

**IN THE NATIONAL COMPANY LAW TRIBUNAL****NEW DELHI (COURT NO. IV)****Company Petition No. (IB)-374(ND)/2018**

(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:****M/S DELISHA ENGINEERING****...Applicant****VERSUS****M/S KKSPUN INDIA LIMITED****...Corporate Debtor****Judgement Pronounced on: 12.09.2018****CORAM:****DR. DEEPTI MUKESH****MEMBER (Judicial)****For the Applicant:****Mr. Anish R. Shah, Advocate****For the Corporate debtor: Mr. S. Santanam Swaminadhan,  
Advocate**

**MEMO OF PARTIES****M/S DELISHA ENGINEERING****Registered office at:** 283/1, GIDC

L-Type, Opp. Odhav Fire Station,

SBI Bank Lane, Odhav,

Ahemdabad- 382415

**...Applicant****VERSUS****M/S KKSPUN INDIA LIMITED****Registered office at:** 7/18A,

Sarpriya Vihar,

New Delhi-110016

**...Corporate Debtor****JUDGEMENT**

1. The present application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'Code, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s Delisha Engineering (for brevity 'Applicant') through its proprietor Mr. Donar Jayeshbai Patel with a prayer for initiation of Corporate Insolvency process against M/s KKSPUN India Limited (for brevity 'Corporate Debtor').

2. The applicant M/s. Delisha Engineering, claimed to be the operational creditor, is a proprietorship concern having its registered office at 283/1, GIDC, L-Type, Opp. Odhav Fire Station, SBI Bank Lane, Odhav, Ahemdabad -382415.
3. The respondent M/s. KKSPUN India Limited a corporate debtor against whom initiation of corporate insolvency resolution process has been prayed for, is a company incorporated on 9<sup>th</sup> January, 2006 under the Companies Act, 1956 having its registered office at 7/18A, Sarpriya Vihar, New Delhi-110016 and having CIN U29199DL2006PLC144590.
4. The Authorised share capital of the Corporate Debtor is Rs. 50,00,00,000/- and Issued, Subscribed and Paid up share capital of the company is Rs. 12,04,08,820/-.
5. It is the case of the applicant that during the course of business M/s KKSPUN India Limited approached the applicant for the supply of Thimble Mounted Sluice Gates with all its accessories and issued two Purchase Orders for total 80 Nos. of size 1500×1500 CI Sluice Gate through purchase orders for 33 No. of gates bearing PO/16-17/CON/00222, dated 30.10.2016 for

Rs. 99,00,000/- as PO1 and 47 No. of gates bearing PO/16-17/CON/00380, dated 30.01.2017 for Rs. 1,36,62,900/- as PO2 with payment terms as prescribed in the said purchase. Pursuant to the said Purchase Orders, the Applicant stated that the supplies of the necessary goods for PO1 was complete and amount of same had also been received, but as per the PO2 out of 47 sluice gates only, 40 sluice gates and accessories were supplied on 22.06.2017 and there was no dispute regarding the same and invoices had been raised for the same. It is further stated by the applicant that the remaining 7 gates were ready for delivery.

6. The applicant has stated that the corporate debtor was very irregular in making payment and did not adhere to the payment schedule mentioned in the purchase order. The applicant owes the total amount of Rs.2,15,28,000/- against both purchase orders, out of which the corporate debtor has made payment to the tune of Rs.1,80,26,800/- as on 26.09.2017 and an amount of Rs.35,01,200/- still remains unpaid from the corporate debtor against the Purchase Order

2 and therefore the aforesaid remaining 7 gates had not been supplied to the corporate debtor.

