

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH AT HYDERABAD**

CP (IB)No/45/09/HDB/2017

U/s 9 R/w sections 13, 14& 33
of the IBC, 2016

In the matter of:

Jaycon Infrastructure Limited
34, Tribhuvan Complex, Ishwar Nagar
Mathura Road, New Delhi - 110 065
Having its Registered Office at
1464, Ground Floor
Sector-43B, Chandigarh. .. Petitioner/Operational Creditor

Versus

**CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL**

M/s Gayatri Projects Ltd.
Having its corporate office at:
B-1, TSR Towers, 6-3-1090
Raj Bhavan Road, Somajiguda
Hyderabad- 500 082 ...Respondent/ Corporate Debtor

Order delivered on: 10th October, 2017

CORAM:

Hon'ble Mr.Rajeswara Rao Vittanala, Member (Judicial)

Hon'ble Mr.RavikumarDuraishamy, Member (Technical)

Parties/Counsels Present:

For the Petitioner/Operational Creditor Mr.Achin Goel &
Mr.Deep
Kishore,
Advocates

For the Respondent/Corporate Debtor Mr.S Ram Babu
& B. Ramesh
Advocates



Per: Rajeswara Rao Vittanala, Member (Judicial)

ORDER

1. The present Company Petition bearing CP (IB) No. /45/09/HDB/2017 is filed by Jaycon Infrastructure Limited, Under Sections 9 r/w 13, 14 & 33 of the Insolvency and Bankruptcy Code, 2016 by seeking to initiate Corporate Insolvency Resolution Process (CIRP) against M/s Gayatri Projects Ltd./ Respondent/Corporate Debtor under the provisions of IBC, 2016.
2. Brief facts, leading to filing of present petition, which are relevant to the issue in question, are as follows;-
 - (1) Jaycon Infrastructure Limited (herein referred to as Petitioner / Operational Creditor) was incorporated under the Companies Act, 1956. Its primary business is construction of Buildings, Roads and Bridges etc.
 - (2) Gayatri Projects Limited (herein referred to as Respondent / Corporate Debtor) was incorporated under the provisions of Companies Act, 1956 on 15.09.1989. And its authorised share capital is Rs. 80 crores with paid up capital of Rs. 35.45 crores (approx) divided into 3, 54, 50, 380 equity shares of Rs. 10/- each.
 - (3) On 09.10.2007, the Corporate Debtor was awarded a contract by NHAI of design, construction, development, finance, operation and maintenance of KM 0.000 to KM 49.700 on National Highway No. 25/26 in the states of Uttar Pradesh and Madhya Pradesh under North South Corridor (NHDP Phase-II)- Package NS1/BOT/UP-2 and of design, construction, development, finance, operation and maintenance of KM 49.700 to KM 990.005 on National Highway No.26 in the States of Uttar Pradesh and Madhya Pradesh under North South Corridor (NHDP Phase-II)-



Package NS1/BOT/UP-3 and operation creditor made an offer to the corporate debtor for execution and completion of certain works arising out of the said contract.

- (4) Subsequently, the petitioner and respondent entered into Sub-contract Agreement on 12th October, 2007 for carrying out Bridge Work in construction package NS-I/BOT/UP-2. Accordingly, the Respondent/Gayatri addressed a letter bearing No.GPL/SUB-CON/BRIDGES/JAYCON/006 dated 16.10.2007 to petitioner/Jaycon, in continuation of petitioner's earlier letter dated 9th October, 2007, by awarding sub-contract for construction of Bridges on Jhansi-Lalitpur BOT Project under the above package for a total contract value of Rs.25,57,43,370/-.
- (5) Being satisfied with the work executed at the aforesaid project, the Corporate Debtor further awarded another work order for construction of Krshipra Bridge at KM 581+532 of NH-3 in the State of Madhya Pradesh vide letter No.GPL/WO/JAYCON/KB/Indore/04/2011/01, dated 19.04.2011. The total contract value against the said award was Rs.4,62,63,080/- The respondent, while filling its returns in Form 26-AS for F.Y.2013-14/F.Y.2014-15 have mentioned that it has deducted TDS on the aforementioned running bills of petitioner i.e. R.A. Bill Nos. 24, 25 and 26.
- (6) The Corporate Debtor is indebted to the operational creditor for a principal sum of Rs.2,28,32,742/- including interest till Jan-2017, out of which the Company duly admits its liability towards the Operational Creditor for an amount of Rs.77,56,137/- (Rupees Seventy Seven Lakhs Fifty Six Thousand One Hundred Thirty Seven Only) and therefore the same is payable without any reason or



rhyme along with an interest at the rate of 18% per annum from the due date till its actual realization. The operational creditor kept on chasing the corporate debtor requesting them to clear the outstanding payments but they always sought time for one or other reason and assured the operational creditor that the same would be cleared at the earliest. The parties after much follow-ups of operational creditor, met on 24.03.2014 and post discussion the operational creditor sent an email to corporate debtor on this date whereby it re-affirmed the points of discussion held on the day.

