

**NATIONAL COMPANY LAW TRIBUNAL, ALLAHABAD BENCH,  
ALLAHABAD.**

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**BEFORE NATIONAL COMPANY LAW TRIBUNAL, ALLAHABAD  
BENCH, ALLAHABAD.**

**COMPANY PETITION No. 13/ALD OF 2017**

(Under sections 9 of the Insolvency and Bankruptcy Code, 2016)

**CORAM: SRI H.P. CHATURVEDI, MEMBER (Judicial)**

**IN THE MATTER OF**

M/s J.R. Agro Industries Private Limited --- Petitioner

**Versus**

M/s Swadisht Oils Private Limited --- Respondent

**AND**

**In**

**Company Petition No. 14/ALD/2017**

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M/s Abhi Agro Industries Private Limited ----- Petitioner

**Versus**

M/s Swadisht Oils Private Limited. --- Respondent

**AND**

**In**

**Company Petition No. 15/ALD/2017**

M/s Jai Lakshmi Solvents Private Limited ----- Petitioner

**Versus**

M/s Swadisht Oils Private Limited. ----- Respondent

**AND**

**In**

**Company Petition No. 16/ALD/2017**

M/s Arohul Foods Private Limited ----- Petitioner

**Versus**

M/s Swadisht Oils Private Limited. ----- Respondent

**AND**

**In**

**Company Petition No. 17/ALD/2017**

M/s Rungta Industries Private Limited ----- Petitioner

**Versus**

M/s Swadisht Oils Private Limited. ----- Respondent

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**PRESENT:** Sri Arvind Kumar Gupta, Ashish Kumar Srivastava,  
learned counsel for operational creditors and Sri Shubham Agrawal,  
Advocate along with Sri Adesh Tandon and Sri Amit Gupta, Practicing  
Company Secretary.

**ORDER****(Pronounced on 30.05.2017)**

The present application bearing Petition No. 13/ALD/2017, 14/ALD/2017, 15/ALD/2017, 16/ALD/2017 and 17/ALD/2017 are filed before this Tribunal by the operational creditors named as above to initiate corporate insolvency resolution process under the provision of Insolvency and Bankruptcy Code, 2016 against a common corporate debtor M/s. Swadisht Oil Private Limited, Kanpur.

As in these applications the alleged defaulter company / corporate debtor M/s. Swadisht Oil Private Limited is same and facts of the cases are identical in nature, hence these petitions are being decided and disposed of by a common order / judgment.

All the operational creditors of these petitions have made a proposal for an appointment of insolvency resolution professional. However, operational creditor in C.P. No. 13/ALD/2017 has alone made a proposal for the name of Sri Manish Gupta, to act as IRP.

**The particulars of the operational debts claim/ dues are described the name of company as below:**


S No.	Name of the company	Case no.	Amount of debt due in Rs
1.	J. R. Agro Industries Pvt Ltd	CP No. 13/ALD/2017	50843252/-
2.	Abhi Agro Industries Pvt Ltd	CP No. 14/ALD/2017	2859514/-
3.	Jai Lakshmi solvents Pvt Ltd	CP No. 15/ALD/2017	2640525/-
4.	Arohul Foods Pvt Ltd	CP No. 16/ALD/2017	2475178/-
5.	Rungta Industries Pvt Ltd	CP No. 17/ALD/2017	1497879/-

It is contended by the petitioners / operational creditors in such petitions that the corporate debtor M/s. Swadisht Oil Private Limited despite admitting of its liability to the extent of above mentioned has now failed to pay such amount even after a receipt of the demand notice issued by the operational creditors as per the provisions of I & B Code.

Facts leading to the filing of the present petitions are incorporated in part IV of respective applications and as described in Para 1-A to 1-T in of respective petitions common grounds those are taken by the operational creditors / to move the present I & B petition CP No.13/ALD/2017 may be summarised as under and as specially described there in:

*That the corporate debtor M/s. Swadisht Oil Pvt. Ltd. despite admitting the liability of Rs. 5082352/ has failed to pay the said amount despite a receipt of demand notice as per provision of the I & B Code. Operational creditor namely M/s. J. R. Agro Industries Pvt. Lt. is in the business of extraction of vegetable oils from the oil cake / rice bran and has credited a niche for itself in the market since three decades. The corporate debtor M/s Swadisht Oil Pvt. Ltd. purchased a rice Bran Oil (crude) from operational creditor through a broker.*

*The Rice Bran Oil was supplied by the operational creditor to the corporate debtor between 13.01.2015 and 02.05.2015 and it has been duly received by the corporate debtor. Several invoices were raised in this regard, out of which an amount due and payable as on the date of filing of the petition is Rs. 5,08,43,252/ respectively. It is also contended that as per the communication dated 10.07.2015 received by the corporate debtor company, there was a credit balance of Rs. 6,15,53,999/- in favour of the operational creditor J.R. Agro Rs. 6,15,53,999/- as on 31.03.2015 as per the books of accounts of the operational debtor. During the course of supply some payments were received by the operational creditor in respect of the goods sold and last payment was made by the corporate debtor to the operational creditor on 30.11.2015 and thereafter no such payment was made thus remaining amount of debt due to the tune of Rs. 5,08,43,252/- respectively. It is contended that the operational creditor received a further communication from the corporate debtor dated 30.11.2015, wherein, they have been admitted that as per their books of accounts there is credit balance of Rs. 5,08,43,252/- in the ledger account of the operational creditor as on 30.11.2015. That in spite of repeated oral requests and several written reminders seeking the due amount along with interest thereon, sent by the operational creditor vide e-mails dated 16.09.2015, 23.01.2016 and 01.02.2016 and letters dated 16.09.2015, 29.01.2016, 31.03.2016, 17.05.2016 and 31.08.2016, 29.09.2016 and even perusal of the visits for settlement of dues only assurances were given by the corporate debtor and all efforts of the operational creditor went in vain since no initiative was taken by the corporate debtor to release the said due payment. The operational creditor received communication dated 15.09.2016 from the corporate debtor wherein they admitted that credit balance to the tune of Rs. 5,08,43,252/- was standing in their books of accounts as on 31.03.2016 but stated that Mr. Dinesh Arora (Ex-Director) of the corporate debtor will personally make the payments. The operational creditor in response to the aforesaid communication dated 15.09.2016 from the corporate debtor vide its communication letter dated 29.09.2016 vehemently denied any such transfer of liability from the corporate debtor company to Mr. Dinesh Arora. The broker Mr. Jay Karan Singh vide his communication dated 01.10.2016 also denied transfer of any such liability from corporate debtor company to Mr. Dinesh Arora. Subsequently, Mr. Dinesh Arora vide his communication dated 01.10.2016 also denied transfer of any such liability from corporate debtor company to Mr. Dinesh Arora, therefore, the amount of Rs. 5,08,43,252/- stands admitted in law as*



