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**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B) No. 30/9/NCLT/AHM/2017

Coram:

**Present: Hon'ble Mr. BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 31.07.2017**

Name of the Company: United Project Construction Ltd.
V/s.
Aerocon Buildwell Pvt Ltd.

Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy
Code

S.NO. NAME (CAPITAL LETTERS) DESIGNATION REPRESENTATION SIGNATURE

1.

2.

ORDER

None present for Operational creditor/ Applicant. None present for Respondent.

Order pronounced in open Court. Vide separate sheet.


**BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

Dated this the 31st day of July, 2017.

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AMEDABAD BENCH
AHMEDABAD**

CP NO. (IB) 30/9/NCLT/AHM/2017

In the matter of:

1. M/s. United Project Construction Ltd.
28, Shanti Nagar, Shri Nagar
Extension Khajrana Road
INDORE
: Petitioner
: Operational Creditor

VERSUS

1. M/s. Aerocon Buildwell Private Ltd.
Johri Mantion, First Floor
26/2 Chain Singh Ka Bagicha
New Palasia
INDORE
: Respondent
: Corporate Debtor

Order delivered on 31st July, 2017

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

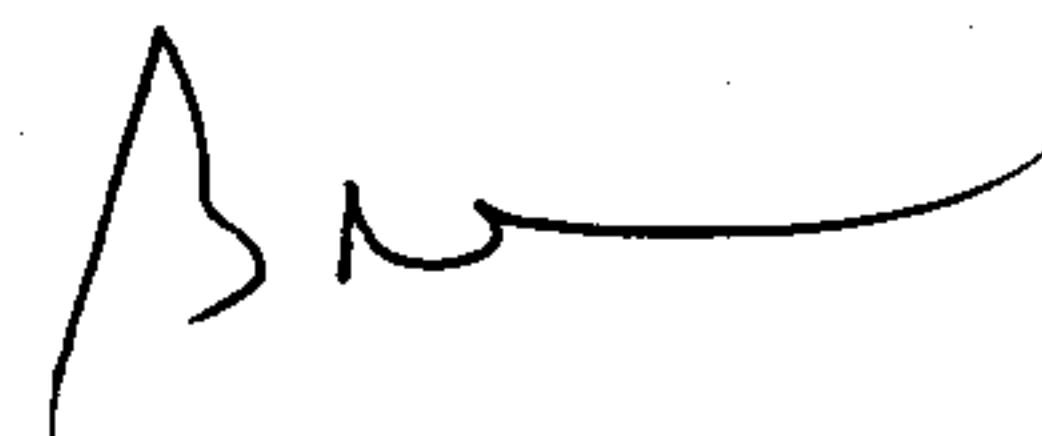
Appearance:

- For the petitioner : Learned Advocate Mr. Vivek Dalal
with learned advocate Mr. Anurag
Solanki
- For the respondent : Learned Advocate Mr. Manoj Munshi
with learned advocate Mr. Tarak
Damani



ORDER

1. M/s. United Project Construction Ltd. filed this application under section 9 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the Rules") with a prayer to trigger Corporate Insolvency process in respect of M/s. Aerocon Buildwell Private Ltd.
2. The facts in brief that are necessary for disposal of this application are as follows: -
3. The applicant executed civil work of the value of Rs. 6,30,06,740/- under 16 RA bills. Further, it is the case of the applicant that he received material worth Rs. 1,65,47,000/- from the respondent corporate debtor. It is also the case of the applicant that he received an amount of Rs. 2,15,74,192/- Therefore, on the outstanding amount of Rs. 2,48,94,335/- the applicant claims interest @ 24% per annum and loss of profit due to non-payment. In all, the applicant is claiming Rs. 3,42,09,590/-. It is stated that the date on which the default occurred is 15.09.2015.



