

**In the National Company Law Tribunal,
Kolkata Bench,
Kolkata**

Coram: Shri V. P. Singh
Hon'ble Member (J)
&
Shri Jinan K.R.
Hon'ble Member (J)

CP (IB) No.646/KB/2017

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process by the Operational Creditor under section 9 of the Insolvency and Bankruptcy Code, 2016;

-And-

In the matter of:

Mahendra Trading Co. a registered partnership firm, having its Office at 51, Ezra Street, Kolkata- 700 001;

-And-

Mr. Mahendra Bajoria, Managing Partner, Mahendra Trading Co., a partnership firm, having its office at 51, Ezra Street, Kolkata- 700 001;

-And-

Mr. Pratyush Bajoria, Mahendra Trading Co., a partnership firm, having its office at 51, Ezra Street, Kolkata- 700 001;

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Mr. Laxmi Bajoria, Mahendra Trading Co., a partnership firm, having its office at 51, Ezra Street, Kolkata- 700 001.

...Operational Creditor/ Applicants

-Versus-

Hindustan Controls & Equipment Private Limited, having its Registered office at P-16 & 16/1, Kasba Industrial Estate, Phase-1, Kolkata- 700 107;

.....Corporate Debtor

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Counsels appeared:

For the Operational Creditor : 1. Mr. Anirban Ray, Advocate
2. Mr. Rudrajit Sarkar, Advocate
3. Mr. V.V.V. Sastry, Advocate
4. Ms. Deepabali Datta, Advocate

For the Corporate Debtor : 1. Mr. Joy Saha, Sr. Advocate
2. Mr. Rudraman Bhattacharyya, Advocate
3. Mr. Rishab Bannerjee, Advocate
4. Mr. Saurojit Dasgupta
5. Ms. Sanchari Chakroborty

Order pronounced on 19th day of January 2018

ORDER

Per Shri Jinan K. R., Member (J):

The petitioner has filed this application under Sec.9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I & B Code) 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to Adjudicating Authority Rules) for initiation of corporate insolvency process against the Corporate Debtor, Hindustan Controls & Equipment Private Limited.

2. Brief facts of the case are the following:-

The Applicants, Operational Creditors, Mahendra Trading Company and their partners, Mahendra Bajoria, Managing Partner of Mahendra Trading Co., Mr. Pratyush Bajoria, partner of Mahendra Trading Co. and Mrs. Laxmi Bajoria, partner of Mahendra Trading Co. are having their office at 51, Ezra Street, Kolkata- 700 001. The Corporate Debtor is Hindustan Controls & Equipment Private Ltd., whose identification Number is U51109WB2000PTC091319 having its registered office at P-16 & 16/1, Kasba Industrial Estate, Phase-1, Kolkata- 700 107..

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3. The petitioners have stated that Mahendra Bajoria, Managing Partner of the Applicant/ Operational Creditor no.1 and also the Constituted Attorney of the Applicants/ Operational Creditors nos. 3 and 4 has been duly authorised by all the partners of the firm and at the meeting of the partners to that effect. The Resolution taken by the partners at the meeting of the company has been enclosed and marked as **Annexure-A** to the application.

4. The Operational Creditor has stated that the goods worth Rs.1,71,81,809/- (One crore seventy-one lakh eighty one thousand eight hundred and nine) only was sold and delivered to the Corporate Debtor under 32 (thirty-two) purchase invoices of different dates between 22nd June, 2012 to 29th March, 2017. A total amount of outstanding debt has been calculated to Rs.1,71,81,809/- to be payable by the Corporate Debtor on account of supplies made by the Operational Creditor. The copies of all purchase orders/invoices have been annexed by the Operational Creditor and marked as **Annexure "B"** to the application.

5. The operational creditor has stated that the supplies were duly received by the Corporate Debtor and the debt for each of the invoices fell due from the receipt of such supplies. Statement showing the details of the supplies made along with the particulars of the invoices raised has been set out in the table attached to the Notice and marked as **Annexure "C"** to the application. An amount of Rs.1,71,81,809/- has been due and payable to the Operational Creditor being the price of goods sold and delivered.