well as in facts. The operational creditor has been haplessly waiting for clearance of its outstanding amount to the tune of Rs. 5,08,43,252/- along with interest and damages which is due and payable since more than a year. A statutory demand notice dated 18.01.2017 as prescribed under section 8 of the Insolvency and bankruptcy Code, 2016 was sent by the operational creditor M/s. J.R. Agro industries Private Limited to the corporate debtor M/s. Swadisht Oils Pvt. Ltd. through speed post at its registered office as well as at address other than registered office as appearing on MCA website. As per the speed post tacking report, the demand notice was received by M/s. Swadisht Oils Pvt. Ltd. on 23.01.2017 at its registered office as well as at address other than registered office as appearing on MCA website. It is submitted that neither the payment has been made by M/s Swadisht Oils Pvt. Ltd. nor pendency of any suit or arbitration proceedings in relation to such dispute filed before the receipt of the demand notice dated 18.01.2017 has been intimated M/s Swadisht Oils Pvt. Ltd. to the operational creditor M/s. J.R. Agro Industries Pvt. Ltd. within 10 days from the date of receipt of the aforesaid demand notice. It is further submitted that no reply has been received from the corporate debtor to the notice dated 18.01.2017 sent by the petitioner / operational creditor within 10 days from the receipt of the aforesaid demand notice was given by the corporate debtor to the operational creditor relating to any dispute with regard to unpaid operational debt. The instant petition is accordingly, being preferred by the operational creditor, M/s. J.R. Agro Industries Pvt. Ltd. under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiating corporate insolvency resolution process for the corporate debtor, M/s Swadisht Oils Pvt. Ltd. who despite admitting the liability of Rs. 5,08,43,252/- failed to release the said amount in spite of receipt of a demand notice as per the provisions of Insolvency and Bankruptcy Code, 2016.

Further the similar grounds as stated above have been taken by the other petitioners in respective petitions claiming total amount of Rs 6,02,16,348 which are felt not necessary to be described herein as to avoid repetition.

The petitioners operational creditor have annexed there with in the respective petitions a copy of the statutory demand notice along with annexures issued on 18.01.2017 to the corporate debtor company in a prescribed format under the Rules 5 of the I & B code, 2016 (Application to the adjudication authority Rues. 2016) (hereinafter to be referred as 'Rules' and 'the Code'). In response to the abovementioned demand notices, the corporate debtor company sent reply, making denial of claims and raised dispute (in terms of the provisions of Section 9 of the Code) as to the said demand notice dated 18.01.2017 for demanding payment by the operational creditors. The reason shown in such notices for making denial and raising of dispute, the corporate debtor has raised following objections and shown reason for refusing payments stating that it did not receive any statutory demand notice issued on 18.01.2017 neither at the registered office nor at factory office of the company. The company came to know about issue of such demand notice only on 22.02.2017 when it received a copy of the present petitions dated 20.02.2017 filed before this Bench to initiate corporate Insolvency Process against it. The

corporate debtor company has further contended that it vehemently denies the demand notice. The replies given by it may be summarized as under:-

*".....3. The mandate of Section 8 (1) of the code read with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 clearly provides for issuance of demand notice in form 3 only on occurrence of default.*

*Please refer to our letter dated 15.09.2016 whereby you had been informed regarding the settlement of claims and Memorandum of Understanding (MOU) executed with Mr. Dinesh Arora, then then Director of the Company. As per said MOU dated 19.05.2016, the liabilities towards sundry creditors amounting Rs. 7,64,79,228/- including dues of M/s. J.R. Agro Industries Pvt. Limited of Rs. 5,08,43,252/- were transferred to Mr. Dinesh Arora, the then Director of the company.*

*Accordingly, the company has written off the above liabilities from its book of accounts and necessary disclosures regarding the said arrangement was also made in the Audited Annual financial statement of the company for the year ended at 31.03.2016 which is available in public domain on MCA portal.*


*The certificate from statutory auditors of the company M/s Rajiv Mehrota and Associates, Chartered Accountant evidencing the fact that no dues are outstanding for payment to M/s J.R. Agro Industries Pvt. Ltd. as on date.*

*In the captioned demand notice yourself has given reference to the said MOU, therefore, it is crystal clear and beyond any doubt that the said arrangement was very well in your knowledge and with your consent. Further alleged denial vide letter dated 01.10.2016 by Mr. Dinesh Arora of signing of the said MOU is false, as he himself has signed the annual financial statement for the year ended at 31.03.2016 giving effect to the said MOU and making write off the sundry creditors liabilities.*


*Further we have been impressed upon by Mr. Dinesh Arora that in accordance with the said MOU due payment to respective creditors has also been made in the month of October, 2016 where after you stopped sending e-mails / letters regarding payment of dues. Therefore, a captioned demand notice is not only false and bad in law but clearly your attempt to extort money in collusion with Mr. Dinesh Arora from the company abusing the provisions of the Insolvency and Bankruptcy Code, 2016.*

*As you are aware regarding the damage done by Mr. Dinesh Arora during his association with the company, due to which he has separated as well from the company and the said MOU was executed regarding sundry creditors."*

During the course of hearing of the present petitions the corporate debtor was also given an opportunity to file formal objection / reply to the present petitions. The corporate debtor duly filed the same on 15.03.2017 along with documents annexed therewith. The corporate debtor took such plea that the present petitions are gross abuse of process of law and deserves an outright dismissal with exemplary cost as being vexatious, ill motive and devoid of merits. Further these petitions are filed with an oblique and ulterior motive to harass and arm-twist the answering respondents company at the instance of its Ex-Director one Mr.



Dinesh Arora. Thus an attempt has been made to misuse the provisions of the I & B Code, 2016. The corporate debtor also pleaded that it is a fully solvent company and having no difficulty in respect of making payment of legitimate dues to its creditor. Moreover, the company in past eight months has made payment of its dues more than of **rupees fifty cores** towards serving finance dues and against credit facilities it availed from banks. The corporate debtor also made some allegations against its Ex-Director Mr. Dinesh Arora to conduct the affair of the respondent company, in a fraudulent manner by creating some bogus liabilities in collusion with sundry creditors (herein with petitions) against the respondents company and thus caused mismanagement for the benefit of his own entities companies promoted and controlled by him. Therefore, thus the corporate debtor raised a doubt about bonafide conduct of the present petitioners companies and alleged in collusion with its Ex-Director Mr. Dinesh Arora. The corporate debtor also pleaded such that this Court ought not to initiate a proceedings under Section 9 of the I & B Code, 2016, the petitioners companies did not come before this Tribunal with clean hands. They are allegedly in collusion and having vested interest with Mr. Dinesh Arora (the Ex-Director of respondent company). The corporate debtor company brought to notice of this Court a Memorandum of Understanding entered between the parties and executed on 19.05.2016. Wherein it has been stated that Mr. Dinesh Arora has agreed in terms of the MOU to bear personally the liabilities of the respondent company during his management period towards the sundry creditors. Thus he was knowing fully that such liabilities including present petitioners did not really exist, further as per the above referred MOU it has been agreed between the corporate debtor company and Mr. Dinesh Arora that the amount if found due and payable and is required to be borne by Mr. Dinesh Arora alone and not by the present corporate debtor company. The corporate debtor in its reply also alleged that no dues really do exits to the operational creditors. Because the alleged dispute between the respondent company and operational creditors is in collusion with Mr. Dinesh Arora and at his instance only such bogus liabilities were created in the account of respondent's company. Thus a fraud has been played against the corporate debtor, Hence, the present petition is liable to be rejected on this ground alone.






