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

C.P. (I.B) No. 25/9/NCLT/AHM/2017

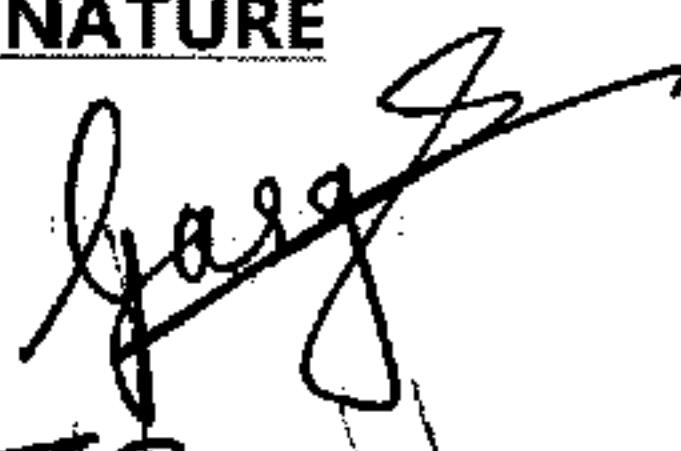
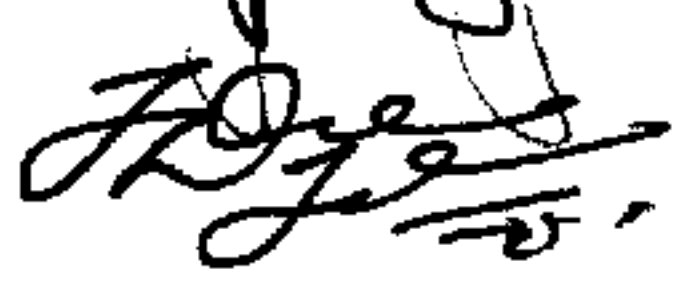
Coram:

**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 02.06.2017**

Name of the Company: RKS Advisors
V/s.
Reliance Defence & Engineering Ltd.

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

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	GARGI R. VYAS	ADVOCATE	APPLICANT	
2.	Jaimin R. Dave	Advocate	Respondent	

ORDER

Learned Advocate Ms. Gargi Vyas present for Petitioner/ Operational Creditor.
Learned Advocate Mr. Jaimin Dave present for Respondent/ Corporate Debtor.

Order pronounced in open Court. Vide separate sheet.

**BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

Dated this the 2nd day of June, 2017.

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

CP NO. (IB) 25/9/NCLT/AHM/2017

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

Date: 2nd day of June, 2017

In the matter of:

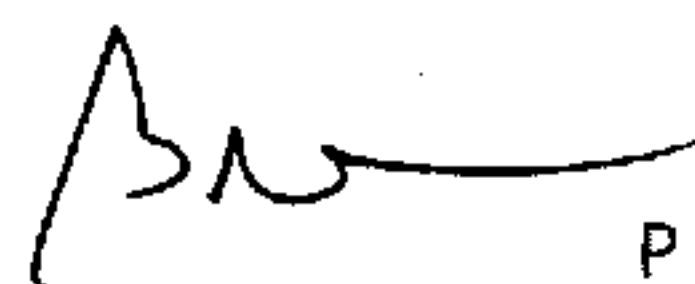
1. M/s. RKS Advisors
(through its proprietor Mr. Rajendra Kumar Soni)
Bonia Building, SLR Homes
Plot No. 18, FFI Reis Magos,
Near Nikita Enclave
Porvorim
Goa 403 521
: Petitioner
: Operational Creditor

VERSUS

Reliance Defence & Engineering Ltd.
(earlier known as Pipavav Defence &
Engineering Company Ltd.)
Pipavav Shipyard Limited Pipavav
Port, Post Uchchaya, Via. Rajula, Rajula
Gujarat 365 560
: Respondent
: Corporate Debtor

Appearance:

1. Learned advocate Mr. Navin Pahwa with learned
advocate Ms. Gargi Vyas present for Operational
Creditor/Petitioner.
2. Learned Sr. Advocate Mr. Dhaval Dave and learned
advocate Mr. Jaimin Dave Ashish present for
Corporate Debtor/Respondent

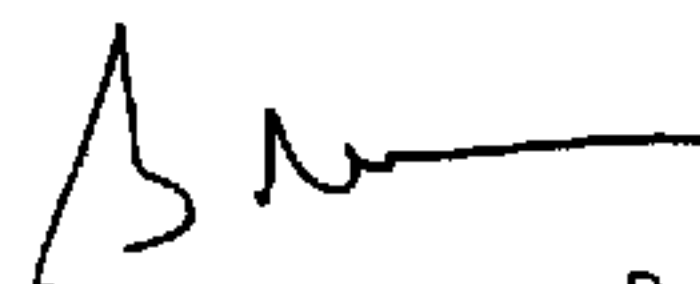


FINAL ORDER
Dated: 02-06-2017

1. M/s. RKS Advisors filed this petition 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") seeking reliefs under Section 9 and 13 of the Code.

