

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

C.P.No.IB-316/ND/2017

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

In the matter of:

**RAMCO Systems Limited
47, PSK Nagar,
Rajapalayam Kamaraja,
Dist. Tamil Nadu-626108 IN**

... Operational Creditor

**SPICEJET Limited,
Indira Gandhi International Airport,
Terminal 1D, New Delhi,
South West Delhi-110 037 IN**

..... Corporate Debtor



Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Counsel for the Petitioners: : Mr.Raj Dev Singh, Advocate
: Mr.Siddharth Singh, Advocate
: Mr.Arijeet Banerjee, Advocate**

**Counsel for the Respondents : Mr. Virender Ganda, Senior Advocate,
: Mr. Abhishek Sharma, Advocate
: Ms.Ashly Cherian, Advocate**

Order delivered On: /12/2017

ORDER

This is an application which has been filed by the Operational Creditor namely RAMCO Systems Ltd. under the provisions of Sections 8 and 9 of Insolvency and Bankruptcy Code, 2016 (for brevity IBC,2016) against the Corporate Debtor namely Spicejet Limited. The transaction leading to filing of the present Petition, it is averred in the Petition is that the Operational Creditor and Corporate Debtor agreed and entered into an Aviation Software Solutions Agreement dated 13.5.2013 and pursuant to the said agreement, Operational Creditor had issued invoice No.INAVN/DIN1/0007/14, amounting



to Rs.1,12,36,000/- to the Corporate Debtor for payment of license fee along with execution of documents and this was followed up with another invoice bearing No.INAVN/DIN1/0008/14 dated 30.5.2013 amounting to Rs.89,88,800/- and in relation to the said invoice it is averred by the Operational Creditor that a sum of Rs.26,98,880/- was paid by the Corporate Debtor towards part payment of the invoice and there yet remains a balance of Rs.62,89,920/-. Subsequent to the above, it is averred by the Operational Creditor that on 1.7.2014 in relation to the Software License agreement dated 13.5.2013, an addendum was agreed and entered into between the parties. Pursuant to the same, Operational Creditor had issued a Change on Demand Order No. COD. Jun14-1/SK-M&E/2014 and again pursuant to this addendum to the Software License Agreement dated 13.5.2013, it is averred that the Operational Creditor had issued invoice No.INAVN/DIN2/0001/15 amounting to Rs.59,83,170/- to the Corporate Debtor in terms of the addendum dated 1.7.2014. On 23.7.2014 it is averred that a further invoice was also raised and issued bearing No.INAVN/DIN2/0002/15, amounting to Rs.33,70,800/- to the Corporate Debtor for additional services and personalization.

2. While so, it is averred by the Operational Creditor that on 19.1.2016 an email seeking balance in relation to Spicejet Ltd. being the Corporate Debtor under the hand of its Auditor was received by the Operational Creditor and that the said email was also responded to on the same date



i.e. 19.1.2016. Further, along with the said email sent by way of response, a statement of account was also attached to sustain the outstanding amount claimed by the Operational Creditor. Pursuant to these exchanges, on 10.11.2016, Operational Creditor avers that a notice was issued for the outstanding sums due from the Corporate Debtor wherein an amount of Rs.2,46,98,090/- was claimed as due arising out of invoices dated 17.5.2013, 30.5.2013 and 23.07.2014 aggregating to a sum of Rs.1,22,73,090/- and Rs.1,24,25,000/- towards unbilled license amount. However, due to lack of response, a notice under the hand of its legal Counsel dated 13.1.2017 was issued to the Corporate Debtor demanding a sum of Rs.2,99,32,640/- as outstanding due along with interest at 18% per annum failing which to face winding up and this was followed up with demand notice dated 24.4.2017 under Section 8 of IBC,2016 read with Attendant Rules wherein a sum of Rs.2,99,32,640 as principal amount and Rs.1,88,54,560/- as interest calculated at 18% till 31.3.2017 in all aggregating to Rs.4,87,87,200/- was claimed as unpaid operational debt due from the Corporate Debtor.

