NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH

Dy. No.3 (081) of 2018

Under Section 8 and 9 of the Insolvency & Bankruptcy Code, 2016

In the matter of:

M/s. Hillview Coals Pvt. Ltd. ... Operational Creditor

-Versus-

M/s. Super Infratech Pvt. Ltd. ... Corporate Debtor

Order delivered on 17th September, 2018

Coram:

Present: Hon'ble Mr Justice P. K. Saikia, Member (J)

ORDER

1. This is an application under Section 8 and 9 of the Insolvency & Bankruptcy Code, 2016, read with Rule 6 of the of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016, has been filed by M/s. Hillview Coals Pvt. Ltd., herein after referred to as "the operational creditor" or "OC" seeking initiation of corporate insolvency resolution process against M/s. Super Infratech Private Ltd., herein after referred to as "the corporate debtor" or "CD".

2. Heard Mr. Purshotam Gaggar, CA, learned legal representative appearing for the operational creditor. Also heard Dr. Ashok Saraf, learned Sr. Advocate assisted by Mr. Suman, Chetia, Advocate appearing for the CD.

3. It may be stated that M/s. Hillview Coals Pvt. Ltd. is having its registered office at Kamalalaya Centre, 156A, Lenin Sarani, 2nd Floor, Rom No.214, Kolkata- 700013, West Bengal whereas the corporate debtor M/s. Super Infratech Private Ltd., is a company, incorporated under the Companies Act, 1956 having its registered office at T. R. Phookan Road, Dibrugarh, Assam. M/s. Hillview Coals Pvt. Ltd., as per statement, made in the Article of Association, (in short AOA) is engaged in the business of construction work.

4. M/s. Super Infratech Private Ltd had engaged M/s. Hillview Coals Pvt. Ltd to execute the work, specified in the agreement dated 10-11-2008, which has been marked as Ex.-D to the application. It has been found from the materials on record that one Brahmaputra Cracker & Polymers Ltd. (in short, BCPL), a joint undertaking of Government of India and Government of Assam

had allotted M/s. Super Infratech Private Ltd. "the side grading works" in respect of BCPL complex at Lepetkata, Dibrugarh, Assam in the month of November, 2008 and such work was to be concluded within certain stipulated period. After obtaining the work order – Item No C 006.16.000 MO2 from BCLP, the CD, under a sub-contract, again allotted a part of such work to the OC. Such sub contract was in respect of Item No C 006.16.000 MO2 of quantity 307500.00.CUV (compacted) and Item No. C 999.99 OC9 (compacted) of quantity of work 1310000.00 (compacted), vide contract agreement dated 10-11-2008.

5. After entering into the agreement, the OC started to execute the work in the month of December, 2008 itself and completed the said work within the specified time, same being 16 (sixteen) months from the date of allotment of the work. During the course of execution of the work, running account bills (in short RA Bill) were raised from time to time as against the executed work and CD also made payment against such RA bills.

6. However, quite astonishingly, since June, 2011, the CD without there being any rhyme and reasons, defaulted in making payment of some of the bills, raised by the OC although such amount fell due on and from March, 2010. Therefore, the representatives of the OC had regularly been pursuing such matters by making emails/demand notice etc. Copies thereof are also annexed with the application which is collectively marked as Ex.-F.

7. In spite of making various requests and despite issuance of demand notice to the CD from time to time, the CD did not pay the amount which became due on and from March, 2010. In such a situation, the OC filed a Money Suit, same being Money Suit No.115/2013 on arraying the CD as one of the defendants therein and such suit was instituted before the Civil Judge, Sr. Division at Kamrup, Guwahati seeking a decree in respect of dues due to the OC together with interest accrued thereon.

8. The CD entered appearance and contended that Civil Judge, Sr. Division at Kamrup, Guwahati had no territorial jurisdiction to try such a suit. However, the trial court on hearing the parties was pleased to dismiss such a plea. The matter was thereafter carried to Hon'ble Gauhati High Court and Hon'ble High Court, on hearing the parties, set aside the order of the Trial Court holding that the court at Gauhati had no territorial jurisdiction to try such a suit and directed the trial court to render necessary order as indicated in the order dated 16-09-2017 in CRP No.130/2014.