6. The operational creditor has further stated that the sale was made under the contract for goods sold and delivered and services rendered thereto and is governed by the Sale of Goods Act, 1930 and also under the Indian Contract Act, 1872. The petitioner had raised invoices from time to time and the Corporate Debtor has not made any payment to the Operational Creditor for the goods sold and services rendered causing great hardship to the Operational Creditor.

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7. The petitioner further stated that a Demand Notice dated 18th September, 2017 was issued by the Operational Creditor which was received on or about 22 September, 2017 but no notice of dispute has been issued by the Corporate Debtor till date. A copy of the **demand notice dated 18th September, 2017** has been annexed hereto and marked as **Annexure-D** to the application. As on the date of issuance of the demand notice an amount of Rs.1,71,81,809/- is admittedly due and payable and the Corporate Debtor has already admitted that an amount of Rs.1,71,80,689.47 has been due and receivable by the Operational Creditor. This is evident from the account statement regarding confirmation of outstanding amount and ledger statement as on 31st March, 2017 for the accounting period 01.04.2016 to 31.03.2017 duly prepared and forwarded by the Corporate Debtor under electronic mail dated 30th August, 2017. The copies of the above confirmation of outstanding ledger statement have been collectively enclosed and marked as **Annexure –E** to the application.

8. The applicant has further stated that though demand notice was issued to the Corporate Debtor on 18th September, 2017 by the Operational Creditor, which was received on or about 22 September, 2017 by the Corporate Debtor but no notice of dispute has been issued by the Corporate Debtor till filing of the application by the Operational Creditor. Even after receipt of the demand notice, the corporate debtor failed to make payment of the outstanding dues. Therefore, the petition has been filed for initiation of corporate insolvency process against the corporate debtor.

9. The applicant / operational creditor has delivered demand notice of unpaid operational debt/copy of Invoices between 22nd June, 2012 to 29th March, 2017 under 35 invoices raised on account of supplies to Corporate Debtor in prescribed manner as specified in clause (a) of sub rule (1) of Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authorities) Rules, 2016, under Section 8(1) of the Insolvency and Bankruptcy Code, 2016.

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10. The petitioners have submitted a statement of bank account where deposits are made or credits received normally by the Operational Creditor in respect of the debt of the Corporate Debtor. A copy of the bank statement has been annexed and marked as **Annexure-F** to the application.

11. The petitioners have also submitted copies of the unpaid invoices in terms of the details as mentioned in Annexure A and the copy of the letter dated 1st April, 2017 received from the Corporate Debtor confirming the outstanding amount due and payable to the Operational Creditor annexed and marked as **Annexure-G** to the application. The petitioners have also filed the copy of the electronic mail along with enclosures dated 30th August, 2017 from the Corporate Debtor admitting the dues annexed and marked as **Annexure-H** to the application.

12. The Corporate Debtor has filed objection wherein it is contended that the application filed by the Operational Creditor is barred by the Indian Partnership Act, 1932, as the Operational Creditor no.1 is not a registered partnership firm and the instant application is barred by the provisions of section 69 of the Partnership Act, 1932. The Operational Creditor nos. 2 to 4, either personally or through the Operational Creditor no.1, cannot maintain an action against the Corporate Debtor only on the basis of purported invoices raised by the Operational Creditor no.1.

13. The Corporate Debtor has stated that demand notice under section 8 of the I & B Code, 2016 issued to the Corporate Debtor is not a notice, in view of the fact that the said notice had been issued by only one of the partners of the Operational Creditor no.1 and the said notice is not in proper form and therefore has no existence in the eye of law.