3. In view of lack of response by way of payment of the amount claimed in default or notice of dispute being issued to the Operational Creditor on the part of the Corporate Debtor, the above Application has been preferred wherein an operational debt in a sum of Rs.4,87,87,200/- is claimed as the amount in default from 24.4.2017.



4. The Respondent has filed a detailed reply wherein the claim as made by the Operational Creditor is sought to be resisted on the following grounds:

- i. In relation to the demand notice dated 24.4.2017, it is contended that the same has been issued without attaching the invoices based on which the purported debt is claimed by the Operational Creditor and is sought to be established. In connection with the same it is also pointed out that invoice No.INAVN/DIN2/0001/15 for the amount of Rs.59,83,170/- and invoice No.INAVN/DIN2/0002/15 for an amount of Rs.33,70,800/- both dated 23.7.2014 had never been issued to the Corporate Debtor and hence taking into consideration the provisions of Section 9(5)(ii)(c), it is contended that this Tribunal is required to reject the Application in as much as the invoices had never been delivered to the Corporate Debtor by the Operational Creditor giving rise to the claim.
- ii. Despite sufficient time having been granted to the Operational Creditor to file the certificate from the bankers in compliance with the provisions under Section 9(3)(c) of IBC,2016, the same is not in order as per the requirements of the provisions of IBC,2016. In this connection, it is also pointed out that the amounts paid to the Operational Creditor by the Corporate Debtor for the period from



13.5.2013 till the issuance of the certificate have not been correctly reflected as the certificate shows only two payments made on 16.8.2013 of Rs.47,96,095/- and on 7.10.2013 of Rs.18,00,000/- which is contrary to the averments of Petitioner/Operational Creditor which has admitted at para 5-6 of the synopsis that a sum of Rs.1,12,36,000/- and Rs.26,98,880/- have been paid and the said payments have not been reflected in the banker's certificate and in the circumstances the same cannot be considered.

- iii. It is also contended by the Respondents in their reply that the claim also includes an unbilled license amount of Rs.1,42,88,750/- that too dated 13.3.2013 which is prior to the date of execution of the agreement. However, in so far as the Petition is concerned, the Petitioner/Operational Creditor is seeking to enforce its claim arising out of the agreement executed by it on 13.5.2013 which is quite paradoxical and the Petitioner is required to explain as to how the amount anterior to the agreement dated 13.5.2013 be enforced. In this regard, it is also contended that no averments have been made in the Application or in the demand notice in relation to the date of accrual of the said sum of Rs.1,42,88,750/- and when it became due but however sought to be enforced which clearly points out to the abuse of process of law on the part of the Operational Creditor in



trying to establish a non-existent claim resulting in extortion of the Corporate Debtor by the Operational Creditor.

- iv. It is also contended by the Corporate Debtor that in view of existence of dispute in as much as the demand notice issued by the Operational Creditor relying on the e-mail communication dated 19.1.2016 issued by the Auditor of the Corporate Debtor for seeking or enforcing the claim, however, had failed in giving the annexure or attachment with the e-mail sent and that the same has not been placed on record along with the Application and in its absence the contents of the same are not known. Even though in the response dated 19.1.2016, the Petitioner/Operational Creditor had repeated that payment in relation to three invoices were outstanding dated 17.5.2013, 30.5.2013 and 23.07.2014 for a total amount of Rs.1,56,43,890/- however, had failed to provide details of the same even at that stage when the response was sent by the Operational Creditor nor even at the present stage either at the time of issue of demand notice or at the time of filing of this Application, the said invoices have been annexed.
- v. The balance confirmation letter in the circumstances cannot be considered as an acknowledgement of debt and it is pointed out that no ledger account had been produced by the Operational Creditor before this Tribunal in order to sustain the claim.