- (7) The corporate debtor despite of having acceptance to the terms as agreed in the meeting dated 24.03.2014, once again agreed and accepted their liability towards the petitioner Company vide their mail/reply dated 25.03.2014 whereby Shri. J. Brijmohan Reddy, Vice Chairman of the corporate debtor agreed to all points as mentioned in the e-mail dated 24.03.2014 written by the petitioner and requested that the first instalment shall be paid by them in the month of April, 2014 instead of March 2014 and second instalment shall be paid in the month of June 2014 instead of April 2014. However, till date nothing has been paid so far.
- (8) The Petitioner/Operational Creditor issued a Demand notice dated 20th February, 2017 in prescribed Form 3 under Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor by calling upon them to pay the outstanding amount of Rs.2,28,32,742 which includes interest within 10 days from the date of receipt else communicate pendency of suit or arbitration proceedings in respect of demand.
- (9) The said notice was duly received and served upon the Corporate Debtor on 27.02.2017, and despite



expiry of the period of 10 days as provided under the code; the Corporate debtor failed to either reply or bring to the notice of the Operational Creditor; existence of any dispute or proof of payment of unpaid operational debt as claimed by the applicant/operational creditor. Hence this Company petition is filed by the Petitioner /Operational Creditor.

3. The Respondent / Corporate Debtor have filed a counter dated 25th April, 2017 by inter-alia contenting as follows:-

- (a) The Petitioner/Operational Creditor is deliberately and intentionally trying to mislead the Tribunal by mixing up the issues. The Respondent entrusted works under 4 agreements (i) Agreement dated 12.10.2007 in relation to UP-2 and UP-3 Bridge works; (ii) Agreement dated 26.02.2008 in relation to Bridge Work entrusted to the Petitioner in UP-2 package; (iii) Agreement dated 19.04.2011 in Indore-Dewas of NH-3 package, whereby the Respondent entrusted a Bridge work; and (iv) LOI dated 23.01.2011, whereby the Respondent entrusted earth work in Indore-Dewas of NH-3 package. The Petitioner is deliberately and intentionally concealing the material facts of each Agreement just to mislead this Tribunal.
- (b) The Agreement of UP-2 and UP-3 i.e Agreements dated 12.10.2007 and 26.02.2008 the Petitioner executed Agreement works and the final account was settled. As per the final account the Petitioner was entitled to Rs.50,30,451/-. However, the Petitioner was liable to pay Rs.31,56,661/- to the Respondent in Indore-Dewas project i.e LOI dated 27.01.2011 (4thAgreement). The said amount was adjusted against the amount payable under the Agreements dated 12.10.2007



and 26.02.2008. Thus, the amount payable to the Petitioner was Rs.21, 35,491/- as admitted by the Petitioner. Apart from that the Respondent also agreed to pay Rs.1,75,000/- towards pre-stressing Jack which was allegedly not returned to the Petitioner. Accordingly amount payable to the Petitioner against the 1st, 2nd and 4th Agreements referred above is Rs. 23, 10,497/- The said fact has been accepted by the Petitioner.

- (c) The aforesaid mentioned due amount of Rs.23,10,497/- has been paid to the Petitioner. Rs.12 lakhs paid through RTGS (Vide cheque No. 528460 dated 02.05.2014 drawn on Canara Bank) and the balance amount of Rs.11,10,497/- was adjusted against the amount payable by the Petitioner in the 3rd Agreement referred above i.e. Agreement dated 19.04.2011.Hence, it is contended that the Respondent is not liable to pay any amount to the Petitioner. Since the Petitioner has abandoned the works as per Agreement dated 19.04.2011 in May 2014, the question of executing the further works by Petitioner beyond May, 2014 does not arise. The whole case is revolving around RA Bill Nos. 27 and 28 or Agreement dated 19.04.2011, which work was never executed by the Petitioner.
- (d) It is reiterated that the Respondent entrusted a bridge work to the Petitioner vide Agreement dated 19.04.2011 and it has to construct the bridge at km. 577.550 to km. 610.00 of Indore-Dewas Project and should be completed within a period of 18 months from the date of handing over of the site. The Respondent handed over the hindrance free site on 31.06.2011. Therefore, the schedule completion date was 31.12.2012. As per the agreement dated 19.04.2011, all the works to be