14. The Corporate Debtor has also stated that the purported claim of Rs.1,51,17,694/- being a portion of the claim as claimed in the instant application is already a subject matter of arbitration pending before the Arbitration Committee of The Calcutta Electric Traders Association and the said

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arbitral reference is pending since 31st August, 2017, i.e. before the issuance of the purported demand notice under section 8 of the IBC. In this context, the Corporate Debtor also mentioned that at the request of the Operational Creditor, a letter dated 31st August, 2017, was issued by the Calcutta Electric Trader Association commencing arbitral reference and a copy of the same along with other correspondences exchanged between the Corporate Debtor and the said Calcutta Electric Trader Association have been annexed and marked as **Annexure "A" and "B"** to the reply filed by the Corporate Debtor. Therefore, the instant application may not be entertained as the same arbitral proceedings is a dispute as specifically enshrined in the I.B. Code.

15. The Corporate Debtor has also submitted that the claim of the Operational Creditor is illegally inflated as the amount of dispute before the Arbitration Committee of the Calcutta Electric Traders Association (in short 'the Association') was Rs.1,51,17,694/- as on 31st August, 2017 whereas before the Tribunal, it has been claimed as Rs.1,71,81,809/- as on 18th September, 2017. Moreover, the Corporate Debtor has also raised objection to the extent that a portion of the purported claim of Rs.1,71,81,809/- is barred by the Limitation Act, 1963 as the same arises out of invoices raised amounting to Rs.27,66,630/- for the claim during the period 22nd June, 2012 to 20th March, 2014.

16. The Corporate Debtor has stated that a Memorandum of Understanding was executed between the Operational Creditor no.1 and the Corporate Debtor on 1st January, 2014, when the Corporate Debtor was in acute financial crisis by which the Operational Creditor assured the Corporate Debtor to provide financial and other support and as agreed between the parties, the profits and loss generated from the said module of business and arising out of the said MOU were to be equally shared by the parties. Copy of the said MOU has been annexed and marked with the **Annexure "C"** to the Reply.

17. It was further stated that as per the MOU, none of the parties would take up any project or take any step which would be prejudicial to the interest of the

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parties. As per the MOU, the Corporate Debtor took up several projects for various companies. But the Operational Creditor no.3, i.e. Mr. Pratyush Bajoria was taking all the decisions with regard to taking up and execution of projects on behalf of the Corporate Debtor and was practically in control of the Corporate Debtor, which will be evident from the series of electronic mails and letters sent by him to third parties. Copies of such mails and letters have been annexed and collectively marked as **Annexure 'D'** to the reply of the Corporate Debtor.

18. The Corporate Debtor submitted that as per the MOU dated 1st January, 2014, on behalf of the Corporate Debtor, the Operational Creditor no.3 started taking unauthorised business decisions and the purported sum has been due by the Corporate Debtor only after the said Operational Creditor started taking decisions on behalf of the Corporate Debtor which is solely due to the faults of the Operational Creditors themselves.

19. The Corporate Debtor further stated that though the MOU was signed and executed by one Mr. Subir Pal Mustafi, one of the directors of the Corporate Debtor, but Mr. Samrat Gupta, erstwhile Director of the Corporate Debtor in collusion with the Operational Creditor no.3 attended all the meeting with third parties and used to represent the Corporate Debtor, which was never communicated to the said Mr. Mustafi. They even caused various documents prejudicial and detrimental to the Corporate Debtor.

20. The Corporate Debtor again submitted that the signatures of the Operational Creditor no.3 and the said Mr. Samrat Gupta would appear in every minutes of the meetings held by the Corporate Debtor with third parties and all the assurances with regard to the technical and financial obligations of the Corporate Debtor were given by the said Operational Creditor no.3 and Mr. Gupta to the third parties, despite the fact that the Operational Creditor no.3 did not have the power and authority to provide financial assurances to third parties. Even the other directors and shareholders of the Corporate Debtor were always kept in dark with regard to the decisions taken by them. In this context, copies

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of the said documents have been annexed and collectively marked as **Annexure 'E'** to the Reply of the Corporate Debtor.