- vi. It is also pointed out by the Respondent in its reply that different amounts/ claim are being made by the Operational Creditor in as much as in the legal notice dated 10.11.2016 a sum of Rs.1,24,25,000/-is claimed as unbilled license fee which is also repeated in another legal notice dated 13.1.2017. However, in the demand notice it had been escalated to Rs.1,42,88,750/-.
- vii. The Respondent also takes the plea of the claim being barred by limitation under the provisions of Limitation Act, 1963.
- viii. Failure to disclose the nature of services which had been rendered by the Operational Creditor to the Corporate Debtor based on which the claim is made and that the services rendered, if any, had been rendered to the satisfaction of the Corporate debtor has also not been stated in the Petition nor any proof filed to sustain such a statement.
- ix. It is also further pointed out that the evidence of occurrence of default has also not been satisfactorily explained as required under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 hereinafter called as 'AAA Rules'.
- x. The Respondent also point out that in relation to the e-mail dated 3.7.2015, it can be discerned that the Operational Creditor had admitted that even 50% execution of the requirement under the agreement dated 13.5.2013 and the addendum entered into on 1.7.2014 has not been complied with and hence the claim that it has



rendered satisfactory services and that the Petitioner/Operational Creditor has complied with the agreement as entered into between the parties is not proved and taking all this into consideration which evidences in any case a dispute in existence and the Application as filed by the Petitioner/Operational Creditor is required to be dismissed.

5. Rejoinder to the reply of the Corporate Debtor has also been filed by the Petitioner wherein apart from reiterating what has been stated in the Application/Petition, Operational Creditor has contended that the agreement was entered into by the parties out of the satisfaction evidenced by Corporate Debtor of RAMCO Aviation Systems and based on which license was issued for its use to the Corporate Debtor by the Operational Creditor in relation to its existing and future fleets or aircrafts and in acceptance of the same the billing was raised and not as contended by the Corporate Debtor. It is also averred in the rejoinder that demand notice dated 24.4.2017 filed as Annexure-I, all particulars including the details of invoice dated 30.5.2013 was also disclosed and in view of the said disclosures, the contention that disclosure was not made relating to the invoice is not correct. It is also reiterated in the rejoinder that the claim to the extent of Rs.4,87,87,200/- in relation to principal amount outstanding arising out of three invoices dated 17.5.2013, 30.5.2013 and 23.07.2014 as well as unbilled amount all to the extent of



Rs.2,99,32,640/- in addition to interest at 18% per annum amounting to Rs.1,88,54,560/-. Further it is also contended that the invoices itself reflect that the payments were required to be made within a period of 30 days of the execution of the agreement. It is also pointed out in the rejoinder that the Limitation Act will not apply as held by the Hon'ble Appellate Tribunal in Neel Kamal's case and in the circumstances the claim as made by the Operational Creditor should be sustained.

6. We have carefully considered the plea of the rival parties before us. Before going into the merits of the claim certain pertinent objections have been raised by the Corporate Debtor which are required to be dealt with. First among them is the plea of limitation. However, in relation to the said plea, the Hon'ble NCLAT has time and again reiterated by way of several of its judgments that Limitation Act, 2013 has no application in so far as the claim made under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC,2016). The following extract as passed by the Hon'ble NCLAT in the case of Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Ld. In Company Appeal (AT)(Insolvency) No.91 of 2017 relating to the aspect of limitation is reproduced hereunder:

7. The questions that arises for consideration is :

"Whether the application preferred by appellant - operational creditor is barred by limitation?"



8. Learned counsel for the appellant contended that law of limitation is not applicable and referred to decision of this Appellate Tribunal in “**Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.**” of Company Appeal (AT) (Insolvency) No.44/2017.

9. In spite of service of notice the respondent has not appeared to contest this appeal. The pleading made in the company petition and the appeal has not been controverted.