completed in all respects by January, 2013. However, the Petitioner has executed only up to 51% work. As per Clause No.29 of Agreement dated 19.04.2011, if the Agreement works are not completed as agreed upon, the Petitioner is liable to pay pre-estimated damages. Accordingly, the Petitioner agreed to compensate the damages of Rs. 50,000/- per day subject to ceiling of 10% of the contract sum.

- (e) Because of the Petitioner's irresponsible actions/inactions, the Respondent suffered delay of 518 days. As per clause 19 of the said Agreement, the Petitioner is liable to pay pre-assessed damages i.e. Rs.50, 000/- x 518 days, which is more than 10% of the contract value. As per this clause, the Petitioner is liable to pay liquidated damages of Rs. 45 lakhs.
- (f) The Petitioner is making false claims vide RA Bills No.24, 25, 26, 27 & 28. The Petitioner did not execute any work beyond May, 2014. Moreover, the RA Bills, 27 &28 are not signed by the Respondents. It is denied that the Respondent is liable to pay Rs.2, 28, 32,742/- to the Petitioner. It is seen that out of Rs.2, 28, 32,742/-, interest part itself is Rs. 78, 11,005/-
- (g) As per the clause 6 of the Agreement dated 19.04.2011, the Petitioner is entitled for 50% retention amount upon issuance of taking over certificate and balance 50% upon completion of the defect liability period in compliance of Clause 30 of Agreement.
- (h) In pursuant to the Demand notice issued by the Petitioner, the Respondent replied it on 16.03.2017. In fact, the Petitioner earlier issued notice dated nil which was received by the Respondent on 02.07.2016, and in response, the



Respondent issued a detailed reply dated 22.07.2016.

- (i) It is contended that Respondent is solvent Company and is having consolidated net worth of Rs. 76,065.85 lakhs. The Respondent is not liable to pay any amount as demanded. Therefore, this petition is liable to be dismissed.
4. The Petitioner has filed a rejoinder dated 04.05.2017 by denying the averments made in the counter filed by the Respondent. The following are the main contentions raised in the rejoinder.
- (1) The Corporate Debtor has categorically accepted and admitted the claims of the operational creditor. The Corporate Debtor has no right to file a reply to the present proceedings initiated under the IBC as this Tribunal has to adjudicate the issue upon considering the facts enumerated in the petition. The Corporate Debtor has categorically admitted the receipt and approval of invoices (RA Bills) as raised by the Operational Creditor.
 - (2) It is the settled position of law that money given on contract cannot be adjusted against the amounts due in another contract. The contention to adjust the dues against the liquidated damages for the delay is nothing but an afterthought.
 - (3) It is stated that the delay in execution of the contracts in question was due to the reasons attributable to the Corporate Debtor. The Petitioner is not aware about the imposition of any liquidated damages and the Corporate Debtor has come with plea of liquidated damages, when the Petition is filed.
 - (4) After receiving notice under Section 8 of the IBC, 2016 on 22.02.2017, the Respondents failed to reply the same within the stipulated period i.e. 10 days,



thereby forfeited its right to give any reply for the same. The contentions of the Respondents that they have given reply to notice under section 8 of IBC i.e. on 16.03.2017 cannot be considered it as a reply to the demand notice. It is relevant to point out that the copy of the present petition was delivered to the Respondents on 15.03.2017 and sending the said reply on 16.03.2017 is an afterthought. Moreover, it is baseless, frivolous and unrealistic facts.

- (5) The Respondents have also filed CA No. 1620/2016 before the Hon'ble High Court by inter-alia seeking to convene the meeting of unsecured creditors of the Corporate Debtor for the purpose of considering and approving the Composite Scheme of Arrangement with or without modification. The meeting was held on 23.01.2017 and the Petitioner was also called for the meeting as one of un-secured creditors and the Scheme was opposed by the Petitioner during the said meeting. So the contentions of respondent that the petitioner itself was due to them are baseless and untenable.
- (6) It is denied that the Petitioner is mixing up the issues. The fact is that the Corporate Debtor had entrusted different work under different Agreements / sub-contracts.