4. Applicant issued demand notice dated 03.04.2017 under section 8 (1) enclosing therewith copy of three invoices which covers 14, 15 & 16 RA bills. According to the applicant, demand notice was served on the corporate debtors on 05.04.2017 but no reply has been given by the corporate debtors. Applicant enclosed copies of ledger account of the respondent company and statement of accounts of the applicant with State Bank of India for the relevant period. Applicant did not name the proposed Interim Insolvency Resolution Professional. It is stated by the applicant that he has despatched copy of the application by speed post on 24.05.2017.
5. This application is filed before the registry on 25.05.2017. This application is registered before the Adjudicating Authority for the first time on 04.07.2017. This authority directed the petitioner to serve notice on the corporate debtor informing the date of hearing along with copy of order and to file proof of service. Accordingly, applicant served notice of hearing on the respondent and filed proof of service. Respondent filed his objections before this authority on 18.07.2017 after taking time twice. This authority heard arguments of both the sides on 20.07.2017.
6. It is the case of the respondent as can be seen from the averments in the objection.

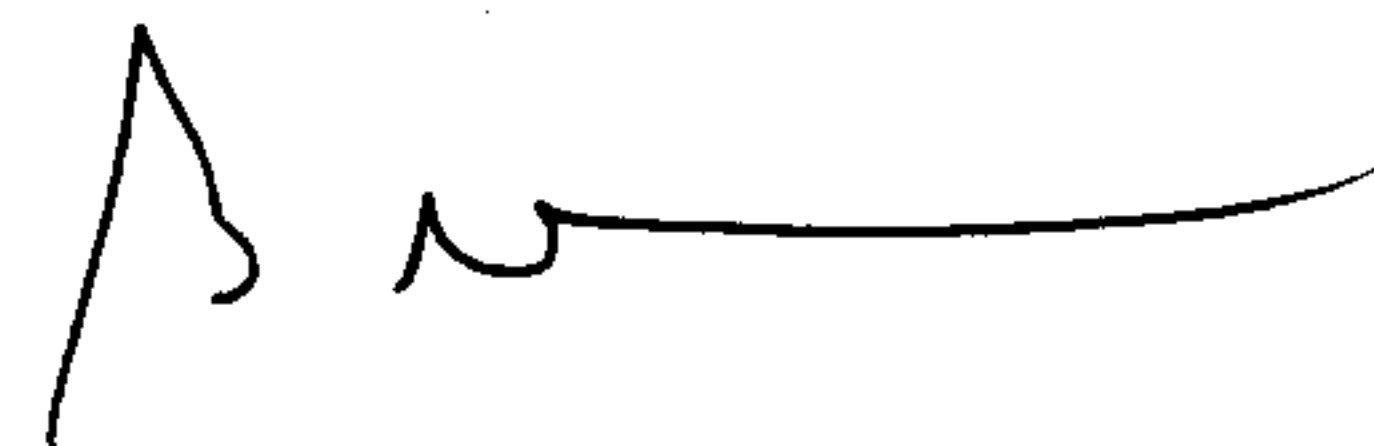


7. The first plea of the respondent is that demand notice dated 03.04.2017 has not been received by the corporate debtor. It is also pleaded that all communication between the applicant and the respondent have been taking place only through mails and when such is the case why the demand notice has not been sent by mail to the respondent.
8. Next objection is that the applicant did not produce copy of the agreement or work order issued by the corporate debtor to the applicant for construction of factory building.
9. Third objection is that although the applicant referred to 16 RA bills in the demand notice, only copies of RA bills 14, 15 and 16 were enclosed to the demand notice.
10. According to the respondent, the amount of work executed by the applicant is only for Rs. 4,70,10,825/- but not for Rs. 6,30,06,740/-. It is a fact that respondent supplied building material worth Rs. 2,46,50,185/- to the applicant. Respondent also paid cash of Rs. 2,15,57,806/-. Therefore, the net amount payable to the operational creditor as on 31.03.2015 is only Rs. 8,02,834/-. It is the case of the respondent that during the year 2015-16 the applicant purchased AEC blocks manufactured by the respondent of the value of Rs. 4,84,158/- which shall be adjusted towards the amount payable to the applicant and thereby the net amount