9. Having found no other way out, the OC was forced to issue demand notice dated 11-01-2018 in Form No.4 as required under Section 8 (1) of the Code of 2016, which was served on the CD on 09-03-2018 calling upon the CD to make payment of the amount in default along with interest

accrued thereon to the OC. According to the OC, the total amount due to the OC as per information in Part IV of the application was Rs.4,48,90,155/- (Rupees Four crores forty Eighty lakhs ninety-one thousand one hundred and Fifty-five only).

10. However, till the date of filing of the present application, the OC has neither received any payment of the outstanding amount claimed nor did it bother to respond in any manner whatsoever to the demand notice, issued on it by the OC. Therefore, claiming an amount to the tune of Rs.4, 48, 90,155.00 as debt, OC has initiated this proceeding under Section 8 read with Section 9 of the Code of 2016 seeking reliefs aforementioned.

11. In support of such contentions, the OC has submitted various documents including the bank statement to show that on the date of initiation of the application under consideration, an amount to the tune of Rs.4, 48, 90,155.00 remained outstanding from the side of the CD, and therefore, there was clear default in repayment of such debt.

12. On receipt of this application, this Authority had scrutinized the same and noticed some defects in the application and accordingly, such defects were duly notified to the OC requiring it to rectify the same. In due course, the defects were rectified and thereafter, notice was served upon the CD requiring them to furnish reply to the allegations, made in the application under consideration. The OC has also served a copy of the original application as well as the rectified application upon the CD for their information and doing the needful.

13. On receipt of the notice of the application, the CD entered appearance and having filed counter affidavit, opposed the prayers, made in the application on counts more than one. It has been submitted that the present proceeding is liable to be rejected since the applicant did not divulge all the material facts which were within its knowledge and which have enormous bearing on the claims made in the application. In simple words, according to the CD, the applicant did not come to this authority with clean hands.

14. In that connection, it has been stated that long before the initiation of the present proceeding, the CD had seriously disputed the claim of the OC to the effect that the CD had owed a debt to the OC. In other words, there was a pre-existing dispute regarding the debt aforesaid. In support of such contention, it has been argued that the CD was awarded the contract in question by BCPL in 2008, the value of which was estimated at Rs.26,19,75,550.00 (Rupees Twenty-Six crore, Nineteen lakh, Seventy-Five thousand Five hundred and Fifty only). Such work was to be executed within a certain time frame.

15. CD allotted a part of such work to the applicant (OC) vide agreement dated 10-11-2008. As per the agreement dated 10-11-2008, the OC was to complete the work within the stipulated time period as per Department's Instructions and in the event of failure to complete the work in time, the OC had to bear the penalty, if any, as imposed by the Department, unless such delay in execution of the work occurred due to the default on the part of the Department.

16. The OC could not complete the work as per the agreement dated 10-11-2008. Rather it abandoned the work mid-way and left the site for which the CD had to engage another contractor, same being Ch. Sethpal Construction Co., for doing the leftover work which was earlier assigned to the OC. In that connection, an agreement was entered into between the said Ch. Sethpal Construction Co. and the CD on 05-10-2009. The said agreement has been annexed with the reply as Annexure – IV.

17. Since the OC did not complete the work as per agreement dated 10-11-2008, rather abandoned the same midway, the CD had to engage a different contractor to execute the left over work and in that process, the work, assigned to the CD could not be completed within the scheduled period –for which– time for completion of contracted work had to be extended and ultimately construction work could be concluded only on 15-03-2012, although under the original contract, the contract work was to be completed on or before 16-03-2010.

18. Copies of completion certificate issued by Engineers India Ltd. (EIL), the consultant of BCPL had been annexed with the counter affidavit as Annexure-V. Under the aforesaid circumstances, the CD was entitled to claim damages from the OC for the losses, it had suffered, because of non-completion of the work by the OC in time which, in turn, resulted in complete violation of the various stipulations in the agreement dated 10-11-2008.