The corporate debtor company has filed its detail reply in these petition stating that it has taken over the 100% management and control of the company from Mr. Dinesh Arora and his group and the company at present is being controlled and managed by Sri Tilak Raj Sharma known as TRS group, This has frustrated Mr. Dinesh Arora to encourage / instigate the present petitioners / sundry creditors to move the these petitions against the company hence their intention is to act in collusion with and at the instance of Mr. Dinesh Arora to destroy the respondent company for their personal gain. As per the corporate debtor the present petitions are nothing but evidence of a malafide intention and are an abuse the process of law with ulterior motive to put the operation of respondent corporate debtor company to halt and to put a pressure to accede to meets an illegal demand of petitioners as well as of Mr. Dinesh Arora. Hence such whimsical conduct of petitioners are harsh and against the interest of the corporate debtor company. Therefore, the respondent / corporate debtor company reserves its rights to take appropriate legal recourse against alleged illegal act of petitioners in collusion with Mr. Dinesh Arora.

In view of the above it may be seen that the corporate debtor company made efforts to substantiate its stand that there are no undisputed debts as claimed in the present petitions and the same are liable to be dismissed with exemplary cost being an abuse of the process of law including the I & B Code, 2016.

The corporate debtor company in its reply specifically in paras 8 to 11 (at page 8 to 18) has made efforts to bring to the notice of this adjudicating authority. Some facts (those) are necessary and pre-requisite for adjudication of the present petitions.

The corporate debtor company made such allegations against Mr. Dinesh Arora (the Ex-Director) along with his associates (referred to as Dinesh Arora group) and informed its dispute with Mr. Tilak Raj Sharma, the present Director of the company. It is further explained that one Shri Honny Sharma being another Director of the respondent company was not involved in day to day affair and operation and management of the respondent company. He was merely signing some documents in good faith, those were required to be signed by a Director as per the provisions of the company. Thus, as per corporate debtor Mr. Dinesh Arora




alone was in whole control of company with all operation / management of the company which includes manufacturing, purchase, sales, bank operation of the respondent company. He allegedly misused his power and trust of the company for his personal gain. When this came to the notice of another group (TRS group) about such alleged fraudulent activities in the affair and mismanagement of the company, and some bogus liabilities were created in company's record despite this there was no actual delivery of goods made to the company but invoices were prepared in the name of the company and such supply of goods allegedly transferred by him to some other destination / company controlled / owned by **Mr. Dinesh Arora** for inadequate / nil consideration in collusion with present petitioners, Thereafter, the respondent company started inquiring into the affair of company with effect from 22.02.2016 that resulted in the resignation of Mr. Dinesh Arora from his directorship of the company on 24.05.2016 and followed by the reconstitution of the Board of Directors of the respondent's company, and new management of Mr. Chetan Shrama, Mr. Honey Sharma and Mr. Kishan Lal Shrama came into power to take over control of the company. It has been also contended that Mr. Dinesh Arora (Ex-Director) has admitted his misdeed with / mismanagement in the company and agreed to accept his personal liabilities towards sundry creditors. Consequently, a Memorandum of Understanding dated 19.05.2016 was entered into and in follow up thereof of an annual balance sheet for the year ended on 31.03.2016 was prepared by giving effect to such MOU by considering the actual liabilities excluding alleged bogus liabilities towards sundry creditors such annual account / balance sheet has been duly signed by Mr. Dinesh Arora subject to proposed independent audit / investigation of respondent company through an independent agency. Therefore, it is contended by corporate debt company that if some operational debt is found against it then the same is recoverable from Mr. Dinesh Arora alone or from his owned entities and not from the corporate debtor (company).

It is also submitted that the corporate debtor raised substantial dispute on its liability of making payment of operational debts which is subjected to a statutory audit and independent investigation which is being contemplated by the corporate debtor company. Therefore, this Court ought not to




invoke the provision of the I & B Code, 2016 to initiate of CIRP as the object of the code is not meant to make recovery of dues under dispute for which separate legislations and separate legal forum available because the respondent company is fully solvent and already making payment of its legitimate dues to its actual creditors. Further the company has already paid to the tune of Rs. 50 cores to banking institution towards loan facility availed by it. Therefore, as per the respondent company the present petitions do not deserve to be admitted and are liable to be rejected with exemplary cost.


The corporate debtor has also filed in its written submission /argument through its Advocate in respect of the present petitions and took an alternative plea contending such that the said confirmation letter dated 30.11.2015 issued by the company (as annexed with the petitions) are an outcome of a conspiracy between the petitioners and Mr. Dinesh Arora personally for his personal gain. It is alleged further that Mr. Dinesh Arora was acting at their behest of the respondent company and these confirmation letters are obtained individually from him. The same are not issued in the capacity of management and on behalf of the respondent company. The company's balance sheet for the year ended on 31.03.2016 (enclosed at page nos. 144 to 174 of reply of respondent's company to the petition) has been finalized and approved and duly signed on 19.05.2016. It does not contain any such liabilities towards the operational creditors, therefore, by any chance it cannot be presumed that the debts amount are due and payable. The respondent company has no liability at all towards operational creditors. It is not a concocted defence allegedly created by the respondent company to avoid the demand notice. The corporate debtor also gave an explanation in its the written / argument submission on the memorandum of understanding which has been entered into between it and Mr. Dinesh Arora group by mutual consent and it was well within the knowledge of the present operational creditors / sundry creditors and through which it has been reduced in writing that the responsibility of total credit balance of total amount of Rs. 5,08,43,252/- stands shifted to Mr. Dinesh Arora. It is also contended on behalf of the corporate debtor that the credit balance cannot be transferred as per the existing practice of account and settled principle of law but such amount to be treated as a written off. The corporate debtor also made such