5. We have heard Mr.AchinGoel & Deep Kishore, Learned Counsels for the Petitioner / Operational Creditor and Mr. S. Ram Babu &B. Ramesh, Learned Counsels for the Respondents/ Corporate Debtor, and also perused all the pleadings of both the parties along with the material papers filed in support of their respective contentions and extant provisions of IBC, 2016.
6. The case was listed for admission on 12.04.17 and a notice was accepted on behalf of respondent and sought further time to file reply and thus, the case adjourned to 26.04.17,

08.05.17, 09.06.17 and reserved the matter for orders and both the learned counsels are permitted to file their respective arguments so they have filed their arguments later on by reiterating respective stands giving no scope for settling the issue in question.

7. Shri Achin Goel, learned Counsel for the petitioner, while reiterating various contentions raised in the pleadings basing material papers, has further contended as follows:

- 1) A notice under section 8 of the Code was issued by the operational creditor on 20.02.2017, which was duly served upon the corporate debtor on 22.02.2017. Despite receipt of the same, neither any reply nor any dispute whatsoever was raised by the corporate debtor within the statutory period of 10 days as enumerated under Section 8 of the Code. As such the present petition/ application ought to be straight away admitted by this Hon'ble Tribunal on this ground itself.
- 2) The present application was filed before this Hon'ble Tribunal on 16.03.2017 and an advance copy thereof was served upon the corporate debtor on 15.03.2017. It was only after then, when the corporate debtor came to know about the filling of the present petition before this Hon'ble Tribunal, it sent a vague, false, vexatious and hopelessly delayed reply dated 16.03.2017 alleged to be a reply to the notice dated 20.02.2017 by way of afterthought, manipulation and with malafide intention. There is no proof of payment is either being annexed or referred by the corporate debtor in the said reply dated 16.03.2017 or in its counter; though in the counter affidavit it has wrongly and falsely alleged to have paid certain amounts as claimed in the present petition. It has also failed to give any reference of any dispute or proceedings pending



before any court of law or arbitration in terms of the provisions of the Code and as discussed and settled in the case of "*Kirusa Software Private Limited Vs. Mobilox Innovations Private Limited decided on 24.05.2017 vide Company Appeal (AT) (Insolvency) 6 of 2017 by the Hon'ble NCLAT, New Delhi.*"

- 3) There are unequivocal, undisputed and unambiguous admissions on behalf of the corporate debtor in respect of the due amounts vide different communications as well as in its reply/ counter filed to the present petition. The corporate debtor vide its email dated 25.03.2014 while replying to an email dated 24.03.2014 of operational creditor undisputedly agreed for paying an amount of Rs.24,90,497/- to the operational creditor in respect of first contract dated 12.10.2007 however nothing as such has happened till date despite repeated assurances.
- 4) That in respect of the second contract dated 19.04.2011, there are five R.A. Bills i.e. R.A. Bill no. 24, 25, 26, 27 and 28 which are not being paid by the corporate debtor till date despite receiving/acknowledging the same. It is pertinent to mention here that out of the aforesaid five bills, three bills i.e. R.A. Bill nos. 24, 25 and 26 have already been approved/ certified by the corporate debtor but not being paid till date deliberately. The total amount due in respect of these three bills is Rs.52,65,640/-.
- 5) The corporate debtor has duly accepted that the R.A. Bill nos. 27 and 28 has not been paid however it has not disputed the receipt of the same. So far signatures on the bills are concerned, it is contended it was not mandatory all the time to sign the bills before payment and it is a matter of fact that even



the bills which were not signed have been paid in past. For instance, even from the own admission of the corporate debtor, the R.A. Bills nos. 24, 25 and 26 were duly accepted and approved by them however out of these bills; R.A. bill no. 25 which is annexed at page 119 of the petition was not signed by either party but acknowledged to be approved and accepted by the corporate debtor. Thus, though the signatures on the bills were required but it was not mandatorily compulsory so as to call them as invalid.