payable to the applicant is only Rs. 3,18,676/- as on 31.3.2016. It is also the case of the respondent that ledger account of the operational creditor in the books of accounts of the corporate debtor along with copy of the bank statements for the year 2013-14, 2014-15 and 2015-16 and copy of ledger account for supply of AEC blocks manufactured by the respondents and purchased by the applicant amounting to Rs. 4,84,158/- during the year 2015-16 along with copy of invoice are filed by the respondents vide annexure R/2 to R/4. According to the respondent, outstanding balance is only Rs. 8,02,834/- as on 31.03.2015 and Rs. 3,18,676/- as on 31.03.2016 but the applicant filed this petition towards outstanding of Rs. 2,48,94,335/-. Further, it is the case of the respondent that he has been pursuing with the applicant to rectify the defects in the construction of factory building and about the bad quality of construction but the applicant did not take note of the same. Further, its only outstanding of Rs. 3,18,676/- has not been paid by the respondent to the applicant.

11. Respondent obtained audited balance sheet of the applicant from the website of Ministry of Corporate Affairs. Audited balance sheet/financial statement of accounts for the years 2014-15 and 2015-16 which are annexed as annexure – R/8 (i) to (ii). A perusal of annexure shows that in the financial year 2014-15 at Sr. No. 2 the amount receivable by the applicant is shown as Rs. 8,02,834/- and for the financial year



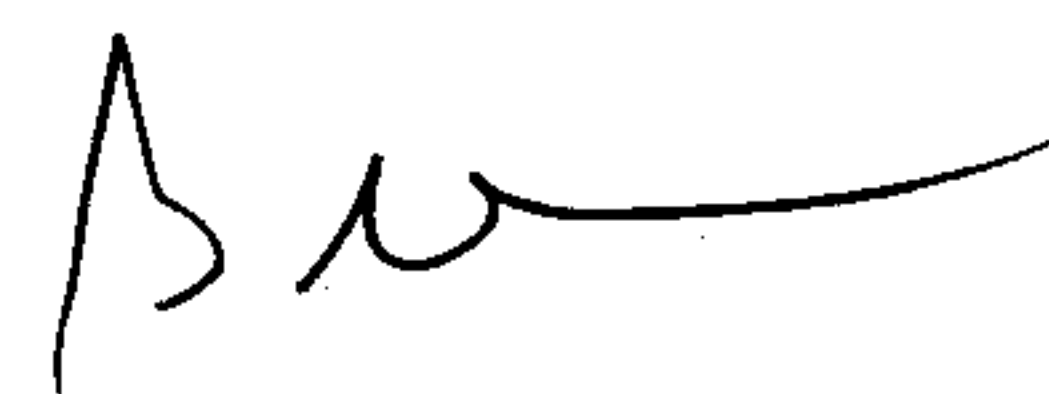
2015-16 also the receivable amount is shown as Rs. 8,02,834/- It is stated that the outstanding balance in the audited financial accounts of the corporate debtor and operational creditor as on 31.03.2015 is shown as Rs. 8,02,834/-. There is a difference in the outstanding balance as on 31.03.2016 and it is on account of not accounting the supply of AEC blocks by the respondent to the applicant. Therefore, it is not a fit case to trigger Corporate Insolvency code under Section 9 of the Code.