19. Quite surprisingly, OC, thereafter, had served a legal notice dated 06-09-2012 on the CD demanding an amount to the tune of Rs.1, 18, 83,328.50 with interest thereon from the CD. The CD vide its reply dated 20-12-2012 not only denied the said liability but also informed that a substantial amount was due to it from the side of OC for the losses it suffered on account of delay in completion of the work as well as for the payment made in excess to the OC in respect of work, executed. Copies of legal notice dated 06-09-2012 and the reply dated 20-12-2012 from the side of CD are annexed with the counter affidavit as Annexure VI and VII respectively.

20. Immediately, thereafter, the CD vide its letter dated 01-01-2013 raised a demand for Rs.41, 63,968.00 (Rupees Forty One lakh Sixty Three thousand Nine hundred Sixty Eight only) from the OC urging the latter to pay the same within 15(fifteen) days of receipt of such letter. In the said letter,

the CD further informed that such a demand was made without prejudice to its rights to claim the penalty, same being Rs.1,30,98,778.000 (Rupees One Crore Thirty lakh Ninety Eight thousand Seven hundred Seventy Eight only), which might be imposed on it by BCPL for the delay in completion of contracted work. The OC by letter dated 21-01-2013 had disputed such demand and reiterated its claim made in its earlier notice vide notice dated 06-09-2012.

21. Soon thereafter, the OC filed a money suit before the Civil Judge, Sr. Division, Kamrup at Guwahati vide Money Suit No.115/2013 for recovery of an amount to the tune of Rs.2, 78, 48,325.50 (Rupees Two Crore Seventy-Eight Lakh Forty-eight Thousand Three Hundred Twenty-Five and paise Fifty only) from the CD along with pendente lite interest @18% per annum till realisation of the same. In the said money suit, as stated above, the question of jurisdiction was raised and ultimately, the Hon'ble Gauhati High Court upheld the claim of the CD and ordered the trial court to render necessary order for retuning the plaint to the plaintiff to be presented to the proper court.

22. The Civil Judge, Sr. Division, Guwahati thereafter, passed necessary order returning the plaint to the plaintiff (the OC herein) for filing the same before the appropriate court at Dibrugarh. However, instead of pursuing its claim before the Civil Court at Dibrugarh, the OC had most illegally tried to invoke the jurisdiction of this Authority although there are enough indisputable materials on record to show that there was a pre-existing dispute regarding the debt aforementioned and same was there since long before the initiation of the present proceeding before this Authority.

23. Therefore, as required under the Code of 2016, the CD has urged this Authority to dismiss the proceeding in hand. In support of such contentions, my attention has been drawn to the decisions of the Hon'ble Supreme Court rendered in the case of K. Krishnan Vs Vijay Nirman Company Pvt. Ltd. reported in 2018 SCC Online SC 1013 [Civil Appeal No.21824 of 2017 – decided on August 14, 2018

24. The OC has, however, denied the claim made in the counter affidavit/reply stating that the OC has a genuine claim for an amount of Rs.1,80,83,328.50 (without interest) as on **19-03-2018** (as per demand notice) and in order to defeat such a genuine claim, the CD has raised such spurious plea just to defeat the proceeding initiated before this Authority by the OC seeking initiation of Corporate Insolvency Resolution Process (in short "CIRP") for occurrence of default in the payment of the debt due to the OC from the side of the CD.

25. I have heard Mr. Gaggar, learned CA appearing for the OC and also Dr. Saraf, learned Sr. Advocate appearing for the CD. The learned legal representative appearing for the applicant as well as the learned Sr. Counsel appearing for the CD reiterated the case, the parties had projected through their pleadings. But one thing which becomes very apparent from the pleadings of the

parties is that the CD wants the dismissal of the proceeding contending that there was undisputable pre-existing dispute as to the debt under consideration.

26. In such a situation, I find it necessary to know what the term "dispute" means. Section 5(6) of the Code defines the word "dispute". For ready reference same is reproduced below: -

> "5. Definitions. –
>
> ....
>
> (6) "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;"

27. It is worth noting that Hon'ble Apex Court too in the case of K. Krishnan (supra) had the occasion to consider the term "depute "as contemplated in section 5(6) of the Code. On considering the term "depute" from various angles, Hon'ble Apex Court gave its finding on the term "depute" in the following manner: -