- 6) The allegation of Corporate Debtor that petitioner has abandoned the work in respect of contract dated 19.04.2011 in the month of May, 2014 is strongly denied. On the other hand, the contract in question was amicably closed by consent and understanding of both the parties in the month of June, 2014.
- 7) The learned counsel further submit that the petitioner was called for the meeting of unsecured creditors which was convened and held on 23.01.2017 in terms of the order dated 05.12.2016 passed by the Hon'ble High Court of Judicature at Hyderabad. And this shows that petitioner is admittedly an un-secured creditor.
- 8) The learned Counsel further pointed out letter dated 31.05.2015 they have shown the operational creditor in debt of Rs. 3,59,372/- while in their reply dated 16.03.2017, it has shown a balance of Rs.14,69,869/- Therefore, in one communication the corporate debtor has deliberately, malafidely and in order to cover up their own wrongs have referred some other figure while in another communication some other. Therefore, these communications neither could be believed nor considered in the present proceedings



being manufactured only with an intention to cause wrongful gains from it.

- 9) He has further contended that the Corporate Debtor has deliberately and malafidely given adjustment to the amounts due to the Operational Creditor in respect of the contract dated 12.10.2007 against the contract dated 19.04.2011. And the same is not legally tenable in terms of the Judgment passed by the Hon'ble Supreme Court in the case of "*Union of India Vs Raman Iron Foundry 1974 AIR 1265*" and by Punjab and Haryana High Court in the case of "*SECL Industries Limited Vs The State of Haryana and others CWP No. 13285 of 2012 decided on 09.10.2012*".
- 10) It is further contended that the I&B Code is a separate legislation, which has been introduced to keep a check on illegal activities of the corporate debtor. It is contended that a reply if any issued earlier, under Companies Act does not have any bearing upon the present proceedings as these proceedings are all together different.
- 11) The following judgements are relied upon by the petitioner in support of their case:
- "Kirusa Software Private Limited Vs. Mobilox Innovations Private Limited" decided on 24.05.2017 vide Company Appeal (AT) (Insolvency) 6 of 2017 by the Hon'ble NCLAT, New Delhi.
 - "Union of India vs Raman Iron Foundry 1974 AIR 1265"
 - "SECL Industries Limited Vs The State of Haryana and others" decided by the Hon'ble High Court of Punjab and Haryana vide CWP No. 13285 of 2012 on 09.10.2012
 - "Essar Projects Inida Ltd. Vs M/s MCL Global Steel Pvt. Ltd." decided by the NCLT, Mumbai Bench, Mumbai in CP NO. 21/I & BP/NCLT/MAH/2017 on 06.03.2017



- e) "M/s Surbhi Body Products (P) Limited Vs M/s Meyer Apparel Ltd." decided by the NCLT, Chandigarh Bench, Chandigarh in Company Petition (IB) NO. 13 & 14/Chd/Hry/2017 on 07.04.2017.
- f) "Era Infra Engineering Ltd. Vs. Haryana VidyutPrasaran Nigam Limited & Ors." decided by the Hon'ble High Court of Punjab and Haryana vide CWP No. 9460 of 2013 on 28.04.2016.
8. Shri S.Ramababu, learned counsel for the respondent, while reiterating the pleading raised in his pleadings, has further submitted as under:
- (1) The Operation Creditor failed to establish that the Corporate Debtor is liable to pay Rs.2,28,32,742/- as demanded vide Notice dated 20.02.2017. The Operation Creditor issued two Notices dated 02.07.2016 demanding Rs.24,19,497/- under Agreement dated 12.10.2007 and Rs.52,40,005/- under Agreement dated 19.04.2011, whereas, now the Operation Creditor demanded Rs.2,28,32,742/- under Notice dated 20.02.2017. Thus, it is clear the contention of the Operation Creditor is wrong and afterthought.
- (2) The Corporate Debtor gave detailed reply to the aforementioned Notices vide reply Notice dated 22.07.2016. It is reiterated that the Operation Creditor issued Notices dated 02.07.2016 (two), whereby claimed that the total amount due to the Operation Creditor is Rs.77,30,502/-, whereas the Operation Creditor now claimed Rs.2,28,32,742/- vide Notice dated 20.02.2017. Thus it is clear the Operation Creditor filed the subject Petition with malafide intention.
- (3) It is stated that Clause 47 of the Agreement dated 12.10.2007 provides the mechanism for settlement of disputes. Therefore, the Operation Creditor cannot file this petition without exhausting alternative remedy under the said agreement.