9. In ‘Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.’, similar plea was taken by the appellant of the said appeal. This Appellate Tribunal by Judgement dated 11th August, 2017 observed and held as follows:

“The next ground taken on behalf of the appellant is that the claim of the respondent is barred by limitation, as the Debentures were matured between the year 2011 – 2013 is not based on Law. There is nothing on the record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I&B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.”

10. In Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd., Civil Appeal No.10711 of 2017, the parties raised before Hon’ble Supreme Court the question of application of Limitation Act for initiation of Corporate Insolvency Resolution Process under I&B Code. The Hon’ble Supreme Court by order dated 23rd August 2017 while dismissing the appeal observed as:

“In view of the this, we find no merit in the appeal. Accordingly, the appeal is dismissed keeping the question of law viz. whether the Limitation Act would apply to this proceeding, open.”

11. In this case even if it is accepted that the Limitation Act, 1963 is applicable for initiation of Corporate Insolvency Resolution Process, in such case Article 137 of the Limitation Act, 1963 will be applicable, which is quoted below:



"Description of application	Period of Limitation	Time from which period begins to run
Any other application for which no period of limitation is provided elsewhere in this division."	Three years	When the right to apply accrues

12. Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016. Therefore, the right to apply under I&B Code accrues only on or after 1st December, 2016 and not before the said date (1st December, 2016). As the right to apply under section 9 of I&B Code accrued to appellant since 1st December, 2016, the application filed much prior to three years, the said application cannot be held to be barred by limitation.

7. Taking into consideration the above judgement of Hon'ble NCLAT which has subsequently also consistently reinforced that the plea of limitation cannot be taken into consideration as a ground to challenge maintainability of a Petition under IBC,2016 the plea of the same raised by the Corporate Debtor herein cannot be considered.

8. The next objection as raised by the Corporate Debtor is in relation to maintainability of the Company Petition on the basis of Section 8 notice issued under IBC,2016 being the notice of demand issued by a person who is not properly authorized to issue such a notice on behalf of the Corporate Debtor. At the time of oral submissions Ld. Sr. Counsel appearing for the Corporate Debtor/Respondent vehemently stressed on



this particular aspect and in this connection reference was made to the typed set filed alongwith the application to page number 86 and more particularly attention was drawn to page number 89 and it was pointed out by the Ld. Sr. Counsel appearing for the Respondent amongst others that the notice of demand which is required to be sent in the proforma strictly as specified in form-3 and signed by an authorized person holding a post/status in relation to the Operational Creditor under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules,2016 has not been sent and further it is also pointed out that one Mr.Satish Kumar K claiming to have signed the said notice for and on behalf of the company however is not authorized on behalf of Operational Creditor to issue such notice particularly at the time of issue of the said notice dated 24.4.2017. This according to the Ld. Sr. Counsel for the Corporate Debtor is evident from the board resolution which has been annexed alongwith the Petition at page number 9-11 alongwith authority letter claiming to be given to the said Mr. Satish Kumar K by one Mr. R.Ravi Kula Chandran, Chief Financial Officer which is dated 22.8.2017 and which is posterior to the date of issue of the said notice. Further, Ld. Senior Counsel for the Corporate Debtor also points out to the resolution passed in the board meeting held on 07.02.2017 by the Operational Creditor wherein certain persons named therein have been authorised to do certain acts and that in the said resolution the name of the person who



has signed the notice under Section 8 on behalf of the Corporate Debtor is not to be found. As pointed out by the Ld. Sr. Counsel for a Corporate Debtor upon careful perusal of the certified true copy of the resolution passed in the Board meeting held on 07.02.2017, it is seen that the name of the person namely Mr.Satish Kumar K who has signed the notice of default is not to be seen even though the name of Mr.R.Ravi Kula Chandran, Chief Financial Officer who seems to have delegated his authority given by the Board to him as well as to others subsequently to Mr. Satish Kumar K, long after the issue of notice of demand which is dated 24.4.2017 and the authorization letter as already stated is dated 22.8.2017. By now it is trite that the notice of default required to be issued under Section 8 and which is required to be in the format as prescribed in Form-3 or Form-4, as the case may be, of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules,2016 should be signed in relation to Corporate Debtor only by the person who is authorized to do such an act as the issue of such notice upon the Corporate Debtor envisages serious consequences and also put in motion a chain reaction which ultimately if admitted culminates in the unleashing of Corporate Insolvency Resolution Process. The importance of Section 8 notice being the notice of default, as well as of the strict adherence to the format prescribed has been repeatedly stressed by the Hon'ble NCLAT in several of its decisions and in this connection the decision