21. Corporate Debtor has also stated that the use of the stamp and seal by the petitioner no.3 is unauthorised and a misappropriation of the Debtor's property, which is evident from perusal of the challans and the Approval and Requisition Letters for payments to the third parties. The Corporate Debtor has also claimed that it is also evident from the above fact that the Operational Creditor no.3 had and still has full access to the official stamp and seal of the Corporate Debtor. The copies of the same signed by the Operational Creditor no.3 have been annexed and collectively marked as **Annexure 'F'** to the Reply.

22. It is further stated by the Corporate Debtor that *bona fide* of the remaining directors of the Corporate Debtor would be evident from the fact that despite wrong business decisions, the accounts department of the Corporate Debtor fully paid consultancy charges and out of pocket expenses to the Operator Creditor no.3 and also to the said Mr. Samrat Gupta for their consultancy. The Corporate Debtor reimbursed the out of pocket expenses of the Operational Creditor no.3. Copies of the same have been annexed and marked as **Annexure "G"** to the Reply.

23. The Corporate Debtor stated that the Operational Creditor no.3 breached the contractual clauses and failed to contribute to the Corporate Debtor as per the MOU. As per the MOU, the parties were to share the loss from the said business module, and therefore, the Corporate Debtor has a claim of about Rs.1,58,70,808/- against the Operational Creditor nos. 1 and 3 due to the following reasons:

- a) The quality of the products used by the Operational Creditor no.3 was compromising and below the general standard of the Corporate Debtor, thereby damaging the reputation and goodwill of the Corporate Debtor.

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- b) The Operational Creditor no.3 pressurised the Corporate Debtor for placing the order for switchgear product on the Operational Creditor no.1 at much lesser discount.
- c) The Operational Creditor no.3 used to book fictitious orders on SIEMENS Limited.
- d) Majority of the projects were undertaken at unworkable prices causing failure and huge loss to the Corporate Debtor.
- e) The Operational Creditor nos. 1 and 3 under the MOU never injected funds in the Corporate Debtor as working capital for components other than SIEMENS electrical components.
- f) The Corporate Debtor continuously suffered loss and damage after the Operational Creditor no.3 took over charge of the Corporate Debtor and started taking business decision on his own. Copies of the Balance Sheets of the Corporate Debtor for the financial year 2014 to 2017 have been annexed and collectively marked as **Annexure 'H'** to the Reply of the Corporate Debtor.

24. The Corporate Debtor has further stated that the said Mr. Samrat Gupta is hand in gloves with the Operational Creditor no.3, as he switched sides and has joined the Operational Creditor no.1 and he is not a part of the Corporate Debtor any more and has joined the Operational Creditor no.3 for suppressing his misdeeds, while he was in the Board of the Corporate Debtor. Mr. Samrat Gupta had no authority to sign the purported letter dated 1st April, 2017 or to send the electronic mail dated 30th August, 2017. Even there was no Board Resolution authorising Mr. Samrat Gupta to issue such communications.

25. The Corporate Debtor has further submitted that the purported confirmation of overdue could not have been made by the Corporate Debtor on 1st April, 2017 as the last invoice raised by the Operational Creditor no.1 was

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dated 29th March, 2017. The said Mr. Samrat Gupta clandestinely issued the electronic mail dated 30th August, 2017 from the e-mail ID of the Corporate Debtor as he had access to the seal and e-mail IDs of the Corporate Debtor.

26. The Corporate Debtor has stated that the letter dated 1st April, 2017 issued in the name of Mr. Samrat Gupta is a manufactured document and the Corporate Debtor never authorised the said person to sign the said document on its behalf. Moreover, the amount of sum purportedly admitted in the said letter is Rs.1,71,80,689.47, whereas, in the Arbitral Proceedings, the Operational Creditor No.1 has claimed a sum of Rs.1,51,17,694/- from the Corporate Debtor. If the said sum was admitted by the Corporate Debtor in April, 2017, then the whole sum ought to have been claimed by the Operational Creditor No.1 in the said Arbitral Proceedings.