> *"7. A reading of Section 9(5) (ii) (d) would show that an application under Section must be rejected if notice of a dispute has been received by the operational creditor. In the present case, it is clear o facts that the entire basis for the notice under Section 8 of the Code is the fact that an Arbitral Award was passed on 21.07.2017 against the Appellant. As has been pointed out by us, this clearly appears from the gist of the case that was filed along with the insolvency petition. The fact that the reply of 16.02.2017 to the notice given with the insolvency petition. The fact that the reply of 16.02.2017 to the notice given under Section 8 was within 10 days, and raised the existence of a dispute, also cannot be doubted.*
>
> *8. However, learned counsel appearing on behalf of the Respondent strongly relied on the fact that this is not an ordinary case inasmuch as the amount of Rs.1.71 Crores which was awarded was admitted by Mr. Banerji's client in the arbitral proceedings to be a debt due, ad that this being so, there can be no dispute regarding the same. We are afraid that we are unable to agree. As was correctly pointed out by Mr. Banerji, counter claims for amounts far exceeding this were rejected by the learned Arbitral Tribunal, which rejection is also the subject-matter of challenge in a petition under Section 34 of the Act. It is important to note that unlike counter claim Nos. 1 and 2, which were rejected by the Arbitral Tribunal for lack of evidence, counter claim No.3 which amounts to Rs.19,88,20,475/- was rejected on the basis of a price adjustment clause on merits. Therefore, it is difficult to say at this stage of the proceedings, that no dispute would exist between the parties.*
>
> *9. Our recent judgment in Mobilox Innovations (supra) throws considerable light on the issue at hand. While referring to the legislative history of the Code, this Court referred t the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law. One of the things the Legislative Guide spoke about was whether the debt is subject to a legitimate dispute or set-off, in an amount equal to or greater than the amount of the debt. Another think spoken of was that improper use of the insolvency process would occur in cases where a creditor uses insolvency as an inappropriate substitute for debt*

enforcement procedures, even though they may not be well developed. (See para 13 of the judgment)

10. *The Notes on Clauses annexed to the Bill of the Insolvency Code were also referred to by this Court in Para 27 of the judgment. The important sentence in these Notes of Clauses needs to be reproduced, which is done herein below: -*

> *"This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations."*

11. ***This Court also noticed that the original Bill which ultimately became the Code had the expression "bona fide dispute" contained in an inclusive definition.*** *It is significant to note that by the time the Code was enacted the expression "bona fide" was dropped. (See para 32 of the judgment)*

12. *After referring to Section 8, the judgment went on to hold that what is important is that the existence of the dispute and/or a suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.*

13. *The Adjudicating Authority, therefore, when examining an application under Section 9 of the Act, will have to determine the following: -*

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act).

(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 the 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?"

14. *If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act".*

15. *In para 38, this Court cautioned:*

We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

16. *Finally, the law was summed up as follows:*

51. *It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or*

arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

.....

22. *We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process Under Sections 34 & 37 has taken place."*

28. It is, thus, evident from the aforesaid decision that once the corporate debtor succeeds in showing that there is a pre-existing dispute regarding the debt which is not spurious, hypothetical or illusory the Adjudicating Authority has no other option but to dismiss the application seeking initiation of CIRP.

29. In the aforesaid backdrop, let us see if the dispute in respect of debt, so alleged by CD, comes within the purview of dispute as contemplated in Section 5(6) of the Code of 2016 which was further explained by Hon'ble Supreme Court in the case of K. Krishnan (supra). In order to appreciate the above question, I find it necessary to have a look at the pleaders notice dated 06.09.2012 from operational creditor addressed to CD as well as pleaders notice dated 20.10.2012 from CD addressed to operational creditor. For ready reference those two letters are reproduced below:

"Date: - 06-09-2012

By Speed Post with A/D

To,
M/S. Super Infratech PTE Ltd.,
(A Company registered under the companies Act 1956)
Regd. Office- T. R. Phukan Road,
Chiring Chapori,
P. O- Dibrugarh – 786 001.
Assam

Dear Sir,

Sub: Advocate's Notice
My Client: - M/s. Hill View Coals (P) Ltd.
(A Company registered under the
Companies Act, 1956) having regd. Office
at 53/1 Burtolla Street, Kolkata- 700007
and also at Suit No:206, 2nd floor,
Beltola, Guwahati 781 028, Assam