allegation that goods against the alleged invoices has been raised ***were never ever supplied to the respondent company but only to Mr. Dinesh Arora or other entities own / controlled by him and not at all to the corporate debtor.*** It is also contended that the balance sheet of the respondent company for the year ended on 31.03.2016 contains writing of the bogus liabilities created through the alleged bogus invoices against which no supply ever received by the company. Hence, on such strength of the above stated balance sheet which is prepared as per the books of account and report of the statutory auditor. It proves well this fact that there is specific denial of its liability as being no supply of the goods against invoices raised by the respondent company / corporate debtor. It is further contended that the annual balance sheets has been placed on record in public domain under the provisions of Company Act, 2013, hence on this account also the present petitions are liable to be rejected. The corporate debtor further contended that by merely raising of invoices without supply of goods does not necessarily make a person as operational creditors because an operational debts do exists only against goods supplied / services made. Therefore, the present petitioners do not fall within the definition of the operational creditor and this having no locus standi for filing of the present petition under the I & B Code. The corporate debtor also made an attempt by giving explanation-cum-interpretation in respect of the statutory auditor's report, wherein the company has credited an amount of Rs. 7,64,96,981/- on cessation of its liability with regard to certain credits balances, which were stated not to be due by the company but by the previous management as per the agreement. The corporate debtor company gave some explanation contending such the alleged liability never ever existed on the respondent company being a personal liability of earlier management / Mr. Dinesh Arora, accordingly, the same debts are written of instead of being transferred to Mr. Dinesh Arora and his group. Therefore, the language of the letter dated 15.09.2016 should be construed in the light of above given facts of the case and substance in the matter and such cannot be construed as reconfirmation of alleged liability. As all previous alleged confirmation made or letter issued on behalf of the respondent company are alleged as being false and suffers from the above mentioned defects hence such have no evidential value nor it can be relied upon. Thus, it can be seen that the corporate debtor company itself has made an attempt to retract and



confront the confirmation letters issued by its behalf on such pretext that these were issued during the period of previous management hence cannot be binding upon present management of the respondent company. Therefore, these petitions are liable to be rejected on such reasons also. The corporate debtor by filing supplementary / additional written submission took another alternative plea contending that it has entered into a MOU dated 19.05.2016 between the two group of management in the respondent company known as TRS group and D.A. group hence this should to be treated as renovation of contract, further Mr. Dinesh Arora has equally signed the annual balance sheet dated 19.05.2016, wherein, the debts liabilities towards petitioners / operational creditors are shown as written of therefore such provision made in balance sheet are equally binding upon the operational creditors also and the recovery if any to be made only from Mr. Dinesh Arora and his entities and not from the corporate debtor company as the previous contract has now been agreed to be substituted by new one. It is contended that the operational creditors are having full knowledge, hence they are deemed to have given their implied consent through their conduct, therefore, the original contract need not be performed as per Section 62 of the Indian Contract Act and on Such alternate ground also the corporate debtor is not required to make payment of debts. The respondent company further pleaded that in case operational creditors / applicants intends to claim the impugned debt from the respondent company then they are required to prove the liability of corporate debtor company about debts amount due to operational creditor and payable by it, before a competent court of law. Such being disputed question of fact needs testimony of Mr. Dinesh Arora, Mr. Jay Karan Singh and Ajay Jhunjhunwala including an elaborate cross examination of them. Hence on such a controversial issue this Tribunal is not expected to go into roving enquiry of disputed claims among the parties nor it can be the object of I & B Code which is meant to ensure reorganisation of insolvency resolution of corporate person etc. in a time bound manner for maximization of value of assets of company. In case these petitions are admitted the consequences of admitting of petitions would be severe and create havoc in the business of the respondent company. It is contended that the respondent company is a commercially solvent having many numbers of employees and good turn over. It has received fresh credit facility to the tune of Rs. 20



cores after making repayment of earlier loan facilities availed of Rs. 50 cores from the State Bank of India and other banking institution. Thus, it cannot be said that the respondents company is unable to pay its debts from its assets and has become insolvent. As per the corporate debtor the amount being claimed by the operational creditors are not found due and payable by it. The petitions are misusing the process of I & B Code to arm twist of the respondent company hence the same are liable to be rejected. It is also objected by the corporate debtor by raising legal objection on proper filing of present petitions through their authorised signatory under a general power of attorney. As per the corporate respondent company, the authority & signatory is not competent enough to file present petitions under the I & B Code until and unless a specific power of attorney is executed in his favour on behalf of the company duly supported by its Board Resolution such defects is not curable. Hence these petitions are liable to be dismissed on this ground also.

During the course of scrutiny and on making verification of the contents of the petitions, this Tribunal vide its order dated 07.05.2017 thought it fit to issue a notice under Section 9 (5) of the I & B code seeking clarification from the corporate debtor which reads under: -

*After carefully perusal of the company application and documents, records enclosed therewith.*

*I prima facie feel that the present application is not complete and needs particulars mentioned therein to be more clarified and by removing objection as raised by corporate debtor on question of law and facts. Hence, a notice under section 9 (5) II read with proviso is required to be issued to the operational creditor to provide information / clarification along with supporting documents within 7 days from the receipt of the present notice. The information / clarification sought for are described as under.*

*(i). As the corporate debtor in its reply to the demand notice dated 02.03.2017 raised dispute in respect of the statutory demand notice issued on 18.01.2017 was not properly delivered to the company in its registered office nor in factory office. The captioned demand notice is said to be sent through Speed Post with acknowledgment due on 18.01.2017. The operational creditor has provided track record of delivery of Speed Post (of demand notice) to the corporate company, however did not furnish a copy of the acknowledgement received back from the corporate debtor acknowledging the receipt of such letter. Hence the operational creditor is required to clarify as to whether the demand notice was send through registered / speed post with acknowledgement due on 18.01.2017 or otherwise. In case the notice was issued with acknowledgement due then whether such letter and acknowledgement has been duly acknowledged by the corporate debtor company or otherwise.*

*(ii). The operational creditor in the present application furnished a copy of the bank statement of HDFC Bank showing non receipt / amount on debt on account of HDFC. As the operational creditor in its demand notice has referred to about its dealing with Mr. Dinesh Arora Ex-Director of the corporate debtor company through a broker named Mr. Jai Karan Singh and further referred to an alleged MOU dated 19.05.2016 is said to have been*

entered between Mr. Tilak Raj Sharma (group) the present promotor and Mr. Dinesh Arora (group), Ex-promotor of the corporate debtor company, for the transfer of its creditor's debts liability to one Mr. Dinesh Arora and his group. Because Mr. Dinesh Arora is not a party to the present petition / proceeding, the operational creditor is expected to put its stand opinion on signature made by him (Mr. Dinesh Arora) in the memorandum of understanding dated 22.02.2016 and also reflected in the annual balance sheet of the corporate debtor company for the ending year 31.03.2016, whether these signature appears to be made voluntarily and are genuine or otherwise.

(iii). The operational creditor at page no. 210 of the present petition has enclosed a certified copy of the resolution passed in the meeting of the Board of Director on 16.01.2016 authorising Mr. Ajai Jhunjhunwal, Managing Director and Mr. Deepak Agrawal, Senior Manager of the company to take such action for as may deemed necessary which may be in the interest of the company which include filing of the suit filed by or against the company. As the corporate debtor has raised specific legal objection contending that such resolution passed by the Board of Director of the company is not specific to give authorisation in respect of the present petition, hence the present IB petition is not maintainable in the light of a decision of the Hon'ble Delhi High Court in the case of **Mibro Ltd. Vs. National Insurance Co. Ltd.** decided on 06.03.1990, AIR 1991 Delhi 25. The operational creditor is expected to clarify its legal stand about necessity for passing a specific resolution by the Board of Director of the petitioner company respect of the present petition or to ratify the authority of Mr. Ajai Jhunjhunwala for filing the present petition on behalf of the company.