27. The Corporate Debtor has also submitted that the Operational Creditor no.3 and said Mr. Samrat Gupta have committed the highest amount of fraud and misrepresentation before the Ld. Tribunal. Mr. Samrat Gupta is not working with the Corporate Debtor since October, 2017 as he resigned on 23.10.2017. Mr. Samrat Gupta purposefully did not make the other directors aware of the same to cause irreparable loss to the Corporate Debtor.

28. The Corporate Debtor has again submitted that there exists a large number of disputes between the parties regarding the purported claim of the Operational Creditors and hence the application is not maintainable under section 9 of the I.B.C. and should not be entertained at all.

29. The Operational Creditor filed rejoinder contending that the objections raised by the respondents are not sustainable and reiterated the very same contentions in the application.

30. Heard the Ld Counsels of both side and perused the records. Upon hearing the arguments and considering the contentions taken by the parties the points that arise for consideration are the following:

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1. Whether failure to send reply to the demand notice received by one of the directors of the Corporate Debtor is fatal?

2. Whether Corporate debtor succeeded in establishing existence of any dispute? If so, whether the dispute is spurious, hypothetical or illusory as contended by the Operational Creditor?

31. **The Point No1**

This is a unique case in which serious contentions were raised by the respondent/ corporate debtor that the petitioner /operational creditor is one and same and there is suppression of material facts regarding existence of MOU in between the applicant and the respondent which was executed long before the institution of this application. The Ld. Counsel for the respondent submits that respondent did not send a reply because receipt of demand notice was not brought to the notice of the respondent. According to him Mr. Samrat Gupta one of the directors of the respondent is a mutual friend of the 3rd petitioner in the case in hand and in order to have unlawful gain Mr. Samrat Gupta upon receipt of the notice from the petitioner send a reply without placing the notice before the Board of Directors and without getting consent from the other directors and without a decision from the Board. According to the Ld. Counsel for the respondent he has no authority to send reply without a Board resolution. To show that Mr. Samrat Gupta and 3rd petitioner are known friends known to the public at large produced downloaded copies of Face book Page of Samrat Gupta and 3rd petitioner Mr. Pratyush Bajoria. (Page Nos.8 & 9 in the supplementary affidavit filed by the respondent on 21.12.2017). It was seen downloaded on 8.11.2017. Those documents were not challenged on the side of the petitioner. Ld. Counsel also submits that Mr. Gupta has resigned from the respondent company on 23.10.17 and had joined the operational creditor. This fact was not denied by the petitioner. It is a circumstance strengthening the contention on the side of the respondent that Mr. Samrat Gupta has a close association with the 3rd petitioner.

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32. Ld. Counsel for the respondent also stressed his argument on the basis of Memorandum of Understanding executed on 01.01.2014 in between the Operational Creditor and the respondent (A copy is produced along with reply and marked as Annexure C) to substantiate its contention that petitioner's firm is a business partner of the respondent and as per the terms of the understandings profit and loss out of its business is to be shared at the rate of 50% and in violation of the understanding the petitioner raised demands and later filed the present case only for grabbing money illegally from the respondent. According to him because of the breach of contractual terms of the MOU the respondent is entitled to have huge claims against the operational creditor. Execution of MOU between the parties is evident from the production of its copy by the respondent. Existence of MOU is not at all found a place in the pleading in the application. More over in connection with business operation of the respondent as per the terms of MOU, 3rd petitioner used to attend the meetings convened between third parties and the respondent along with Mr. Samrat Gupta representing the respondent. Said Samrat Gupta allegedly resigned from the respondent company on 23.10.2017 and is not working in the company and a criminal prosecution for cheating and forgery allegedly lodged against him is pending argued by the Ld. Counsel for the respondent. A reading of some of the terms in the MOU is good to understand the nature and terms of the understanding between the parties. It read as follows:-

"1. That this Agreement/Indenture shall be effective on and from 1st day of January 2014.