Under instructions from my Client and on his behalf I am to state as follows: -

In accordance with deed of agreement executed between you and my client as on 10th Day of November, 2008 and 2nd January 2010 my client had done a sub – contract work for site grading work at Lepetkata, BCPL complex under M/s. Super Infratech Pte Ltd. and completed the work in time frame in march 2010 but still Rs.1,80,83328/50 (Rupees One Crore eighty Lakh eighty three thousand three hundred twenty eight and paise fifty) is outstanding which you have most unjustly been refraining yourself from making said payment to-gether with 18% p. a. interest by which you are indebted to my said client through you also dispatched TDS Certificates without said payments.

You, acknowledged your liability by offering last payment vide cheque No; 29040 dated 24.06.2011 received from SIPL amounting to Rs.1,50,000/- (Rupees one Lakh fifty thousands, only).

I have since been instructed by my client above mentioned client to inform you that if you do not take energetic steps to clear off the said dues within fifteen days from the receipt hereof, My client may be in the painful necessity to initiate stringent legal proceedings against you for recovery of the said outstanding amount without any further reference to you and in such case you shall be liable for the expenses, costs and consequences, which please note.

Yours Faithfully
Sd/- Advocate."

"Reg. with A/D

Date: 20-10-2012

To,
Rajendra Kumar Mittal,
Hastings Chambers,
7-C, Kiran Shankar Roy Road,
Kolkata- 700 001

Sub: Reply to your Notice dated 14.09.2012 on behalf of my client.
Ref: Your Notice dated 14.09.2012
My client:
M/s Super Infratech PTE Ltd.
(A company registered under the Companies Act, 1956)
Registered Office: T. R. Phukan Road,
Chirang Chapori, P.O. Dibrugarh, Pin- 786 001,
Assam

Dear Sir,

With reference to the above and under the authority and instructions from my client M/s. Super Infratech PTE Ltd., I beg to state as follows:

That sir, my above named client denies the statements made in your notice dated 14.09.2012 to the effect that your client had completed the work in time frame in March, 2010 but still Rs.1,80,83,328.50/- is outstanding which my above named client have most unjustly refraining from making said payment together with 18% p.a. interest. The statements are vague and baseless. Be it stated herein that the contractual work was not completed by your client within the stipulated time frame set by the M/s. Brahmaputra Cracker & Polymer Ltd. (BCPL), however, the work was completed only on 15.03.2012. The delay in completion of the contractual work has attracted penalty imposed by M/s. Brahmaputra Cracker & Polymer Ltd. (BCPL) upon my above named client. As per Clause 05 of the agreement dated 10.11.2008 entered by and between your client and my above named client, your client is liable to bear the penalty imposed by the M/s. Brahmaputra Cracker & Polymer Ltd. for delay in completion of the work.

My above named client reserves its rights to initiate appropriate steps for realization of the amount of penalty and other dues from your client.

Further, no amount is due or payable to your client by my above named client. My above named client has never acknowledged any liability towards your client at any point of time. Rather, I have instructions from my client that there is substantial amount receivable from your client on account of delay in completion of the work as well as other excess payments made to your client.

I, therefore, request you to refrain your client from making any vague and baseless demands of money from my above named client and kindly advise your client accordingly,
Thanking you,

Yours Faithfully,
Sd/- (Arunangshu Dhar) Advocate"

30. A very careful perusal of those two pleaders notice leaves no manner of doubt that way back in 2012, the CD stoutly denied having any liability to pay off any amount to the OC for the work, done on its behalf. Such revelations clearly evince that a dispute between the CD and OC did exist in respect of the debt under consideration. Such conclusion of mine gets strengthened more and more when one considers the letter dated 01.01.2013 from the CD, addressed to OC (annexure-IX) as well as the letter dated 21.01.2013 from OC addressed to CD (Annexure-X to the counter affidavit) alongside the pleaders notice dated 06.09.2012 and the pleaders notice dated 20.10.2012.

31. It needs to be stated here that under the letter dated 01.01.2013, the CD not only reiterated its earlier allegations hurled at the OC but also demanded an amount to the tune of Rs.41,63,968/-, same being the damages, reportedly suffered by the CD for the OC's negligence in completing the work, allotted to it within the stipulated period. However, the operational creditor under the letter dated 21.01.2013 denied all those allegations, hurled at it under the letter dated 01.01.2013.