(iv). The operational creditor is also expected to furnish information about its other bank accounts if maintained by the company, wherein, some payment made, if any, towards unpaid debts can be credited to by a paying third party in addition to the corporate debtor company because the corporate debtor company in its reply to demand notice (as stated in para 8) has taken such plea that they are impressed upon by Mr. Dinesh Arora that in accordance with said MOU the due payment to the respective creditors has been made in the month of October, 2016. Thereafter the operational creditor stop sending e-mail letter regarding payment of dues. Hence the present notice is false and bad in law. Hence, the operational creditor is required to clarify such factual position as to whether it has actually received any payment towards its unpaid debt in respect of present I & B petition from Mr. Dinesh Arora or from the account of his group companies. In case no payment is received a certificate from the financial institution to this effect to be furnished.

(v). As per the matter available on record the corporate debtor company appears to be a profits making company and its assets seems to be more than its liability, as it has made some repayment of its loan / debts to the State Bank of India (SBI) then legal question arises as to whether the IRP can be triggered against a solvent company / having positive value and going concern. The operational creditor is expected to clarify its stand on the above and to remove objection as pointed out above within seven days from the receipt the copy of this notice.


The operational creditors in response to the above said statutory notices issued by us have duly replied clarifying that they have not received any payment in the Bank account till date neither from the corporate debtor company nor from Mr. Dinesh Arora nor his group pursuant to the MOU dated 19.05.2016. In support of its contention the operational creditors companies have filed certificate / statement obtained from the financial institution / HDFC Bank certifying that there is no such payment received towards supply of the goods those are the subject matter of the present petitioners nor they received any payment from Mr. Dinesh Arora or his group. That apart the operational creditors have further clarified that the present petitions are properly filed by its



authorised signatory / the Managing Director itself of the operational creditor company however, to be on safer side a copy of the company's Board Resolution is also filed ratifying the act / proceedings initiated by their Managing Director on behalf of the corporate debtor company including the present IB petitions. In support thereof the operational creditors have annexed a copy of the extract of its Board Resolution dated 11.05.2017 which is taken on record.

During the course of argument in these petitions, the counsel for both parties have filed some documents with the permission of this Tribunal in support of their contentions. The petitioners / operational creditors produce a copy of statutory returns / form filled up by the corporate debtor company before the Commercial Tax, Department of the Government of Uttar Pradesh wherein it has declared about purchase made for clamming Tax credits for the relevant period on 28.02.2015 in the statutory return / form which includes a purchase list containing the names of selling dealers / the preferred operational creditors against their respective columns, which is a documentary evidence for making sell and supply of the goods made by the operational creditors and its receipt is acknowledged by the respondent company. Accordingly, such Tax invoices were prepared. In the said purchase list of goods, the details particulars of purchase made from the operational creditors, by the corporate debtor company are given.

Further the corporate debtors filled recent balance sheet dated 01.04.2016 to 31.03.2017 to impress upon this court that the company at present is not running in loss and has positive assets more than its liability to the tune of Rs, 23,27,25000/- while payment made in the year ending towards its liabilities were to the extent of Rs. 10,50,00000/-. Thus the corporate debtors also furnished a copy of its statements of account prepared in respect of unsecured loans / capital etc. for the period of 01.04.2016 to 31.03.2017. The respondent company / corporate debtor has also filled a list of its other creditors / sundry creditors to whom it is making regular payment hence, its contention is that all the claims made by the sundry creditors as per the MOU dated 19.05.2016 are disputed for want of actual supply of the goods. Hence, no payment against it is found due, therefore, these have been singled out from its liability and accordingly are written off. Further, as per the Memorandum of Understanding entered between Shri Dinesh





Arora and his group previous management Shri Tilak Raj Sharma and group all the present management all such liabilities towards payment of its sundry creditors, stand shifted to and taken over by Mr. Dinesh Arora. Therefore, the company has rightly written of these liabilities from its account / balance sheet which has also been signed by his outgoing Director Mr. Dinesh Arora. Therefore, the respondent company is no longer responsible to make such payment to the operational creditors / sundry creditors in the light of above referred MOU. Hence the present petitions are not maintainable and is liable to be rejected.


Having examined the contents of the present petitions and reply / objection filed further having considered carefully the rival submission made before us by the learned counsel for the parties. The points of issue arises for consideration of this Tribunal, in respect of admission or otherwise of the present petitions (filed under the Section 9 of the I & B Code) are described as under.

S.N.	ISSUE	FINDINGS
a.	As to whether the amount of debt as claimed in the petitions have been paid by the corporate debtor.	No
b.	As to whether there exists any previty of contract among corporate debtor and the operational creditors / other sundry creditors in respect of MOU dated 19.05.2016 entered between two managements of corporate debtor company namely Mr. Dinesh Arora and Mr. Tilak Raj Sharma whether such amount to renovation of a contract / agreement between operational creditors and corporate debtor company	No
c.	As to whether such MOU dated 19.05.2016 is having a binding effect on operational creditors / petitioners to insist them to seek recovery of its amount of debts from Mr. Dinesh Arora or his group only.	No
d.	As to whether the affairs of the corporate debtor company were being conducted in fraudulent manner or there were serious irregularities committed by the previous management group of the corporate debtor company under then control of Mr. Dinesh Arora	No  no adequate proof is furnished and moreover the statutory auditor's report of the respondent company itself states that no fraud has been found/ reported.
e.	As to whether the present application / petition are filed properly through its authorised signatory and competent person and is maintainable under the provision of Section 9 of the I & B Code.	Yes
f.	As to whether the cessation of its liability of the corporate debtor company in its book account towards operational creditor on the strength of	No

	MOU can be treated as valid one and have binding effect on the operational creditors.	
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As the above stated point of issue are based on mixed question of law and facts relating to each other, hence the same are being discussed and decided commonly herein succeeding paras.