2. Hindustan Controls & Equipment Pvt. Ltd. will be the lead partner for manufacturing of Control Panels and execution of turnkey electrical projects. Mahendra Trading Co. will be the second partner.

3. Scope of Work/Responsibilities:

a. As a lead partner, Hindustan Controls & Equipment Pvt. Ltd. scope of work includes

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I. All activities for business, development, sales and marketing and manufacturing.

II. All activities related to design, development, drawing, manufacturing supervision and quality assurance.

b. As a second partner, Mahendra Trading Co. scope of work includes

I. Procurement of raw materials for all LV & MV Electrical Control Panel orders and Turnkey Electrical projects.

II. Arrange working capital for all LV & MV Electrical Control Panel orders & Turnkey Electrical projects.

c. Hindustan Controls & Equipment Pvt. Ltd. & Mahendra Trading Co. will be equally and jointly responsible for any other activities necessary to carry out the business, other than those not coming under the stipulated broad distinctions as stated above.

d. That Hindustan Controls & Equipment Pvt. Ltd. will arrange for any after sales services, if required. Mahendra Trading Co. will render necessary support for procurement of spares whenever required.

Financial Requirement:

(i) Mahendra Trading Co. will bring in the necessary working capital required for manufacturing of control panels human resource cost and general overhead for business development and sales and marketing Mahendra Trading Co. will also arrange for all banking facilities for this module of business.

(ii) Hindustan Controls & Equipment Pvt. Ltd. will provide their total manufacturing infrastructure setup including Tools & Machineries and Workshop.

5. Profit/Loss Sharing:

a. As a lead partner Hindustan Controls & Equipment Pvt. Ltd. will share 50% of the profit from the said module of business.

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b. As a second partner Mahendra Trading Co. will share 50% of the profit from the said module of business.

c. Similarly, loss generated from the above module will be shared in the same proportion.”

33. Execution of MOU not at all denied by the petitioner. The first party of the agreement is the respondent company and the second party is the operational creditor. One of the directors of the respondent company and the Managing partner who was authorised to file the case in hand by the 3rd and 2nd petitioner who are the remaining partners of operational creditor has signed the MOU representing the respective parties. In the rejoinder petitioner contends that 3rd petitioner is working as a consultant for which he was paid remuneration and that he has no control over the respondent company. Whether 3rd respondent has control over the respondent company or that he is acting as a consultant for remuneration is not a question germane for consideration in this case. A perusal of MOU, the minutes of meetings convened at the instances of respondent for its operation of business signed by the 3rd petitioner and Mr. Samrat Gupta (page nos. 92 to 98) ,copies of mail send by the 3rd respondent (Annexure D) to third parties in connection with respondent business transaction, copies of Challan and vouchers signed and approved by the 3rd respondent (Annexure F & G) for and on behalf of the respondent give rise a legitimate inference that 3rd petitioner is playing a dominating role in the management of the affairs of the respondent company and taking decisions in regards business operation and making communication through E-mail ID in the name of respondent with third parties. The above said factors leads to *prima facie* conclusion that petitioner's firm has some control over the respondent through 3rd petitioner and it has come out in evidence that petitioner's firm is a party to the MOU above referred. It is a circumstance doubting the contact of Mr. Samrat Gupta who has got intimate friendship with the 3rd petitioner. So deliberate neglect on the side of him in not sending the reply to the demand notice received by him cannot be ruled out. Whether he has taken a decision

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reply on the basis of any decision approved by the board of directors of the respondent company is a question cannot be answered in this case. It requires larger evidence. Ld. Counsel also produced a copy of FIR at the time of final hearing. The respondent herein this case succeeded in establishing a case of certain control over the respondent company by the petitioner through the 3rd respondent. The unholy nexus between Mr. Samrat Gupta and the 3rd petitioner is probable to believe in the above said circumstance. In the above said peculiar circumstances we find failure on the side of the respondent in not sending reply is not fatal. This point is answered accordingly.