2. The claim of the petitioner is as follows: -

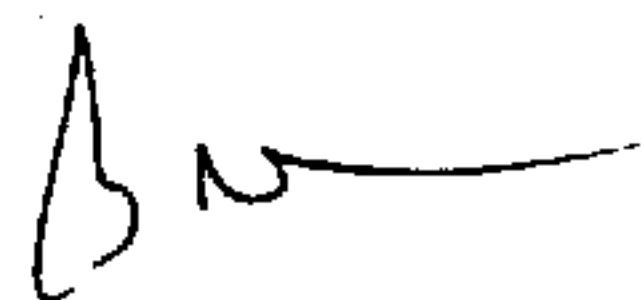
M/s. RKS Advisors was engaged as advisor to the respondent company as per consultancy agreement dated 09.12.2011 and scope of services as set forth in the contract were required to be performed solely by Mr. Rajendra Kumar Soni who is proprietor of M/s. RKS Advisors in his representative capacity. Duration of the contract was for a period of 36 months with effect from 9th December 2011. The contract was further extended for a period of one year, till 31st December, 2015. According to the petition, the respondent company was required to pay advisory fees of Rs. 1.00 crore per annum to Mr. Rajendra Kumar Soni inclusive of applicable service tax. During tenure of the contract, petitioner provided requisite services to the satisfaction of the respondent company. On 22.05.2015, Mr. Rajendra Kumar Soni conveyed his desire to terminate the contract with the respondent company. This was on account of the change in management of the company.



Resignation of Mr. Rajendra Kumar Soni was accepted by respondent company on 15.06.2015. Petitioner provided three months' notice by way of letter dated 22.06.2015 to terminate the contract as per the terms and conditions contained under clause 9 of the contract, date of termination being 30.09.2015. As per letter dated 22.06.2015, petitioner undertook to vacate the company accommodation before 30.09.2015 occupied by him. Thereafter, Mr. Rajendra Kumar Soni, by way of email intimated the company that the official laptop provided by the company and the petrol card has been returned to the IT and Administration personnel of the company and that the house leased by the company shall be vacated by 01.12.2015. Respondent company by email dated 19.01.2016 intimated the petitioner that an amount of Rs. 46,55,400/- was due to the petitioner. Petitioner again on 14.03.2016 sent a reminder mail to CEO of the respondent company but no response was given to the said email. Petitioner has raised invoice for the months April and May 2016 towards consultancy services provided for production and other related activities. Invoice dated 05.05.2015 which relates to the month April 2015 is for Rs. 8,42,700/-. Invoice dated 31.05.2015 which relates to May 2015 is for Rs. 8,42,700/- and invoice dated 30.06.2015 relates to June 2015 is for Rs. 8,55,000/-. Total amount claimed by the petitioner is Rs. 25,40,400/-. The petitioner also claimed an amount of Rs. 25,65,000/- including service tax of Rs. 3,15,000/- by way of notice period fee. M/s. RKS Advisors and Mr. Soni through their advocates served demand notice dated 06.04.2017 on the respondent company calling

upon the respondent company to pay outstanding amount. The respondent company responded to the demand notice by way of letter dated 12.04.2017 styling it as notice of dispute. Again, this was replied by M/s. RKS Advisors on 18.04.2017. According to the petitioner, there is admitted liability on the part of the respondent to pay money to him and inspite demand notice the respondent company has not paid the said amount. According to the petitioner, dispute raised by the respondent is only dispute for the sake of dispute and it is not substantial dispute.