7. The applicant has submitted that with regard to the said unpaid amount, various invoices were raised from time to time against the Purchase Order 2, dated 30.01.2017, by the applicant on corporate debtor. The applicant further submits that regular follow ups were made through emails, letters and telephonic conversations, but no payment was received.
8. The applicant then issued demand notice, dated 16.01.2018 under the provisions of section 8 of I & B Code, 2016 seeking repayment of unpaid amount of Rs. 35,01,200/- and the said notice was received by corporate debtor on 20.1.2018, as per the track report/service affidavit filed by the applicant.
9. The applicant further states that neither the payment nor any notice of dispute was raised by the corporate debtor and hence present application is filed which is duly served on corporate debtor.
10. The corporate debtor filed a reply raising dispute. It is contended by the Respondent that all the gates have not been

supplied in full as per the Purchase Order 2, dated 30.01.2017 and whatever supplies have been effected in relation to the Purchase Order 1, dated 30.10.2016 have been supplied beyond time, which also were defective and of sub-standard quality and are of much below the stipulated weight. It is further stated by respondent that four such defective gates are still lying at the project site which were delivered under the PO2 and the whole project remained stalled due to the poor quality of the goods delivered.

11. The Respondent further contended that on taking up the issue with the applicant for immediate delivery of the gates, the applicant insisted for the payment saying that funds are required to procure the raw materials and components in bulk and only then it will be viable to manufacture and deliver the gates.
12. Further, the Respondent has placed the documentary evidences to disclose supply of gates by the applicant. In this connection, it is stated that while the invoice claimed that it had supplied 80 sluice gates, however, on actual receipt of

gates, since it was found that corporate debtor had only received 73 sluice gates and in view of the same, objection was duly recorded therein.

13. Further, the Respondent claims that as per the several discussions between the parties, the respondent had certain disputes with respects to the performance of the contractual obligations to be done by the applicant. The applicant instead of fulfilling its obligations, vide email dated 03.06.2017 refused to the respondent to deliver the pending headstocks until the respondent make the payment as demanded. The respondent under compulsion, without prejudice or waiver of its rights, made part payment, and thereafter the applicant made delivery of the accessories for the 40 gates on 10.07.2017, as per PO2.
14. The Respondent states that the applicant refused to give the performance bank guarantee for second Purchase Order. The respondent had demanded proper certification with respect to the gates supplied, so as to ascertain that they were as per exact specification and in complete accordance with the Purchase Orders. On this note, the applicant emailed some

vague and incomplete certification through emails dated 07.09.2017. Instead of giving the performance bank guarantee, the applicant began sending unwarranted and mala fide legal/demand notices. There were few meetings held between the applicant with his representatives and advocate with representatives of corporate debtor even after demand notice was issued.

15. Contentions are also taken by the Respondent that the amount claimed in default is not payable by the respondent due to non-compliance of the complete terms of the purchase orders in toto within the stipulated time and that the CD has suffered an irreparable loss particularly since the time was the essence of the contract and the supply of goods were not done on time.
16. The Respondent states that the applicant itself had requested the respondent to give 2 threaded shafts to its engineer for refurbishment of their operating nut in order to place a new nut and further the applicant have accepted vide email dated 03.08.2017 that its performance was deficient and that the gates supplied were not ready to be installed and commissioned

and against such wrongful acts, the applicant had agreed to send an engineer/technician to rectify those mistakes.

17. The Respondent responded to the demand notice, dated 16.01.2018 and stated that the same is defective and incomplete as per the Form 3 of I &B Code. Further, there is no compliance with section 9(3)(c) of the Code by the applicant.

The learned counsel for the Respondent relied on the order of the Hon'ble National Company Law Appellate Tribunal in the case of **Drulum India Private Limited Versus Sharma Kalypso Private Limited (IB-351/2018)** and in the National Company Law Tribunal Principal Bench, New Delhi **in the case of Gac Logistics Private Limited Versus Ai Nafees Proteins Private Limited (IB-267/2017)** which came to the following observation:

*“That in case the amount claimed in default is not payable due to non-supply of the complete goods within the stipulated time and the corporate debtor has suffered an irreparable loss particularly when the time was the essence of the contract and the supply of goods were not on time as also admitted by the*