(4) It is stated that the Corporate Debtor has awarded 4 works to the Operation Creditor. The details of the Agreements executed between the parties are as follows:

- (i) Agreement dated 12.10.2007 in relation to UP-2 and UP-3 Bridge works;
- (ii) Agreement dated 26.02.2008 in relation to Bridge work entrusted to the Operation Creditor in UP-2 package;
- (iii) Agreement dated 19.04.2011 in Indore-Dewas of NH-3 Package, whereby the Corporate Debtor entrusted a Bridge work; and
- (iv) LOI dated 23.01.2011, whereby the Corporate Debtor entrusted earth work in Indore-Dewas of NH-3 Package.

The issues in relation to Agreement Nos. 1 and 2 were settled in June 2012. Therefore, the disputes in relation to Agreement Nos. 1 and 2 are barred by limitation. And no dispute was raised by the Corporate Debtor in relation to 4th Agreement. The present petition is filed against Agreements dated 12.10.2007 and 19.04.2011 and the following are his contentions:

IN RE: The disputes in relation to the Agreement dated 12.10.2007:

While agreeing with the execution of agreement, it is stated final account was settled in June 2012 i.e. almost 5 years prior to filing of subject Company Petition. As per the final account, the Operation Creditor was entitled to Rs.50,30,451/-. However, the Operation Creditor was liable to pay Rs.31,56,661/- to the Corporate Debtor in Indore-Dewas Project i.e. LOI dated 23.01.2011 (4th Agreement) referred above. The said amount was adjusted against the amount payable under the Agreements dated 12.10.2007 and 26.02.2008. Thus, the



amount payable to the Operation Creditor was Rs.21,35,491/- as admitted by the Operation Creditor. Apart from that the Corporate Debtor also agreed to pay Rs.1,75,000/- towards pre-stressing Jack which was allegedly not returned to the Operation Creditor. Thereby, the outstanding amount payable to the Operation Creditor against the 1st, 2nd and 4th Agreements referred above was Rs.23,10,497/-. The said fact has been accepted by the Operation Creditor in the subject Petition also.

Out of said amount, Rs.12,00,000/- (Rupees Twelve lakhs only) paid through RTGS (vide cheque No.528460, dated 02.05.2014 drawn on Canara Bank) and the balance amount of Rs.11,10,497/- was adjusted against the amount payable by the Operation Creditor in the 3rd Agreement referred above i.e. Agreement dated 19.04.2011. So the Operation Creditor wrongly and in contrary to the documents pleaded that the Corporate Debtor is liable to pay Rs.37,70,271/-.

IN RE: The disputes in relation to the Agreement dated 19.04.2011:

- a) The dispute is revolving around RA Bill Nos.27 and 28 of the Agreement dated 19.04.2011. The Operation Creditor invoked Arbitration Clause and referred the disputes to the Arbitral Tribunal vide its letter No.JIL/CFA/L-117-B/128, dated 21st April, 2017. As per Notice dated 21.04.2017 the alleged amount involved under Agreement dated 19.04.2011 was Rs.1,90,62,471/-. Therefore, it is contended that the amount in question is under dispute.
- b) There is Clause No.29 in the Agreement dated 19.04.2011. The Clause deals with pre-estimated damages, if the Agreement works are delayed due to the reasons attributable to the Operation Creditor, then the Operation Creditor shall pay pre-estimated



damages. As per the said Clause, the Operation Creditor agreed to compensate the damages of Rs.50,000/- (Rupees Fifty Thousand Only) per day subject to ceiling of 10% of the contract sum. As per Clause No.29 of the Agreement dated 19.04.2011, the Corporate Debtor is empowered to recover liquidated damages if delay is attributable to Operation creditor.

- c) While explaining that the delay in completion of works in question, the respondent in fact is entitled for damages and it can adjust the same with the amount payable to petitioners in other works.
 - d) It is contended that that since the Corporate Debtor had invoked the Arbitration in relation to the 2nd Agreement; Company Petition is liable to be dismissed on this count also.
9. The case listed for admission on 12.04.2017, 26.04.2017, 08.05.2017, 09.06.2017 and finally on 10.10.2017 and the counsel for the Respondent takes notice on 12.04.2017. The case was adjourned on the above dates in order to give sufficient opportunity to the Respondent so as to put their defence to their satisfaction and also to see whether the respondent, being a reputed Company, wanted to settle the issue before initiating CIRP against it, by this Tribunal. Since the Respondent are not willing to settle the outstanding bills of the Petitioner pending with them, there is no other alternative the Adjudicating Authority to consider the merits of the case whether to initiate CIRP or not basing on the facts available on records.
10. Since the present Company petition is initiated u/s 9 of the IBC, the following are fundamental issues relevant for consideration.