32. It is equally worth noting here that unable to recover the alleged dues from the CD, the operational creditor evidently and admittedly approached the Civil Court at Guwahati by way of money suit seeking decree for realisation of an amount to the tune of Rs.2,78,48,325 .50/- together with pendente lite interest on the principal amount. It is well evident, now that the plaint in said suit was ordered to be returned to the plaintiff (OC herein) for being filed in the appropriate court. Such admitted facts, in my opinion, throw more and more weight behind the above conclusion of mine that there was a p-re existing dispute in respect of debt under consideration.

33. Here, it deserves a mention that the Insolvency and Bankruptcy Code of 2016 is a special legislation basically designed, among other things, to revive an ailing enterprise/organisation. It is not a modicum or measure to recover the dues from the defaulting entities although there is always chance to get back to the debt or part thereof in the event the enterprise is forced to go on liquidation. In other words, the IBC is not at all a substitute for civil law dealing with recovery of dues from the defaulting persons/institutions/organisations.

34. However, the applicant seems to have approached this Authority solely for the purpose of getting back its alleged dues from the CD since when the applicant was enquired as to why it did not approach court of competent jurisdiction to institute a suit to get back its alleged dues from the CD as directed by the Civil Court at Guwahati, the learned legal representative appearing for the applicant submits that by the time the plaint was returned to the plaintiff for being presented to the court of appropriate jurisdiction, the IBC has come into being and as such, the operational creditor, instead of approaching the civil court of appropriate jurisdiction , had approached this Authority seeking initiation of CIRP against the CD. Such conduct on the part of operational creditor, in my opinion, needs to be deprecated.

35. Mr. Gaggar, CA appearing for the OC further submits that the prayer seeking dismissal of the proceeding under consideration, so made from the side of the CD, needs to be rejected for another very valid reason. In that connection, my attention has been drawn to Section 8, more particularly, 8(2) (a) of the Code. For ready reference, the same is reproduced below: -

> *"8. (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*
>
> *(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute*
>
> *(b) .....*

36. In the present case, the CD admittedly did not respond to the demand notice dated 09-03-2018, at any point of time, much less its responding to such notice within a period of 10 days from the date of receipt of demand notice, as required under the law. Since, the CD did not follow the mandate in Section 8 (2) (a) of the Code, it is debarred for raising the plea that there was a pre-existing dispute in respect of the debt in question.

37. Dr. Saraf, appearing for the CD has, however, contended that such plea cannot be accepted since there is enough information in the application itself which unmistakably shows that the CD has always been disputing the debt claimed by the OC and it has been doing so long before the initiation of present proceeding. In that connection, my attention has been drawn to various Annexures, attached with the application, more particularly, the plaint in Money Suit No.115/2013 vide Para 4 of running pages 17 (internal page 4) & paragraphs in running page 18 (internal page 5) of the application.

38. I have considered such submissions and found that it has rightly been pointed out from the side of CD that the documents, annexed with the application, clearly evince that there exists a dispute between the OC and CD in respect of the debt in question and such dispute came into being

as early as 2012-2013. Such revelations, in my firm view, show that the lapses on the part of CD in not complying with the direction in Section 8(2) (a) of the Code of 2016 cannot be allowed to grow beyond its size so as to come in the way of accepting the prayer of the CD made in the counter affidavit.

39. On considering the pleadings of the parties in their totality having regard to the submissions, advanced by learned legal representative appearing for OC as well as learned Sr. Advocate appearing for the CD, I have found reason to conclude that the CD could establish that there is a dispute between the parties hereto regarding the debt in question which is not spurious, hypothetical or illusory and such dispute was there since long before the initiation of present proceeding.

40. Resultantly, this proceeding is dismissed for the reasons aforementioned.

41. I make it clear here that any observation made in this order shall not be construed as expression of opinion on merit on the controversy in any other suit or proceeding and the right of the applicant before any other forum shall not be prejudiced on account of dismissal of instant application

(Adjudicating Authority)
National Company Law Tribunal
Guwahati Bench: Guwahati.

Deka