3. Respondent filed reply stating that petitioner prematurely terminated the advisory contract vide letter dated 22.05.2015 without serving notice period of three months. Therefore, respondent company claimed Rs. 13,97,260/- being the amount in lieu of short fall in notice period. Respondent also stated that Mr. Rajendra Kumar Soni used residential premises of the respondent company between 1st July, 2015 and 1st March 2016 and in that account the petitioner has to pay Rs. 8,34,918/-. Respondent further stated that the petitioner accepted to pay rent for the house vide email dated 22.06.2015. In reply notice respondent stated that after deduction of TDS for the months April 2015 to June 2016, the amount payable towards professional fee is Rs. 2,22,500/- and after adjusting the amount of Rs. 22,32,178/- which is due to the company and payable by Mr. Soni to the company amounts to Rs. 45,323/- and it was paid by way of cheque No. 103949

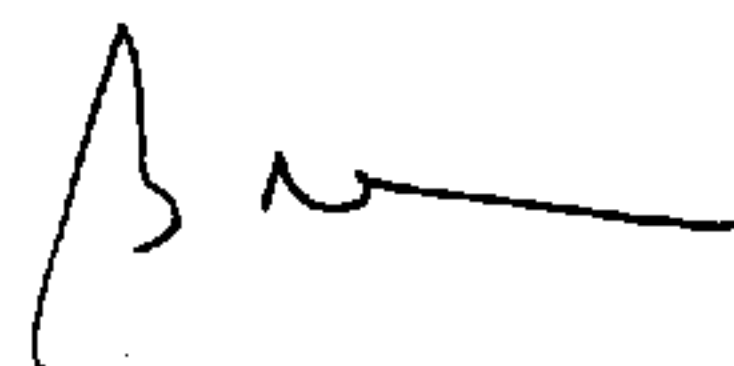


dated 05.04.2017 towards full and final settlement of the claim. Respondent in the reply to the notice denied the contents of email dated 19.01.2016 and 20.01.2016. According to the respondent, those emails cannot be considered as acknowledgement of liability. They were sent from the yahoo email id and not from company's email id. According to the respondent Mr. Rajendra Kumar Soni is not entitled to retain accommodation provided to him by the respondent company beyond 30.06.2015. According to the respondent, the reply of Mr. Bhavesh Gandhi dated 02.11.2015 cannot and does not constitute any admission of liability by the company.

4. Learned counsel appearing for the petitioner contended that the dispute raised by the respondent company in reply is not at all bona fide dispute and it is illusory dispute. Learned counsel for the petitioner further contended that the acknowledgement of liability made by way of email dated 19.01.2016 is binding on the company.
5. Learned counsel for petitioner relied upon the following decisions: -

(i) Darjeeling Commercial Co. Ltd. v/s

Pandam Tea Co. Ltd. reported in (1983) 54
company cases page 814 (cal)



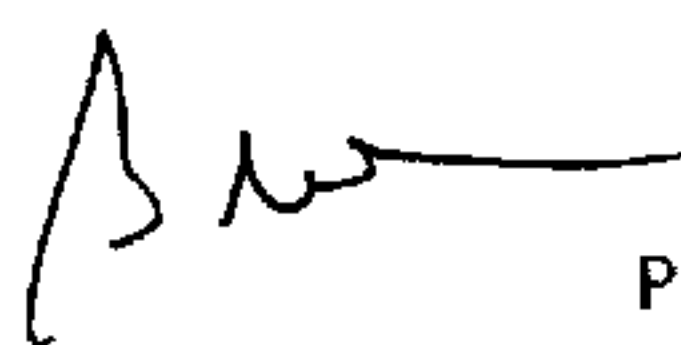
(ii) Oswal Machinery Ltd. versus Pipavav Shipyard Ltd.
Reported in 2012 (0) GLHEL-HC 229295

(iii) Decisions of Hon'ble National Company Law
Appellate Tribunal, Company Appeal (AT)
(Insolvency) 6 of 2017 dated 24th May 2017.

 Kirusa Software Private Ltd., Vs. Mobilox
Innovations Private Limited

In the first two decisions it is held that in order to invoke the jurisdiction of winding up of the company that the liability must be not be barred by limitation and the Dispute if any, raised by debtors must be bona fide dispute.