It is canvassed before us on behalf of the corporate debtor company that no dues / debts are lying at present in the balance-sheets / accounts of the corporate debtor company. The alleged liabilities are stated to have been written off pursuant to a MOU dated 19.05.2016 entered between the new management group of company (TRS) and with Mr. Dinesh Arora. Which is reflected in the statutory auditor reports therefore operational creditors are estopped from making claim of such amount from the present management and their remedy if any lies only with Mr. Dinesh Arora and his group in view of the above stated MOU. However, such plea, in our view does not carry legal force in view of the provision of Section 62 Illustration 'C' of the Indian Contract Act read with provisions of Sales of Goods Act, 1930 and further under Section 91 & 92 of the Evidence Act. there is no proof of contract among operational creditors / petitioners and with both group of the management of corporate debtor company. It is seen that no representative of operational creditors have counter signed or ratified the said MOU by giving its express consent accepting to the terms of such MOU. But contrary to this the operational creditors have confronted the MOU by placing on record a subsequent letter written by Sri Dinesh Arora as well as by Shri Jai Karan (the broker of the operational creditors for bringing orders for supply of the goods) they have denied to have accepted such terms of the MOU and their signatures on it. Such letters make the MOU questionable and it became disputed document. Therefore, on the basis of such MOU any subsequent entries made in respondent company's the account and balance-sheet specifically with regard to cessation of company's liabilities has also become questionable, and disputed. Thus it has lost its legal sanctity. Therefore, in our view Such cession of liability cannot be enforced on petitioners for want of express contract agreement among them, therefore, on a sound legal principle of doctrine of equity and fair play the corporate debtor company cannot claim discharge from its liability on the strength of such MOU nor any revision in its balance-sheet



can be made. We find support from a decision of Hon'ble NCLAT in the matter of M/s Innoventive Industries Ltd. Vs. ICICI Bank and another the relevant paras thereof quoted herein as under:


....."79. In view of the finding as recorded above, we hold that the appellant is not entitled to derive any advantage from MRU Act, 1956 to stall the insolvency resolution process under Section 7 of the Insolvency & Bankruptcy Code, 2016.

80. Insofar as Master Restructuring Agreement dated 8<sup>th</sup> September, 2014 is concerned, the appellant cannot take advantage of the same. **Even if it is presumed that fresh agreement came into existence, it does not absolve the Appellant from paying the previous debts which are due to the financial creditor.**

81. The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the appellant cannot derive any advantage of the Master Restructuring Agreement dated 8<sup>th</sup> September 2014."

Thus in the light of the above referred decision the changes made in the account and balance-sheet of respondent company prior to the MOU deemed to be reverted back and if some credit balance is found, and there is debts liabilities then the company cannot avoid the same and is legally required to discharge in a lawful manner.

The corporate debtor company did not furnish any proof of payment towards admitted credit balances and its debts prior to entering into the said MOU which has now become questionable and disputed. That apart petitioners / operational creditors in reply to notice issued by this Tribunal furnished certificates from a financial institution / bank accounts showing that they did not receive any payment from the corporate debtor company nor from Mr. Dinesh Arora and his group. Thus the amount of debts as claimed in the present petitions remains unpaid and this establish that default has been committed in this respect by the respondents' company and Mr. Dinesh Arora. We are of the view that there is collective responsibility of management of the respondent company or the person in its management whether it is former one or




continuing with to make payment of companies due to the concern under the principle of law of promissory estoppel, therefore, on the above stated ground we feel the present petitions deserves, admission.

We carefully made study to the auditor's report relied on itself by the corporate debtor company wherein the statutory auditor has observed that on account of heavy loss and change in the management during the year of the company the operation of the company were discontinued. As per the auditor's opinion there is uncertainty about the company's availability to continue as going concern. That apart, the statutory auditor has also made some adverse comments in column (x) of Annexure A to his independent audit report stating inter alia that as per explanation given to him **no fraud is found or detected or reported in the company by its officer / employees during the course of the audit.** The statutory auditor in his adverse opinion has also commented such.

- (a) *The company did not have an appropriate internal control system for inventory management, physical inventory check which could potentially result in the company in embezzlement of inventory, over or under valuation of inventory etc.*
- (b) *The company did not have an appropriate internal control system regarding purchase and sale of inventory. The company also does not maintain any stock records regarding material received or sold, which could potentially result in the company in recognizing expense or income without any surety of the actual quantity purchased and sold.*
- (c) *The company does not have any control on the possession of underlying documents related to its trading activity which could potentially result in showing of wrong purchase or sale amount related to trading activity."*

That apart the learned auditor further express its comments on cession of company's liability in the column(c) of his qualified opinion explaining such that cession of liability was written of on the basis of a statement made before him on behalf of the respondents company. It is stated such these credit balances are not to be due by the company but were of the earlier management as per agreement (herein MOU). Keeping in view such observation of the statutory auditor made in his report, such cession of liability cannot be treated as conclusive and considered opinion of the statutory auditor on writing of the liabilities, as his view is based on a statement made before him and there is no conclusive proof made available in record that such statements made before the statutory auditors are duly substantiated and in conformity with companies record / bank accounts because the statutory auditor has simply referred to an agreement / MOU upon which the



cessation of liability in respect of the credit balances of petitioners from company's account have been made or reflected. As we have already held in preceding paragraphs that such MOU dated 19.05.2016 itself has become a questionable documents and does not have any preivity of contract among the present petitioners /operational creditors. Further the same is confronted and refused by one of its signatory Mr. Dinesh Arora. Therefore, making change in company's bank account with regard to credit balance also becomes disputed and legally questionable and on these reasons such entries cannot be treated as valid nor it gives room to a corporate debtor to claim discharge from its recorded debt liabilities. Therefore, on such ground also the present application deserves admission.


That apart having perused the record of the case including the document annexed therewith, we are of the considered view that the above referred MOU dated 19.05.2016 is neither consented nor ratified by the operational creditors, moreover the same is alleged to have been retracted and confronted by one of its signatory Mr. Dinesh Arora (the previous Director). Therefore, such MOU cannot be treated, from a legal angle, as renovation of the contract / agreement among the parties specifically the operational creditors hence such cannot have binding effect.

In view of the above discussion we find that the defence / objection taken by the corporate debtor company is not bonafide one nor in conformity with its account/ statutory return and other record of the company against which no rebuttal documents/proof are made available to us. Hence such defence is liable to be rejected in view of a co-ordinate Mumbai Bench decision in the matter of (C.P. No. 45/I/B/NCLT/MAH/2017, M/s. DF Deutsche Forfait AG and another Vs. M/s Uttam Galva Steel Ltd. reads as under:

*".....41. The corporate debtor counsel referred an other dated March 1<sup>st</sup> 2017 passed by NCLT Principal Bench, New Delhi in One Coat Plaster and Others Vs. Ambience Pvt. Ltd. and M/s. Shivam Construction Company and others Vs. Ambience Pvt. Ltd. and Philips India Limited Vs. Goodwill Hospital & Research Centre Limited to say that if at all notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility the petition shall be rejected by reading the definition of dispute as inclusive and the word "and" in clause (a) of sub Section 2 of Section 8 as "or" in the light of section 9(5)(ii)(d).*

*42. With all humility, we cannot agree with the submission of the corporate debtor counsel to reply on the co-ordinate Bench order because the reasoning given in this case is based on the ratio legis enunciated in sections 8 & 9*

*43. Moreover, we have noticed that enough material is there to say that purchase order is present, invoices are present, bill of lading is present, bill of*



exchange are present, on the top of all these, confirmation of forfeiting in favour of Deutsche is present, and acknowledging further assignment of part of the debt to Misr Bank is also present. Moreover, the debtor has not denied any of these documents except saying English law alone is applicable. The alarming situation in this case is, this company is consistently in losses, in fact profit after tax is showing to the loss of 1557 crores by 31<sup>st</sup> March 2016. If any delay is made in passing this order, it will become nothing but defeating the purpose and object of this Code.