Point No 2

34. This is a case in which the petitioner succeeded in satisfying that all the requirements to be satisfied by it as provided under section 9(5) (a to e) of I&B, Code are satisfied. However respondent being raised various contentions regarding existence of disputes let us see whether the contentions on the side of the respondent is genuine or probable to believe even in the absence of notice of dispute issued to the petitioner.

35. The respondent contends that an arbitration proceedings being pending on the date of issuance of demand notice this application is not maintainable and that part of the claim is barred by limitation. So also it contends that the amount claimed is not due to the petitioner and since quality of goods supplied were below general standard of the respondent, it is entitled to claim damages from the operational creditor and since the operational creditor violates the terms of MOU it is liable to pay Rs. 1,58,70,808/- to the respondent. Other than the said contentions various other minor contentions regarding validity of authorisation and competency of the petitioners in filing the petition as a partnership firm also raised by the respondent. Those contentions are found devoid of any merits upon production of supporting documents on the side of the petitioner.

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36. However, the allegation regarding existence of dispute prior to the issuance of demand notice is found sustainable as per the available evidence in the case in hand. As held in **Mobilox Innovations Private Limited V. Kirusa Software Private Limited [Ca No, 9405 of 2017]** by the Hon'ble Supreme Court we are not going to examine the merits of the dispute but let us see respondent succeeded in establishing a plausible contention which require further investigation. It is good to read Para 40 of the above refereed Judgement. It read as follows:-

Para 40. " It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section9 (5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application".

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37. Bare in mind the above said proposition as held in the above referred citation, let us see the main contentions of the respondent regarding existence of dispute. The petitioner mainly relied upon E-mails send by Mr. Samrat Gupta admitting the claim for and behalf of the respondent. To strengthen the said contention Ld. Counsel for the petitioner mainly relied on E-mail copies of letters and statement of account Annexure E, and G. Annexure E is an E-mail with copy of ledger account signed and sent by Mr. Samrat Gupta to the Operational Creditor, as if respondent is confirming the outstanding amount allegedly due to the Operational Creditor. It was sent by him not in reply to any demand from the Operational Creditor. According to the respondent Mr. Samrat Gupta unaniously had taken a decision to prepare it and send to the petitioner without the decision of board of directors on 30-8-2017. Annexure-G dated 01.04.2017 is similar E-mail allegedly issued by him without having any authority to do it.

38. Whether the above referred E-mail admitting the claim of the petitioner by Mr. Samrat Gupta is the decision of the respondent or whether that decision was taken unilaterally by him without discussing with any other directors of the respondent company certainly a question arises in our conscious upon perusal of MOU, copies of minutes from page no 92 to 97 and Annexure 'E' and 'G'. The above referred documents produced on the side of the respondents cannot be casually rejected without having a careful scrutiny of the circumstances behind the repeated admission of the claim of the petitioner by Mr. Samrat Gupta. Thus no doubt the above said contention that Mr. Samrat Gupta has no individual authority to admit the claim and that he played fraud upon the respondent company in defeating its valuable right of defence to be taken in a case of this nature is a serious allegation which require further investigation. More over upon the evidence available in this case we cannot come to a legitimate conclusion that the allegations raised by the respondent are untrue. It requires larger evidence which cannot be led in a case of this nature. The above said circumstances brought out by the respondent give rise a resalable

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above said circumstances brought out by the respondent give rise a resalable doubt in our conscious regarding the claim put forward by the petitioner. The suspicious nature of the role played by Mr. Samrat Gupta, that he resigned from the respondent company and joined the corporate debtor, that all the decisions regarding business operation of the respondent being evidently carried on by 3rd respondent that as per MOU the operational creditor agrees to share profit and loss generated from the business carried on equally as per the terms of the MOU, that the respondent disputed its liability vide letter addressed to the Arbitration committee dated 12.09.2017 in reply to the notice send by the Arbitration Committee Chairman and that no demand or claim so far made before issuing demand notice on 18.09.2017 and that Annexures 'E' and 'G' confirmation of outstanding amount by E-mail (Annexure 'E' and 'G') were sent to the petitioner without a demand evidently made by the petitioner are circumstances proving the credibility of the contentions raised by the respondent regarding the existence of a valid dispute between the parties. From the above said circumstances it appears to us that the contentions regarding existence of disputes are not spurious, hypothetical or illusory as held in the above cited decision of Hon'ble Supreme Court.