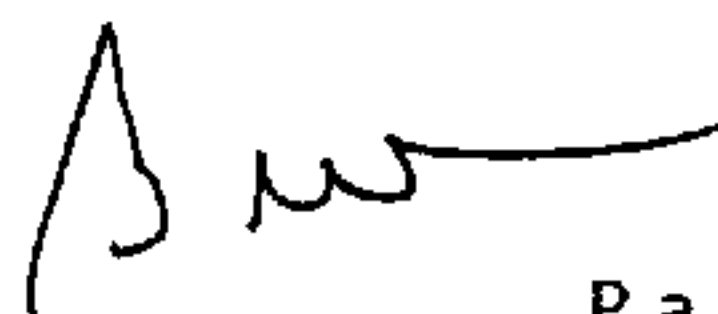
6. Learned counsel appearing for the respondent contended that the dispute raised by respondent company is bona fide dispute and the claim made by the petitioner is barred by limitation. Senior counsel for the petitioner contended that in order to admit an application filed by corporate creditors under section 9, this adjudicating authority shall make an effort to find out as to whether it is a bona fide dispute or not. He further contended that the dispute need not be pending in a suit or arbitration. It can be even by way of reply to the demand notice provided if the dispute raised by the corporate creditors is bona fide and substantial dispute. Reliance is placed upon the decision in IBA Health (India) Private Ltd., Vs. INFO-DRIVE SYSTEMS SDN BHD reported in (2010) 10 S.C. Cases page 533



wherein it is held if debt is bona fide disputed on substantial grounds petition for winding-up shall not be entertained.

7. Learned counsel appearing for the petitioner cited the decision rendered by Hon'ble National Company Law Appellate Tribunal in the matter of Kirusa Software Private Limited versus Mobilox Innovations P. Ltd. decided on 24.05.2017. In that decision it is clearly held that the dispute in Insolvency & Bankruptcy must relate to specified nature in clause (a) (b) or (c) of sub-section 6 of section 5 of the code. Hon'ble Appellate Tribunal further held that the dispute raised must not be for the sake of dispute and it should be a bona fide dispute.
8. Hon'ble National Company Law Appellate Tribunal while considering what does "dispute and existence of dispute" means for the purpose of determination of dispute in I & B code held as follows: -

"Though the words 'prima facie' are missing in Sections 8 and 9 of the code, yet the Adjudicating Authority would examine whether notice of dispute in fact raises the dispute and that too within the parameters of two definitions – debt' and 'default' and then it has to reject the application if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required. On the other hand, if the Adjudicating Authority finds that the notice of

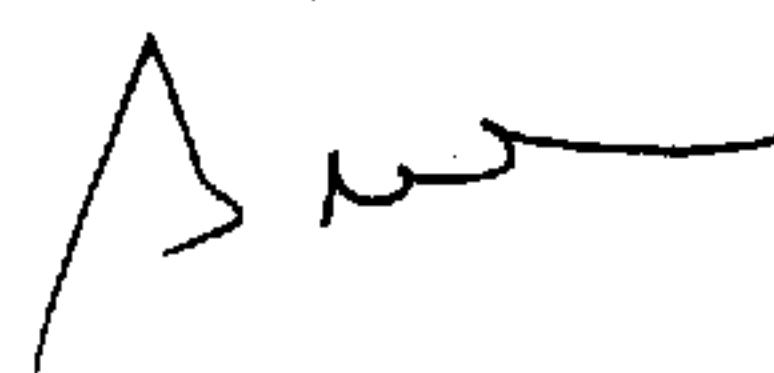


dispute lacks in particulars or does not raise a dispute, if may admit the application but in either case, there is neither an ascertainment of the dispute, nor satisfaction of the Adjudicating Authority.

"The definition of dispute is inclusive and not exhaustive. The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty."

"The intent of the Legislature, as evident from the definition of the term dispute is that it wanted the same to be illustrative (and not exhaustive). The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty"

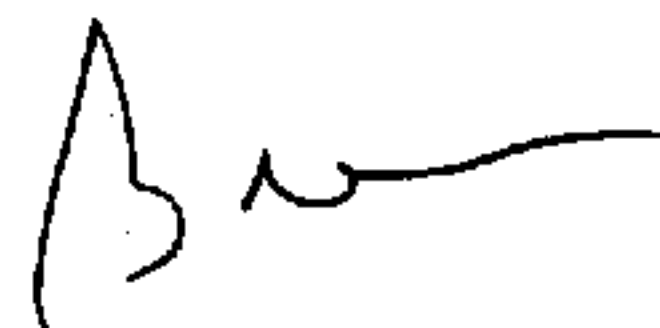
"The intent of the Legislature, as evident from the definition of the term dispute is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have



simply said dispute means a dispute pending in Arbitration or a suit"