- i. Whether there is an “operational debt” as defined exceeding Rs. 1 Lakh?
- ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the Adjudicating Authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon factors mentioned in Section 9(5) of the Act.

11. The word Operational Creditor and Operational Debt are defined U/s 5 (20) & (21) of IBC, 2016 and it reads as under:

Section -5(20): “Operational Creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section 5(21) : “Operational Debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”



Whereas debt is defined U/s 3 (11) and it reads as under:

“Debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

Whereas default is defined U/s 3 (12) and it reads as under:

Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

12. Since the remedy provide U/s IBC is expeditious one, the code has prescribed expeditious procedure in resolving issues by minimising the procedural aspects. Therefore, the Section 8(2) has prescribed 10 days time for the Corporate Debtor to respond to the demand notice either with payment or intimation of existence of dispute with regard to the issue. The intention behind stipulating 10 days time is to avoid roving inquiry into un-related disputes being raised by the Corporate Debtor. So the Adjudicating Authority, in the first instance is supposed to see whether statutory demand is responded by the Corporate Debtor with suitable material or not. Thereafter, it has to examine whether debt and default in question occurred or not. In the instant case, as stated by the learned counsel for the petitioner, the respondent did not respond to the statutory demand notice under the provisions of IBC, 2016 except giving a belated reply, that too after filing the present Company petition, stating un-related and un-tenable grounds, as an afterthought.

13. As per section 9(1) of the IBC, 2016, after the expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment, the Operation



Creditor may file an application before the Adjudicating Authority for initiating a CIRP, if he has not received payment or intimation of dispute, the Adjudicating Authority has to admit the application within 14 days of the receipt of the application, if the application is complete in all respects and reject it, if it is incomplete.

14. In the instant case, after, making all efforts by the Operational Creditor to recover the outstanding amount due from the Respondent, has finally issued demand notice dated 20.02.2017, in prescribed Form No.3 under IBC, 2016 r/w Rule-5 of I&B ("Application to Adjudicating Authority") Rules, 2016. The notice complied all the requirements of a demand notice by giving all the details of debt totalling Rs.2,28,32,742/-. The petitioner has sent the demand notice by RPAD dated 20.02.2017 and also through courier/ DTDC. The acknowledgment of the respondent is filed at page 135 & 136 with Company petition
15. Since the petitioner didn't receive any reply nor any payment within 10 days stipulated time u/s 8 of the IBC, the present CP is filed on 16.03.2017 in this Tribunal by duly serving the copy of the CP to the respondent. The Respondent has filed a counter on 27.04.2017 by enclosing a reply dated 16.03.2017, addressed to the petitioner and since this letter is relevant to the issue, it is extracted below:

"Dated: 16.03.2017"

To

M/s Jaycon Infrastructure Ltd.
34, 35 & 36 Tribhuvan Complex
Ishwar Nagar, Mathura Road
New Delhi-110065

Sub: Six Laning of Lindore-Dewas if NH-3 from
Km.577.550 to Km 610.000 and Km.0.000 to Km.



12.600 (Approx. Length 45.05 Km) for construction of Kashipra Bridge - Sub-Contract Agreement dated 19.04.2011- Reg.

Ref: Your Notice dated 20.02.2017.

Dear Sir,

In response to your above referred notice dated 20.02.2017, we would like to remind you that on the same subject you had issued legal notices dated Nil which were received by us on 02.07.2016 to which our counsel gave detailed reply notices dated 22.07.2016 the contents of the said reply notices may be treated as part and parcel of these notices. We would like to reiterate that we are not liable to pay any amount to you, but as a matter of fact, you are liable to pay Rs.14,69,869/-. Hence we once again request you to withdraw the above referred notice unconditionally and seek apologies for issuing vicious Notice and repay the balance amount of Rs.14, 69,869/- within 21 days from the receipt of this reply, failing which we will initiate appropriate action as may be advised.”



The above reply in the first instance is given after expiry of 10 days as stipulated and secondly, it did not given any particulars of payment of outstanding as claimed in the Demand notice in question. It is also to be pointed here that earlier notices were given by the petitioner Company itself under the Companies Act. Even they did not say they have raised any dispute before any authority or resorting to arbitration. Moreover, this reply cannot be treated a reply to the demand notice.