12. The first objection raised by the respondent corporate debtor is that the demand notice dated 03.04.2017 has not been received by it. Applicant filed copy of demand notice dated 03.04.2017. Applicant also filed track consignment report issued by Indian Postal Department which shows that the demand notice was served on 05.04.2017. Applicant also filed speed post receipt. The track number of speed post tally with the number in track consignment. Therefore, contention of the respondent that the demand notice has not been served do not merit acceptance. The reasons stated by the respondent for not receiving the demand notice is that they have been functioning from the factory premises and city office and not from the registered address of the company. It is the duty of the respondents to inform the Registrar of Companies if there is any change in the registered address of the company. When such course of action is not adopted by the respondent, on the ground the respondent is operating his activities from the city office and factory is not a ground to say that the demand notice



has not been sent to the address. The Rule require that the demand notice shall be sent to the registered office of the corporate debtor. Therefore, it is held that the applicant issued demand notice as required by Section 8 of the Code read with rule 5 of Insolvency and Bankruptcy Code and Rules.

13. Next objection raised by the respondent is that all RA bills 14, 15 and 16 has only been enclosed to the demand notice and other bills i.e. RA bills 1 to 13 has not been enclosed to the demand notice.
14. Demand notice issued by the operational creditor is in form No. 3 but not in form No. 4. In case demand notice is issued in form No. 4, copies of invoice can be annexed but in case demand notice is issued in form Nol. 3, in column 27 applicant/operational creditor shall list out the documents attached to the application in order to prove acceptance of operational debt. It is stated in the demand notice which is in form No. 3 that copies of e-mails are attached as compliance of column 27 of form No. 3. A perusal of the e-mail show that three invoices dated 04.07.2014, 15.07.2014 and 25.09.2014 was sent to the Project Manager of the respondent company from the Project Manager of M/s. United Project Construction Ltd. It appears that in the invoice dated 04.07.2014 the amount of 13th RA bill is mentioned. In the invoice dated 15.07.2014 the amount of 14th RA bill was mentioned. In the invoice dated 25.09.2014 amount of 15th RA bill was

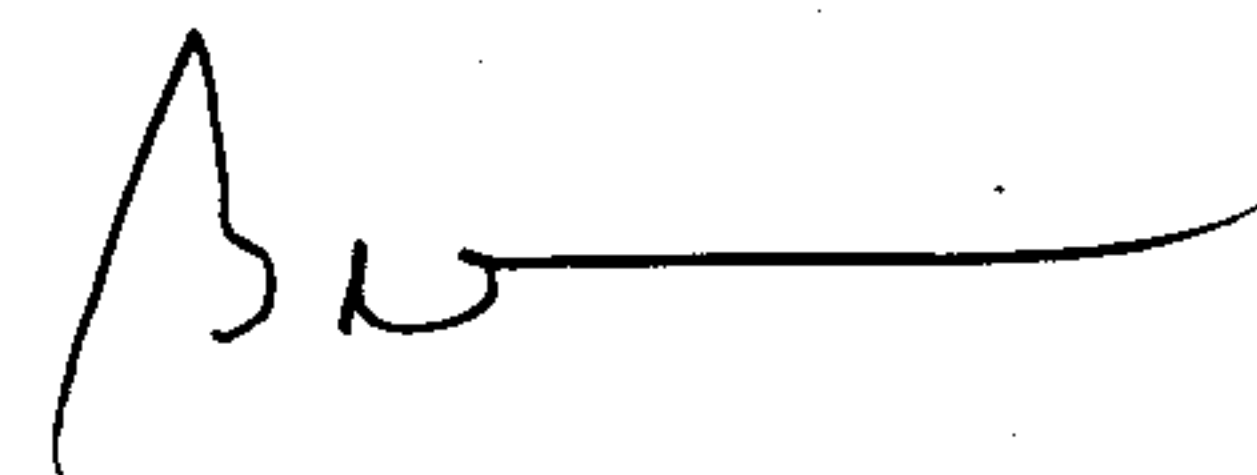


mentioned. Therefore, form No. 3 issued by the applicant to the respondent is in accordance with Rule 5 of the Adjudication Rules. In compliance of Section 9 (3)(b) of the Code, the applicant filed affidavit vide page 396 of the application.