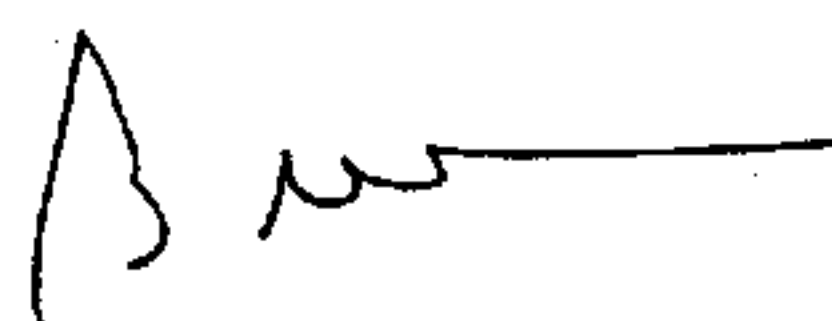
"Admittedly in sub-section (6) of Section 5 of the I & B code, the Legislature used the words 'dispute includes a suit or arbitration proceedings. If this is harmoniously read with Section (2) of section 8 of the I & B code, where words used are existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings, the result is disputes, if any applies to all kinds of disputes, in relation to debt and default. The expression used in sub section (2) of section 8 of the I & B code existence of a dispute, if any is disjunctive from the expression record of the pendency of the suit or arbitration proceedings. Otherwise the words dispute, if any, in sub-section (2) of section 8 would become surplus usage.

Sub-section (2) of section 8 of the I & B code, cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/ authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression existence of a dispute, if any, in sub-section (2) of section 8 itiose.



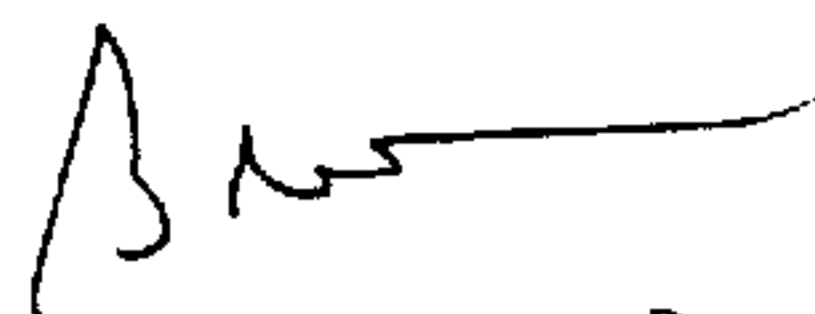
The statutory requirement in sub-section (2) Section 8 of the I & B code is that the dispute has to be brought to the notice of the Operational Creditor. The two comes post the word dispute (if any) have been added as a matter of convenience and/or to give meaning fullness to sub-section (2) of section 8 of the I & B code. Without going into the grammar and punctuation being hapless victim of pace of life, if one discovers the true meaning of sub-section (2)(a) of Section 8 of the I & B code, having regard to the context of Sections 8 and 9 of the Code, it emerges both from the object and purpose of the I & B code and the context in which the expression is used, that disputes raised in the notice sent by the corporate debtor to the Operational Creditor would get covered within sub-section (2) of Section 8 of the I & B code."

"Mere raising a dispute for the same of dispute, unrelated or related to clause (a) or (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.



9. National Company Law Tribunal, Mumbai bench in CP No. 45 of 2017 in case of M/s. DF Deutsche Forfait AG and anr. Versus M/s. Uttam Galva Steel Ltd. held that dispute must be pending in a suit or arbitration filed before the receipt of demand notice under section 8.
10. National Company Law Tribunal, Hyderabad Bench in CP (IB) No. 9 of 2017 in the case of K.K.V. Naga Prasad vs Lanco Infratech Limited. observed that the Tribunal cannot go into roving enquiry into the disputed claims of parties as the object of IBC, as explained above, is to ensure reorganisation and insolvency resolution of Corporate persons, individuals etc. in a time bound manner for maximisation of value of assets persons to promote entrepreneurship etc.
11. National Company Law Tribunal, Principal Bench, New Delhi in Annapurna Infrastructure P. Ltd. & Ors versus Soril Infra Resources Ltd. held as follows: -