of the Hon'ble NCLAT passed in the matter of Shriram EPC Limited v. Rio Glass Solar SA in Company Appeal(AT) (Insolvency) No.133 of 2017 wherein reaffirming its decision as passed in Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr. In Company Appeal (AT)(Insolvency) No.39 of 2017 has stated as follows:

"27. From a plain reading of sub-section (1) of Section 8, it is clear that on occurrence of default, the Operational Creditor is required to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as is prescribed.

28. Sub-rule (1) of Rule 5 of the 'Adjudicating Authority Rules' mandates the 'Operational Creditor' to deliver to the 'Corporate Debtor' the demand notice in Form-3 or invoice attached with the notice in Form-4, as quoted below: -

"Rule 5. (1) An operational creditor shall deliver to the corporate debtor the following documents, namely: -

- (a) a demand notice in Form 3; or
- (b) a copy of an invoice attached with a notice in Form 4."

29. Clause (a) and (b) of sub-rule (1) of Rule 5 of the 'Adjudicating Authority Rules' provides the format in which the demand notice/invoice demanding payment in respect of unpaid 'Operational Debt' is to be issued by 'Operational Creditor'. As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form-3 which reads as follows: -

"6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor
Name in block letters
Position with or in relation to the operational creditor Address of person signing "

30. From bare perusal of Form-3 and Form-4, read with sub-rule (1) of Rule 5 and Section 8 of the I&B Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. **The person who is authorised to act on behalf of Operational Creditor is also required to state "his position with or in relation to the Operational Creditor", meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.**

31. The demand notice/invoice Demanding Payment under the I&B Code is required to be issued in Form-3 or Form-4. Through the said formats, the 'Corporate Debtor' is to be informed of particulars of 'Operational Debt', with a demand of payment, with clear understanding that the 'Operational Debt' (in default) required to pay the debt, as claimed, unconditionally within ten days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no. 6 of notice contained in Form – 3, and quoted above.

Only if such notice in Form-3 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/Advocate notice, like notice under Section 80 of C.P.C. or for proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may decide to contest the suit/case if filed, distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issue of notice under Section 8.

32. In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an 'Advocate/Lawyer' or 'Chartered Accountant' or 'Company Secretary' in absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the I&B Code, which otherwise is a 'lawyer's notice' as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code."

6. In the present case, we find that the notice dated 5th May, 2017 under sub-Section (1) of Section 8 has been issued and signed by a Law Firm which is at Page 196, namely, 'Advani & Co. – Barristers-At-Law'. Even in the end portion of the said notice, the signature is made as ' M/s. Advani & Co.' and not the signature of any individual.

7. Learned counsel for the respondent has also not disputed the aforesaid fact and there is nothing on record to suggest that the person/Law Firm was authorised by the 'Operational Creditor' or the Law firm is holding any position within the office of the 'Operational Creditor'.

8. For the reasons aforesaid and in view of the decision in "Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Anr.", we hold that the application under Section 9 preferred by the respondent-'Operational Creditor' was not maintainable.

8. Perusal of the above extracted portion of the judgment referred to earlier as passed by the Hon'ble NCLAT clearly discloses that the individual who has signed Section 8 notice being the Notice of Default is required to hold with or in relation to the Operational Creditor some position and in addition is also required to be authorized to act on behalf of the Operational Creditor. As pointed out by the Ld. Sr. Counsel for the Respondent/ Corporate Debtor that in the notice issued under Section 8 dated 26.4.2017 even though the name of the individual and the designation has been stated but however on the date of issue of such



notice no proof has been furnished on the part of the Operational Creditor to establish that the said individual has been authorized to give such a notice on behalf of the Operational Creditor.