39. One another contention pressed on the side of the respondent is that an arbitration proceedings relating to the claim in the instant case is pending before Arbitration Committee constituted by The Calcutta Electric Traders' Association and hence institution of this case is not maintainable as per section 5 (a) of I&B Code and hence this petition is liable to be rejected. To strengthen said contention, Ld. Counsel for the respondent referred Annexures-A at page 21 and 23 and Annexure- B at page no 22 and page no 25 in the reply. Annexure A is a letter issued by The Calcutta Electric Traders Association to the respondent for clearing the dues amounting to Rs.1,51,17,694/- of the petitioner. The respondent is warned that despite clearing of the dues they will take further course of action at their end. That letter is signed by Shank Lal Agarwal, Chairman, Arbitration Committee. It was send to the respondent on

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3rd November, 2017. Annexure B is a letter in reply dated 31.08.2017, issued by the respondent to the said Chairman demanding the details of the claim of the petitioner. One another reply was send by the respondent to the Chairman on 12.09.2017 explaining the circumstances in not paying the dues as claimed by the petitioner. On the strength of the above referred documents which were not disputed Ld. Counsel for the respondent submits that pendency of initiating arbitration proceedings by an Arbitration committee before the date of issuance of notice being proved an application of this nature is liable to be rejected.

40. Ld. Counsel for the petitioner submits that there is no existing arbitration agreement by and between the parties herein and as such the pendency of any arbitral reference since 31st August 2017 does not arise. However petitioner in its rejoinder admits that it is a member of Calcutta Electric Traders Association and that petitioner had expressed its grievance to the said Association and Association upon coming to know of such huge sum being payable by the respondent had issued the letters. *Prima facie* the said contention not at all inspire our confidence. The letters above refereed were served on the respondent by the Chairman of the Arbitration Committee. Nothing shows that such a committee is not in existence. That being so the records available on the side of the respondents give rise an indication that those letters were send by the Chairman of the Arbitration Committee to which a reference would have made by the petitioner. Otherwise issuance of such a letter as the Chairman of the arbitration committee does not arise. Thus the contention that there exist an Arbitration proceedings regarding the subject matter in issue in this case is found provable to believe.

41. The next contention is that a part of the claim is barred by limitation. Truly claim of the petitioner on the basis of invoices raised in the year 22nd June, 2012 to 20th March, 2014 is found barred by Limitation. Since no acknowledgement of liability issued by the respondent or part payment of the expired bills were paid before the expiry of period of limitation on the date of filing the suit the


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
contention that part of the claim is barred by limitation is also found sustainable under law.

42. The above said circumstances leads to a conclusion that there exist a genuine dispute prior to the filing of the application and before the date of issuance of the demand notice. It appears to us that the contentions taken by the respondent are not feeble, *mala fide* or hypothetical. Existence of MOU in between the parties and pendency of Arbitral proceedings seen not mentioned in the application. Existence of MOU is an important document produced on the side of the respondent. It deals with sharing of profits and loss between Corporate Debtor and Operational Creditor. How it would be shared or not is not a question to be answered in the case in hand. The terms in between the parties as per MOU may have some relevancy in regards the settlement of the claim in hand. Non-mentioning the above said fact is therefore amount to suppression of material facts.

43. Taking into consideration of the above said facts and circumstances, and bare in mind the principle laid down in the above cited judgment, we are inclined to reject this application. Accordingly rejected. However, no order as to costs.

 11/18

(V. P Singh)
Member (Judicial)



(Jinah K.R.)
Member (Judicial)

Signed on this, the 19th day of January, 2018.