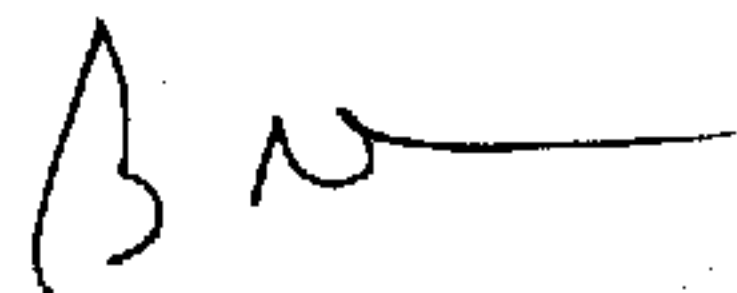
"The definition of the word dispute is not exhaustive but is, in fact illustrative. In other words, a corporate debtor is not left with the only option of showing the existence of dispute by way of a pending suit, arbitration or to show the breach of representation of warranty. The corporate debtor would be well within his right to show that goods and services were not supplied at all or the supply was far from satisfactory in



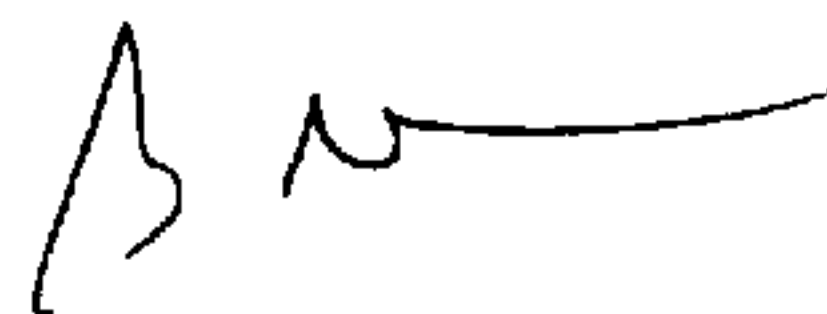
case of demand raised by an operational creditor.

Hence a corporate debtor would be well within his rights to reject the demand on any sustainable grounds. It would therefore, depend on the facts and circumstances of each case."

12. This bench in the earlier decisions, is of the view that, the dispute must be pending in suit or arbitral proceedings which is instituted before the receipt of demand notice under section 8 of the code.
13. In view of the decision of National Company Law Appellate Tribunal in Kirusa Software Pvt. Ltd. versus Mobilox Innovation P. Ltd decided on 24-05-2017 referred to supra. the dispute need not be in a suit or other proceedings and it could be even by way of reply to Demand notice but the Adjudicating Authority has to see whether the dispute raised by the corporate Debtor in the reply notice is a bona fide one on substantial grounds or it is only raised to give a colour of dispute or it is illusory dispute.
14. Considering the findings of Hon'ble Appellate Tribunal, I proceed to examine whether the dispute raised by respondent company is a bona fide dispute on substantial grounds or not.

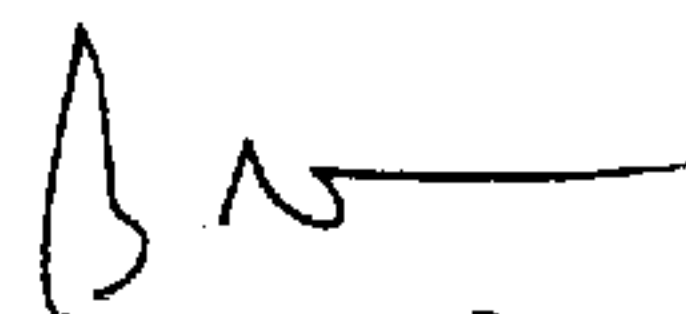


15. In view of the decision of Hon'ble National Company Law Appellate Tribunal in the matter of Kirusa Software Private Limited versus Mobilox Innovations P. Ltd. on 24.05.2017, this Tribunal has to examine whether a bona fide dispute has been raised in the reply notice dated 12.04.2016 or not. A perusal of the advisory agreement dated 09.12.2011 show that the agreement can be terminated by either party after providing adequate notice of at least three months or on breach of any of the terms by the other party. In case on hand the petitioner terminated the agreement by giving notice dated 22.05.2015. The said decision was accepted by Mr. Nikhil Gandhi of Pipavav Defence and Offshore Engineering Company Limited., by his letter dated 15.06.2015. That means in the letter dated 15.06.2015 Mr. Nikhil Gandhi stated that resignation is accepted effective from 01.07.2015. Strangely, on 22.06.2015, again another letter was written by Mr. Rajendra Kumar Soni to Mr. Bhavesh Gandhi stating that the agreement will cease formally on 30.09.2015. Again Mr. Nikhil Gandhi accepted the resignation of Mr. Rajendra Kumar Soni stating that the services of Mr. Soni could not be availed from 30.06.2015.
16. Mr. Rajendra Kumar Soni terminated the agreement dated 09.12.2011 by letter dated 22.05.2015 and the same was accepted by Mr. Nikhil Gandhi, Chairman of Pipavav Defence and Offshore Engineering Company Limited. vide letter dated 15.06.2015. It is not known what made Mr. Rajendra Kumar