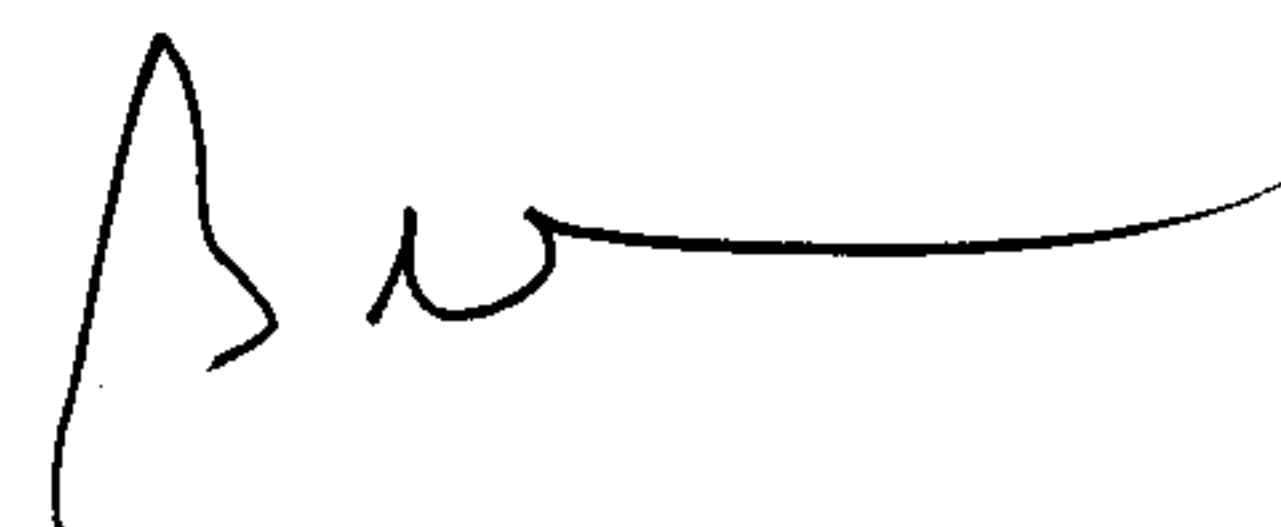
15. Hon'ble National Company Law Appellate Tribunal in Company Appeal (AT) (Insolvency) 6 of 2017 in the matter of Kirusa Software Pvt. Ltd. v/s Mobilox Innovations Pvt. Ltd. held as follows: -

"The dispute under I & B code, 2016 must relate to specified nature in clause (a), (b) or (c) i.e. existence of amount of debt or quality of goods or service or breach of representation or warranty."

16. It is further held in that judgement by Hon'ble Appellate Tribunal that mere raising dispute for the sake of dispute unrelated or related to clause (a) (b) or (c) of Sub-section (6) of Section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a dispute raised by the corporate debtor. It is also held in the judgement that the dispute as defined in sub-section (6) of Section 5 cannot be limited to a pending proceedings or lis within the limited ambit of suit or arbitration proceedings and it can be any other proceedings.

