on landmark judgement of Hon'ble Supreme Court in "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited 2018) 1 Supreme Court Cases 353"

Para 40 of the judgement which reads as under: -

*40. 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.***

8. Further, it is well settled principle of law and stated in the judgement of Hon’ble National Company Law Appellate Tribunal in *M/s Brand Realty Services Ltd v M/s Sir John Bakeries India Private Limited (Company Appeal (AT) (Insolvency) No. 958 of 2020)* and *Neeraj Jain v Cloudwalker Streaming Technologies Private Limited (Company Appeal (AT) Ins No. 1354 of 2019)* that the mere fact that Reply to notice under S. 8(1) has not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating

Authority to establish that there is a pre-existing dispute which may lead to the rejection of S. 9 application.

9. The Hon'ble National Company Law Tribunal in *M/s Kuntal Construction Put. Ltd. vs. M/s Bharat Hotels Ltd. in Company Appeal (AT) (Insolvency) No. 542 of 2020* has made it clear that Insolvency Resolution process is not a recovery proceeding to recover dues of creditors, relevant para of the judgement is reproduced as under: -

*18. We have heard the learned counsel for the parties and perused the record. The email correspondences clearly showed that the operational creditor was intimated about the retention money being adjusted on account of defects in the Work Order. **It is clearly laid down by the Hon'ble Supreme Court "IBC is not intended to be substitute to a recovery forum and whenever there is existence of real dispute, the IBC provisions cannot be invoked."***

10. In the light of the above said facts and after giving careful consideration to the entire matter, hearing the arguments of the learned counsel for the Operational Creditor as well as the reply filed by the Corporate Debtor and upon appreciation of the documents placed on record to substantiate their respective

claims, this Adjudicating Authority **Dismiss** this application filed by the Operational Creditor under section 9 of Insolvency and Bankruptcy Code, 2016 as there is a pre-existing dispute between the parties and IBC is not a substitute for a recovery forum, However, the claim under any other law, if permissible, can be pursued by the Petitioner as prescribed under that law.

-SD-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

-SD-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)