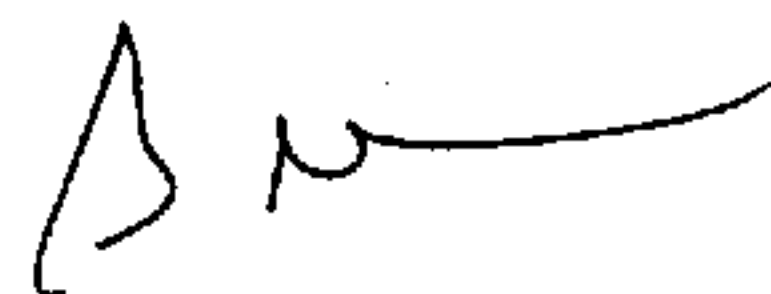
Soni to rethink about the resignation and again send a letter dated 22.06.2015 referring to clause 9 of the agreement dated 09.12.2011 and stating that date of resignation be considered as 30.09.2015. It is also strange to note that Mr. Nikhil Gandhi as Chairman of Pipavav Defence and Offshore Engineering Company Limited. again accepted resignation of Mr. Rajendra Kumar Soni by letter dated 25.06.2015 without mentioning the date from which the agreement was terminated.

17. Now the respondent took plea that the petitioner should give three months' notice for termination of agreement dated 09.12.2011 but Mr. Soni did not give such notice and therefore he is liable to pay Rs. 13,97,260/- to the respondent company.
18. Petitioner (Mr. Rajendra Kumar Soni), vide letter dated 22.06.2015 stated that he will vacate the residential accommodation of the respondent company before 30.09.2015 or else he will pay requisite rent and continue to retain the same. Mr. Soni by letter dated 01.11.2015 stated that he is going to vacate the company leased house by 1st December 2015 and leave Mumbai. Mr. Soni requested Mr. Bhavesh Gandhi of the respondent company to make appropriate deduction from the full and final settlement of dues, accordingly. From these two letters written by the petitioner (Mr. Soni) it is clear that the petitioner had to vacate the residential accommodation of the respondent company by 30th September, 2015. According to the respondent, Mr. Soni did



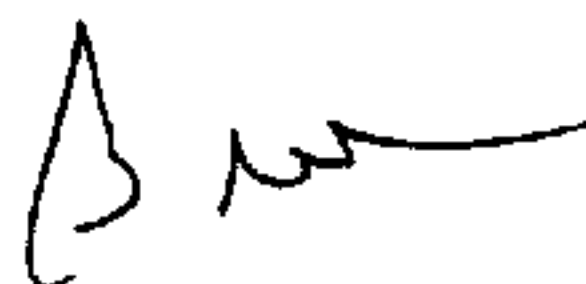
not vacate the residential accommodation of the respondent company till 01.03.2016. On that account, respondents claim an amount of Rs. 8,34,980/-. It is not a case where petitioner did not authorise the respondent company to deduct the amount payable by him towards rent. Petitioner in his letter dated 01.11.2015 has clearly authorised Mr. Bhavesh Gandhi to make deductions from his dues. In that letter Mr. Soni has mentioned that he will vacate the residential accommodation on 01.12.2015 and he may be permitted to use the driver till that period. In the same letter, in the next sentence, Mr. Soni asked Mr. Bhavesh Gandhi, representative of Pipavav Defence and Offshore Engineering Company Limited. to make appropriate deductions from the amount due to him. Therefore, letter dated 01.11.2015 of Mr. Soni gives sufficient authorisation to the respondent company to deduct the amount due to the company from the claim made by the petitioner.