9. Reference in this connection to the decision of the Hon'ble NCLAT passed in Palogix Infrastructure Private Limited vs. ICICI Bank Limited Company Appeal (AT) (Insol.) No.30 of 2017 will be apposite even though rendered in so far as a Financial Creditor is concerned, more particularly in relation to who can be considered as an 'authorised person' who can act in relation to IBC,2016 on behalf of the Corporate entity and the relevant paragraph therein is extracted hereunder:-

9. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the 'Adjudicating Authority Rules' recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf (Enclose Authorisation)".

10. The signature block of the aforementioned Form-1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'.

11. xxxxx

15. Section 179 of Companies Act, 2013 empowers the Board of Directors to do all such acts that a company is authorised to do. A company being a juristic person is capable of initiating and defending legal proceedings and, therefore, the Board of Directors is empowered to exercise such rights on behalf of the Company or may duly empower 'Authorised Representative' to do so on its behalf.



16. Thereby the person authorised by the Board of Directors is duly empowered to initiate or defend any legal proceedings by or against the 'Financial Creditor/Corporate Debtor' in any Court of law including the matters relating to Insolvency and Bankruptcy proceedings. Thereby, the Board of Directors of a Bank are empowered to delegate powers to any of its officer.

17. xxxx

31. As per Section 7 of the 'I&B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by 'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-I' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

32. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.

34. xxxx

36. In so far as, the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by



and against the 'Financial Creditor' / 'Operational Creditor'/ 'Corporate Applicant', mere use of word 'Power of. Attorney' while delegating such power will not take away the authority of such officer and 'for all purposes it is to be treated as an 'authorization' by the 'Financial Creditor'/ 'Operational Creditor'/ 'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'.

37. As per Entry 5 & 6 (Part I) of Form No. 1, 'Authorised Representative' is required to write his name and address and position in relation to the 'Financial Creditor'/Bank. If there is any defect, in such case, an application under section 7 cannot be rejected and the applicant is to be granted seven days' time to produce the Board Resolution and remove the defect.

40. In view of reasons as recorded above, while we hold that a 'Power of Attorney Holder' is not empowered to file application under section 7 of the 'I&B Code', we further hold that an authorised person has power to do so.

10. It is also relevant to note as already stated that persons who have been authorized by the Board vide Resolution dated 07.02.2017 has not signed and verified the Application, whereas have chosen to further delegate authority to another individual, though representing to be an employee holding the position of General Manager Legal of the Operational Creditor. In view of the consistent stand adopted by the Hon'ble NCLAT in relation to authorization, while the person(s) authorized by the Board can sign the application, however others will not be competent to sign the application for and on behalf of the Corporate Debtor in lieu of persons who have been so specifically authorized and



the authority given by the Board cannot be delegated taking into consideration IBC,2016 being a separate code by itself.

11. Next turning to the claim perse made by the Operational Creditor, the Corporate Debtor vehemently disputes the same due to different claims being made at different points of time by the Operational Creditor and also due to inconsistency in relation to the invoices under which it is claimed and thus it is contended that there is a dispute in existence and hence the application must be dismissed. There seems to be some credence in the representation made on behalf of the Corporate Debtor which can be discerned from the conduct of the parties prior to the issue of Section 8 notice and of filing of this application by the Operational Creditor.

12. In this connection, it is pertinent to see that as per notice/correspondence sent by the Operational Creditor dated 10.11.2016 annexed as page No.84 and 85 to the typed set, the total amount claimed, leaving aside Invoice No.07/14 for which full payment had been received from the Corporate debtor, a sum of Rs.62,89,920/-



towards balance amount due in relation to Invoice 08/14 and Rs.59,83,170/- towards Invoice No. 1/15 thereby aggregating in all to Rs.1,22,73,090/= has been claimed, in addition to Rs.1,24,25,000/- claimed towards unbilled licence amount. Further, at page No.85 of the above said letter dated 10.11.2016, it is seen that the Operational Creditor has specifically observed as follows:

“We look forward to re-starting the project and you may let us know a convenient date to discuss the project planning with both the team.”