78. let us test how far this argument is right, one-it is admittedly true Uttam accepted two bills of exchange promising to pay the value of goods within 180 days, thereafter Uttam has not made any payment, by now more than three years and six months are over.


79. For the reason above and the material on record showing compliance under Section 9 of the Code, this petition is hereby admitted and Registry is hereby directed to refer it to the Insolvency and Bankruptcy Board to recommend the name of an IRP to appoint him in this case."

During the course of argument and in their written submission the corporate debtor further took alternative plea that the process of IRP cannot be triggered against it under the provision of Insolvency and Bankruptcy Code. The corporate debtor company is having positive net worth / net value and assets are more than its liability, the corporate debtor is a going concern, therefore initiation of IRP process would seriously prejudice the interest of the company and other parties including its secured creditors. In support of the contention a reliance has been placed on a decision of Hon'ble Apex Court in the case of **Madhusudan Gordhandas & Co. Vs. Madhu Wollen Industries Pvt. Ltd.** reported in **1971 AIR 2600, 1971 (3) SCC 632**. However, in our humble view, with due respect to the judgment we feel that this is not helping to the case of present company corporate debtor. The Hon'ble Apex Court in the very same judgment has equally held that defence of a company should be bonafide and in good faith and on substance, such defence is likely to be succeeded on a point of law. If the company prima facie prove of the facts on which the defence depends then no order of winding up to be passed by a Court. However, contrary to this in the present matter the Corporate debtor company in its own record / return filed before the Commercial Tax Department has shown purchase of the goods from operational creditors and the same were duly received. The said purchase list has been enclosed with by the company in its statutory return/form filed before the Commercial Tax Department of the State. Government in these returns names of the petitioner's companies are well founded along with details Particulars of value of the goods purchased. Supply made by the operational creditors and duly received by the respondent company that apart the



statutory auditor appointed by the corporate debtor company itself in its report made such comments (in its Clause 10 of Annexure to the independent auditors' report) that as per information / explanation given by the respondent company. **No fraud or by its officer employee has been noticed are reported during the course of audit.** Considering such comments, the corporate debtors plea fails that alleged irregularity / fraud has been committed in the Company by its previous management under control of Mr. Dinesh Arora and his group. In our view Such plea does not carry substance till a statutory authority gives conclusive findings of facts establishing the alleged fraud to have been committed by Mr. Dinesh Arora management or his group or the Audits Report of its statutory auditor is not replaced / substituted by another forensic / investigative audits. In this context, it would be appropriate to refer a decision of coordinate Bench of NCLT Chennai in **CA/1/IB/2017** in the matter of **Alcon Laboratories India Pvt. Ltd. Vs. M/s Vasan Health Care Private Limited** wherein it is held that in a winding up petition before the Hon'ble Madras High Court, wherein the Hon'ble High court, permitted the bank to conduct a forensic Audit of the corporate debtor company, but did not pass order for winding up nor appointed an Official Liquidator in the sick/defaulters company, hence such pendency cannot be bar under the code to initiate CIRP before the NCLT.

It is also matter of record that the present Director of the Company Sri Honey Sharma is continuing as director since the Management/Regime of Mr. Dinesh Arora group. He equally failed to point out anything adverse in the Company to the statutory auditors during the regime/the management of Mr. Dinesh Arora. His silence in the present matter appears to be mysterious and such explanation given by the corporate debtor company on his behalf that he was merely signing the documents / papers for the company in good / blind faith is not convincing. Because the corporate debtor company being a corporate entity its Directors are having collective responsibility therefore such pretext / justification can be assumed like such the left hand is not knowing what the right hand is actually doing. Hence such explanation is not acceptable in a corporate governance. In case any fraud is detected in later course and causing of loss to the interest of the company is well established by a competent/statutory authority then it would be a collective responsibility / accountability of previous management's/ Director/




and employees of the company including Shri Honey Sharma to indemnify the respondent company from such loss occurred. The present management of corporate debtor company by its own / cannot opt to absolve Mr. Honey Sharma (being its continuing Director) from his accountability and to throw entire mud only to other person/ Director while as per the record the respondent company was being managed by only two Directors. Therefore, in normal prudence such plea is neither acceptable nor legally permissible.

Notwithstanding the above as in the present matter neither Mr. Dinesh Arora nor Mr. Honey Sharma are before us as parties. Hence we refrain ourselves to express our view on the merits of their alleged conduct / misdeed during their tenure of previous management in the respondent company. We leave it to a competent / statutory authority to enquire into alleged fraud / irregularity if it is detected during the previous management of the corporate debtor company. Hence, our above stated observations should not be meant for nor to be referred to as a findings of facts on such controversial issues.

In addition to the above the Hon'ble Supreme Court in the very same judgment of **Madhusudan Gordhandas & Co. (Supra)** case has pleased to settle the principle about raising bonafide defence against winding up of petition which may be reproduced hereinbelow:

*".....Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (see London and Paris Banking corporation 91). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company. When the company contended that the work had not been done properly was not allowed. (see Re. Brighton Club and Norfolk Hotel Co. Ltd. (2) Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (see Re. A Company 94 S.J. 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd. (3) The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends....."*

In the light of the above stated obiter dictum of the Hon'ble Supreme Court, it can be well founded that where the debts are



undisputed the court will not act upon a defence that the company has the ability to pay the debt chooses not to pay a particular debt. Further "the principle on which the courts acts are first that the defence of the company is in good faith and one of substance, secondly the defence is likely to succeed in point of law and thirdly the company adduce prima facie proof of facts on which the defence depends" such proposition as laid down by the Hon'ble Supreme Court has been further relied on and reiterated in another decision of the Hon'ble Madras High Court in the matter of **Motorola India Pvt. Ltd. Vs. BPL Mobile Cellular Ltd.** reported in **2002 L.W. 315** wherein, the Lordship of the Hon'ble Madras High Court has pleased to pass a winding up order even the company was having commercially solvent on its wilful default of due, however the High Court deferred only the causing of paper publication of winding up order so as to allow the defaulter company to make payment of its dues. In addition to the above the Division Bench of the NCLT, Mumbai in the matter **M/s. D.F. Deutsche Forfait AG and another Vs. M/s. Uttam Galve Still Ltd.** (in C.P. No. 45/I & B P/NCLT/MAH/2017) has also held that change of agreement or assignment of debts will not necessary change the debts liability. (The relevant para of the judgment has been already been referred to in preceding paras.)