19. Petitioner is basing his claim on the mail dated 19.01.2016 issued by Mr. Rakesh to Mr. Soni by way of yahoo.com. Plea of the respondent is that the said mail has no binding on the company since it was not issued from the company mail. It is pertinent to mention that Pipavav Defence and Offshore Engineering Company Limited, was taken over by Reliance Defence and Engineering Ltd. on 18.01.2016. This mail was issued on 19.01.2016 to Mr. Soni stating that the amount of Rs. 46,55,400/- was payable to the petitioner by the respondent company. But in words the amount is written as



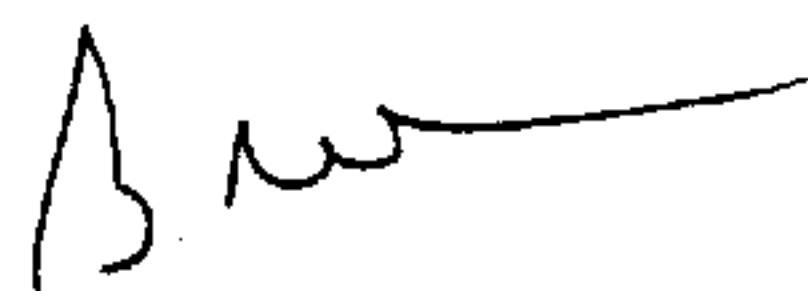
"Rupees twenty-three lacs fifteen thousand four hundred only". The said discrepancy in the amount was explained by Mr. Rakesh through his mobile mail dated 01.09.2016 itself at 07.33 p.m. The dispute raised by the respondent company is that the said email sent by Mr. Rakesh is not binding on the respondent company. However, in the reply notice, according to the respondent company, total amount due to the petitioner is Rs. 22,77,500/- and according to the respondent the amount due from petitioner is Rs. 22,32,178/- i.e. Rs. 13,97,260/- being the amount for 51 days' notice period plus Rs. 8,34,918/- towards rent. Therefore, according to the respondent company, total amount ~~of~~ payable to the petitioner comes to Rs. 45,323/- and the company has issued cheque dated 05.04.2017 for the said amount i.e. a day before issuance of demand notice.

20. The said disputes raised by respondent appears to be bona fide dispute on substantial grounds.
21. This proceeding is initiated to trigger Insolvency Resolution Process against the respondent company.
22. Authorised share capital of the respondent company is Rs. 1,50,00,00,00,000/-. Paid up share capital of the company is Rs. 7,362,062,690/-. Reserve and surplus of the company is Rs. 7,107,100,000/-. The respondent company is having huge




capital reserve. It is unfathomable that it would not be in a position to repay an amount of Rs. 46,55,400/- unless there is dispute with regard to said claim. Respondent company has been awarded contract by Indian Navy for construction of five offshore Patrol Vessels with order value of around Rs. 2,975 crores and two contracts by the Indian Coast Guard for construction of cadet training vessel with order value of Rs. 221 crores. There are 2500 employees working directly or indirectly in the respondent company. The respondent company is paying its debts in ordinary course of business. According to the respondent, under these circumstances, initiating of Insolvency Proceedings will cause prejudice and irreparable harm to the respondent company. According to the respondent there is bona fide and serious dispute regarding the purported debt. Respondent referred to the decision of Hon'ble Calcutta High Court in case of *Motilal Agarwal v/s. Diabari Tea Company Ltd.* reported in [2005] 128 Comp Cases 672 (Cal).

23. It is also a fact that the contract was entered into between the previous management of the respondent company and the petitioner. After the respondent company was taken over by the Reliance Group, petitioner initiated this proceeding on the basis of mail dated 19.01.2016 issued by Mr. Rakesh to Mr. Soni. Petitioner has got several other remedies available to recover the amount if any due to him. But the remedy chosen by petitioner is not in accordance within the objects of the I & B code.



24. In the above set of facts and circumstances defence taken by the respondent company is bona fide one on substantial grounds. Hence the petition is rejected.
25. However, findings and observations made by the Authority in this order on the claim of the petitioner or on the dispute raised by the respondent, are not binding on the parties to this dispute if raised in any other forum.
26. Petitioner is at liberty to recover the amount, if any, due to him through appropriate forum provided if it is not barred by limitation.
27. There is no order as to costs.
28. Communicate copy of this order to both parties.


BIKKI RAVEENDRA BABU
ADJUDICATING AUTHORITY
MEMBER JUDICIAL

Pronounced by me in open court on the 2nd day of June, 2017.

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