13. Thus it is quite evident that the project as envisaged by the parties had come to a standstill and that the same is yet to be completed as no records have been placed by both the parties that the same was restarted. It is also seen from the above said letter dated 10.11.2016 a statement has been made to the effect that the invoices have been long over due from 2013-2014.

14. In this connection the e-mail dated 03.07.2015 filed by the Corporate Debtor along with its typed set, detailing the correspondence sent by the Operational Creditor at page 35, being the project executive status summary discloses that the project progress is 23% and at page No. 38 the same is again reinforced. Hence in the absence of the completion of



the project on the part of the Operational Creditor, even assuming that the same is due to breach of agreement on the part of the Corporate Debtor the amount which is due cannot be ascertained by this Tribunal in the exercise of summary jurisdiction and has to be ascertained only after a elaborate trial or by way of arbitration by letting in evidence.

15. Be that as it may, even in relation to quantum of the claim, while as given in paragraphs above by communication dated 10.11.2016, a sum of Rs.1,22,73,090/-is being claimed under two invoices apart from the unbilled amount of Rs.1,24,25,000/-, in relation to a earlier communication sent on 19.01.2016 in response to the auditors seeking confirmation with respect to the Corporate Debtor, Invoice in Inv.No.0002/15 and an amount of Rs.33,70,800/- is also being claimed which invoice amount is absent in the communication dated 10.11.2016 as seen in the earlier paragraph. Similarly the amount of Rs.1,24,25,000/= claimed as unbilled amount is curiously absent in the earlier correspondence sent to the Corporate Debtor on 19.01.2016. The above inconsistencies in the claims made prior to the issue of legal notice dated 13.01.2017 and subsequent demand notice dated 24.04.2017 leads to a plausible contention in relation to the quantum of the claim coupled as well as in relation to the status of the project completion and the amounts which can be claimed as seen earlier from the Corporate Debtor by the



Operational Creditor. The inconsistency in the overall payments as well as claims made is further accentuated by the non-compliance with the provisions of Section 9(3)(c) by the Operational Creditor and in the absence of a certificate from the Financial institution maintaining accounts of the Operational Creditor confirming that there is no payment of an unpaid operational debt by the Corporate Debtor. On the other hand the certificates produced reflect certain payments made by the Corporate Debtor and even the said certificates produced are not consistent, as rightly pointed out by the Ld. Sr. Counsel for the Corporate Debtor, with the total amount admitted to have been paid by the Corporate Debtor in the synopsis and as to how the payments have been adjusted. The onus is on the Operational Creditor under IBC,2016 to establish that the debt is owed in absolute terms and that it should not or cannot be assailed by the Corporate Debtor in any manner other than being it illusory or moonshine. If it is otherwise than it gives rise to a plausible contention to be put up by the Corporate Debtor and the same cannot be considered as moonshine or illusory and in this connection reference to the judgement of the Hon'ble Supreme Court in "Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. 2017 Sec. OnLine SC 1154 will be appropriate:-

"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.”

16. Thus taking into consideration all the above and as the notice of demand dated 26.04.2017 not being supported by proper authorization, as well as the application under Section 9 of IBC,2016 as filed on behalf of the Operational Creditor not having been filed by persons who are authorized to file as per Board Resolution dated 07.02.2017 and further in view of existence of a plausible dispute between the parties and cannot be decided in a summary manner, this application stands dismissed. No order as to cost. However, the order of dismissal will not preclude the Operational Creditor from seeking other remedies as may be available to it.

Sd-
14.12.2017
(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta
12/2017