*operational creditor and when there is 'pre-existing dispute' the appeal was to be dismissed”*

In the Case of **United Project Construction Limited Versus M/S Aercon Buildwell Private Limited 2017 NCLT 7631** it is observed that *when the existence of amount of debt and quality of service has been raised by the respondent even prior to filing of this application, then the case is not the fit case to order for CIRP.*

18. On hearing the Ld. Counsels of both the sides and on perusal of the record, it can be concluded as under:
  - i. The record of the instant case reveals that the alleged liability has been disputed from time to time and that the dispute was pre-existing. It is seen from the email dated 27.10.2016 that a dispute of deficient performance was clearly pre-existing and raised by corporate debtor. The email spells out huge delay in performance of the gates and its accessories and also states about the defective and sub-standard quality goods supplied by the applicant. In addition, the issue of non-supply of remaining 7 gates was

also raised by the respondent. Admission by the applicant of disputes and defects raised by the corporate debtor is seen from applicant email dated 27.12.2016 wherein the applicant had admitted of such defect with promise to correct the same and further offered corporate debtor to cancel the order of such defective goods which are delivered by him.

Despite the quality issues, on repeated reassurances by the applicant to supply best quality in future, the corporate debtor placed another order on 30.01.2017 and faced similar quality issue again which were exchanged through emails from February 2017 onwards and in June 2017 the applicant stopped making delivery on the ground of non-receiving payment, leading to non-completion of execution of PO2. It is pertinent to note that whatever part delivery was made against PO2 was also defective and corporate debtor had raised quality issue in august 2017 wherein the applicant had agreed to rectify the said issue.

Again inspection was also carried out between the applicant and the corporate debtor to rectify the defects in the goods. Even after the notice was issued under section 8 of the I & B Code, 2016 there were meetings between the parties to resolve issues but all in vain.

There is thus force in the contention of respondent that there is established and long-standing dispute between the parties much prior to the initiation of the present proceedings under the code.

- ii. “Dispute’ has been defined under the code in section 5 (6) which envisages that:  
*‘Dispute’ includes a suit or arbitration proceedings relating to - (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.”*
- iii. It is no longer Res-Integra that the definitions of dispute is inclusive and not exhaustive. Dispute has been given wide meaning so as to cover all disputes on debt, default

etc. and not be limited to only pending suit or a record of a pending arbitration.

- iv. A dispute does truly exist between the parties in terms of section 5(6)(b) in the present case, which may or may not ultimately succeed but requires trial/investigation. On one hand the applicant has relied on invoices in support of its claim. On the other hand respondent has disputed the long-standing dispute of quality and non-performance of the complete contract till date on time. Though this is not the forum to examine and adjudicate as to which portion of the claims or counter claims are admissible. Tribunal will not examine the merits of the dispute other than to see if there is in fact exist a 'real dispute' having some substance.
- v. Hon'ble Supreme Court in the case of "*Mobilox Innovative Private Limited vs. Kirusa Software Private Limited*" in civil appeal number 9405 of 2017 vide order dated 21.09.2017 has held that: "Therefore, all 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 exist in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application. In the present case the respondent has raised dispute with sufficient particulars. Besides the case records reveal that there was existence of dispute much prior to the issuance of notice under section 8 of the code. The claim of the dispute suggest the need of elaborate investigation. The moment there is existence of such a pre-existence dispute, the corporate debtor gets out of the clutches of the code.

19. In view of the aforesaid facts, a conclusion can be drawn that there is 'Pre-existence dispute' though is not legally crystalized in any litigation but dispute is genuine and was raised by corporate debtor time and again much prior to the notice served under section 8 of I & B Code. It is a fit case to reject the application under section 9 of the I & B Code.
20. In view of the above discussion the present application is hereby dismissed. No order as to costs. A copy of the order shall be forwarded to IBBI for its records.

**Sd/-**  
**DR. DEEPTI MUKESH**  
**MEMBER (Judicial)**