Having placed the reliance on the above stated Rulings, we find's the objection / defence taken by the corporate debtor company does not seems to bonafide and to be taken in good faith, but it is found contrary to its own statutory return / form/ audit reports and other company's records. Hence is not legally sustainable and must fails.

In the result the present petition is deserves to be admitted.

As these applications are found complete in terms of Section 9(5)(2) of the Insolvency and Bankruptcy Code, hence deserve admission, we observe and find that there is no repayment of unpaid operational debt despite the invoices for payment were raised by the operational creditors and goods have been delivered to the corporate debtor in terms of its purchase and supply order, thus, the corporate debtor company is in default of making payments of the debts in respect of C.P. No. 13 of 2017, M/s J.R. Agro Industries Private Limited for Rs. 5,08,43,252/- in C.P. No. 14 of 2017 to M/s Abhi Agro Industries Private Limited for Rs. 28,59,514/- in C.P. No. 15 of 2017 to the M/s Jai Lakshmi Solvents Private Limited for Rs.

24,66,392/- in C.P. No. 16 of 2017 to M/s Arohul Foods Private Limited for Rs. 24,75,178/- and in C.P. No. 17 of 2017 M/s. Rungata Industries Private Limited for Rs. 14,97,879/-. It is apparent from the bank statements furnished and certificates issued by the financial institution that the operational creditors have not received so far full payment of supply of the goods made to the corporate debtor company against which invoices were raised. Further it is found in statutory return and the record of corporate debtor company itself that goods have been purchased and received from operational creditor's and their names are reflected in company's purchase list which was duly prepared by the corporate debtor company and submitted along with its Tax returns to the Commercial Tax Department of the State Government. The amount of debts has neither been received from the corporate debtor company nor from Mr. Dinesh Arora or his concern, pursuant a memorandum of understanding stated to have been entered between the corporate debtor company. That apart this Bench is also of the view that there exists no privity of contract among the operational creditors and other sundry creditor corporate debtors company and Mr. Dinesh Arora with regard to the above stated MOU in question. Therefore, such MOU cannot have a binding effect on the operational creditors nor any liability there basis can be fasten to Mr. Dinesh Arora group, nor the operational creditors can be insisted legally to recover the such amount of goods supplied only from Mr. Dinesh Arora or his group of company and not from the present corporate debtor. Because there is no assent of creditors / supplier concern including the present operational creditors/ another sundry creditors, whose name are shown in the body of the above MOU dated 19.05.2016. Under the sound Principle of Indian Contract Act and as per the illustration (C) given in Section 62 of the Act. It is also a settled legal proposition that a company is a legal person, while the definition of Insolvent person is given in under section 2 (8) of that a person is said to be Insolvent who has ceased to pay his debts in ordinary course of business or cannot pay his debts as they become due is declared to be insolvent. Whether he has committed an act of Insolvency and or not. Hence the present corporate debtor being a corporate person fall within the definition of insolvent as it has committed the default for making payment and an action can be taken against him under section 55 to 58 of the Sales of Goods Act. The Hon'ble Supreme Court in the matter of **Shakti Tubes Limited Vs. State of Bihar** came to examine the

provisions of Section 62 of the Contracts Act and illustration 'C' given therein and observed if there is not assents of a third party, no new contract is said to have entered into between such parties. Further in the matter of **Innovative Industries Ltd. Vs. ICICI Bank and another** (Hon'ble NCLAT Appeal (IB) Nos. 1 & 2 of 2017), it is held that the change of subsequent agreement does not absolve the corporate debtor from its debt liability. Thus there is no legal sanctity for cessation of its liability in its book accounts on the basis of MOU, which is neither consented to nor agreed by the operational creditors. In the light of above stated decision. We are constrained to feel that the corporate debtor raised only speculative defence of alleged fraud in its company which is illusory and does not finds support from its own statutory return and auditors report and also contrary to its purchase list records maintained by the company. Hence such defence appears to have been raised to avoid payments hence cannot be treated as bonafide one in the light of the Hon'ble Delhi High Court decision in the matter of **Olam Agro India Limited Vs. Mother Impex Private Limited (2014) 7 High Court Cases 638** and further the decision of Hon'ble Madras High Court decision in the matter of **Motorola India Pvt. Ltd. Vs. B P L Cellular Mobile** reported in **2002 L.W. 315**.

It is also held that the present petition filed by the authorised signatory / managing Director of the operational creditor company and has further been ratified by the Board Resolution passed by the operational creditor companies is found to be in order in view of a Larger Bench decision of the NCLT, Kolkata dated 12.04.2017 passed in **C.P. No. 37 of 2017, ICICI Bank Ltd. Vs. Palogix Infrastructure Private Ltd.** Further the Hon'ble Apex Court in the matter or **National Institute of Technology Vs. Pannalal Chowdhary** (reported in 2015 (11) SCC Page 669) has settled the legal position in respect of ratification of an act done by an authorised signatory to retrospectively validate and it is permissible in law . As present petitions are filed by their authorised signatory / Managing Director and has further been ratified by its operational creditors company hence are found to be find properly and is in order.

It is also found that unpaid debts / liability towards sundry creditors were duly entered and admitted in the books of account of corporate debtor company before signing of the MOU dated 19.05.2016 and only on the strength of such MOU these liabilities



are written off and revised balance sheet is prepared. But we have already held that there exists no privity contract among the interested / affected parties e.g. sundry creditors, nor it has been consented to or ratified by these sundry creditors / including the present operational creditors then writing of such liability cannot be treated to be valid one and have legal sanctity as per the Section 62 illustration 'C' of the Indian Contract Act nor the same appear to be bonafide on a sound principle of law of Contract, privity of contract and meeting of minds among contracting parties nor its in conformity with equity and fair play. In the light of above given facts and circumstances of the case and considering the above referred judicial citations of Hon'ble Courts. We feel the present petition deserve to be allowed hence is hereby admitted. Consequently, an order for moratorium is passed as per Sections 13 & 14 of the I & B Code, 2016.

.....6. A copy of this order shall be duly sent by the Registry to both the Corporate Debtor as well as to the 'Operational Creditor' as contemplated under the IBC, 2016. However, moratorium as contemplated under the provisions of Section 14, as extracted herewith shall also follow suit in relation to the Corporate Debtor.

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in nay count of law, tribunal, arbitration panel or other authority;
  - (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  - (c) any action of foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
  - (d) the recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.
7. We further refer the matter to Insolvency & Bankruptcy Board of India for the limited purpose of nominating Insolvency Resolution Profession (IRP) including the name of proposed IRP by the operational creditor to act as the interim Resolution Professional within a period of 10 (ten) days as mentioned under Section 16(4) of IBC, 2016.

However, a paper publication in respect of moratorium to be made after appointment / nomination or of IRP is received from the Insolvency and Bankruptcy Board of India.

No order as to costs

Order Date: 30.05.2017  
Shreshth Srivastava

\_\_\_\_\_ Sd \_\_\_\_\_

**(H.P. CHATURVEDI, MEMBER (Judicial))**