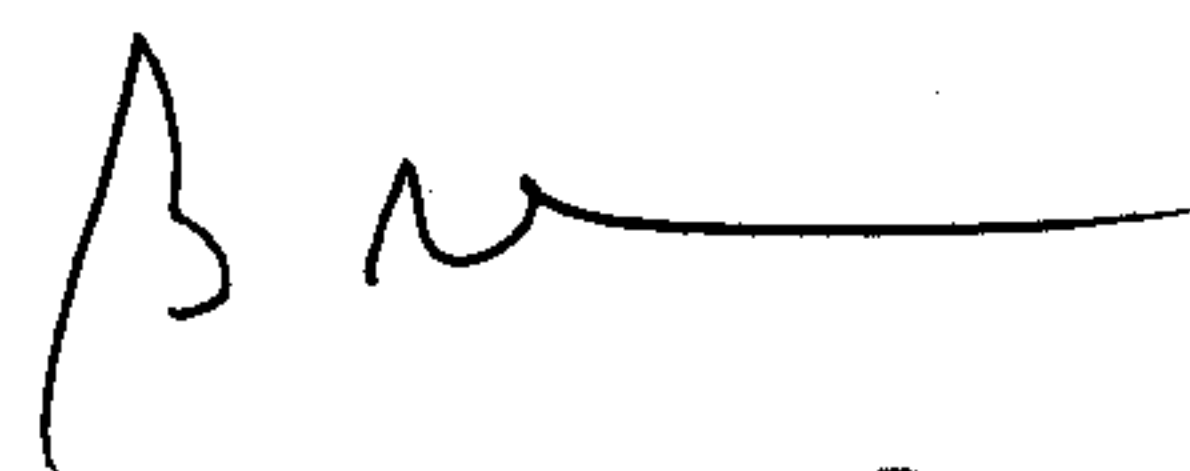


17. Now it has to be considered that whether the dispute raised by the corporate debtor is a dispute in relation to clause (a) (b) or (c) of sub-section 6 of Section 5.
18. Second objection raised by the respondent is that the annual accounts of the respondent company and corporate debtor show that the outstanding balance for the year 2014-15 is only Rs. 8,02,834/-. However, an amount of Rs. 4,84,158/- towards the cost of AEC blocks supplied by the corporate debtor to the applicant has not been taken into account by the operational creditor.
19. Page 414 of the objection is relevant page in the balance sheet of the applicant as on 31.03.2016 which shows that trade receivables from the respondent company is Rs. 8,02,833/-. Perusal of the balance sheet of the respondent company for the year as on 31.03.2015 at page 321 of the objection show that in the column of sundry creditors the applicant company's debt is shown as Rs. 8,02,834/-. Ledger account of the respondent company which is at page 42 of the objection show that the closing balance of M/s. United Project Construction Ltd. as on 31.03.2016 is Rs. 8,02,834/-.
20. A perusal of balance sheet and profit and loss statement as on 31.3.2016 which is at page 345 of the objection that United



Project Construction Ltd. i.e. the operational creditor is payable only Rs. 3,18,676/-.

21. A perusal of TDS certificate at page 286 show that TDS was deducted by the respondent company in respect of payments made to the applicant company. From the aforesaid documents which are audited balance sheets of both the companies, the amount due from the respondent company to the applicant company is only Rs. 08,02,833/- that too without taking into consideration the amount of Rs. 4,84,158/- which is the cost of AEC blocks sold to operational credit^d by the corporate debtor. Therefore, there exists dispute regarding the amount due from the respondent to the applicant company.
22. The respondent also raised dispute regarding the quality of construction. No doubt the respondent did not give any reply to demand notice. Respondent in his letter dated 10th October, 2016 addressed to the operational creditor which is prior to demand notice clearly mentioned that some of the platforms constructed by the operational creditor are broken and could not be able to start working properly and hence suffer loss in production as well as factory. It is also mentioned that dues will not be released yet until the problems are sorted out from your end. This letter clearly goes to show that a dispute has been raised by the respondent long prior to demand notice regarding quality of the construction. Moreover, as already said, respondent has raised dispute regarding existence of



amount of dispute relating to debt. Therefore, in the given facts and circumstances basing on the material available on record, this adjudicating authority is of the considered view that the dispute regarding the existence of amount of debt and quality of service has been raised by the respondent even prior to filing of this application. Therefore, it is not a fit case to order for Corporate Insolvency Resolution Process. The dispute between the operational creditor and corporate debtor has to be resolved in any other appropriate forum but not before this adjudicating authority.

23. In view of the above discussion this application is dismissed.
No order as to costs.


BIKKI RAVEENDRA BABU
ADJUDICATING AUTHORITY
MEMBER JUDICIAL

Pronounced by me in open court on the 31st day of July, 2017.