16. The petitioner has also filed his banker statement (State Bank of India) at Page 123 to 127 of the material papers filed along with the CP, to show that the amount was not paid by the Respondent. The above circumstance clearly shows that the petition/application filed U/s. 9 of IBC is

complete in all respects and it is a fit case to admit the application u/s. 9(5) of IBC, 2016.

17. It is also relevant to point out here the casual nature of filing counter, on behalf of the Respondent, in a case, where serious consequences would ensue by admission of the case by the Adjudicating Authority. The Company petition is opposed by Respondent by filing a counter by one Mr. M.Praveen Kumar, DGM(Contracts) of respondent Company. It is relevant to point out that this counter affidavit stated to have been signed on 25.04.2017, but it is stated to have been attested by one Shri ChallariNageswara Rao, Notary on the next day ie on 26.04.2017. It is also not known as to how an affidavit signed on 25.04.2017 can be attested in absence of deponent. Another glaring fact to be noted down is that Shri. M.PraveenKumar is stated to have been given GPA, which is executed on 20th January, 2014 through Mr.T.V. Sandeep Kumar Reddy, MD. So the GPA is executed in the year 2014 when IBC Code itself is not promulgated. Since the IBC is promulgated to bring remedies available SICA, 1985, Recovery of Debts due to Banks and Financial Institutions Act, 1993, SARFAESI, Act, 2002 and Companies Act, 2013, under its purview of jurisdiction, it has prescribed stringent compliance of all the provisions like issuing the final demand notice by an Authorized representative of the Company, (Corporate Debtor, who is duly authorized by the Company through proper resolutions of the Board of the Company, granting only 10 days to Corporate Debtor to respond to it. The Code under section 8(2) use the word 'Shall' to avoid further delay in the issue. As stated supra, it is not in dispute that the demand notice in question is issued under the provisions of IBC r/w Rule-5 of I&B ("Application to Adjudicating Authority") Rules, 2016 by an authorised representative of the petitioner Company.



In this context, it is relevant to point out here, while seeking to initiate the present CIRP, the petitioner has filed a copy of a Board Resolution passed by item No.178/10 in the Board meeting of the Jaycon Infrastructure Ltd held on 23.01.2017 (Annexure- P1, Page -32 of material papers) duly executed by inter-alia authorising Shri Jatinder Mittal, Director of Jaycon Infrastructure Limited to initiate CIRP before the NCLT, Hyderabad Bench by executing necessary documents for the above purpose.

18. Therefore, the respondent has not only causally opposed the Company petition but it has also not followed proper procedure in giving authorisation to a responsible representative of the Company to conduct proceedings initiated under IBC, on behalf of the Company. In fact, the counter is ought to have been rejected. It is relevant to point out here the contention of Mr. AchinGoel, learned counsel for petitioner that once the petitioner /Operational Creditor is able to prove that there is a debt and default, and the other side failed to respond to a statutory Demand notice issued under IBC bringing out existence of any dispute, the Adjudicating Authority should not grant any further time to the Corporate Debtor and it should admit the case by initiating CIRP as prayed for. Mr. AchinGoel is right with above contention. However, before initiating CIRP under IBC, which would have serious legal consequences apart from eroding the goodwill of Corporate Debtor, it is just and equitable to extend full opportunity to the Corporate Debtor so as to see that the issue in question should get some sort of solution. Apart from that, principles of natural justice are invariable to be followed by judicial Authorities, while passing any adverse orders affecting the rights of other party/parties. Therefore, we have granted enough time to the Corporate Debtor for reconciliation of the issue in question. Unfortunately, the



Corporate Debtor, who is stated to be solvent to pay its debts, has failed to avail opportunity afforded by the Adjudicating Authority and taken Operational Creditor into confidence to resolve the issue, leaving the Tribunal with no other alternative except to decide the issue of CIRP. The Corporate Debtor have time and again reiterated the very same un-tenable grounds like, it is for the petitioner to refer the matter for arbitration, they have adjusted the dues of petitioner against another account due to the respondent; they are entitled for Liquidated damages as per the agreements etc

19. It is in not in dispute that there are several sub-contracts entrusted to the petitioner Company by the Corporate Debtor and executed separate Agreements by incorporating the terms and conditions for the particular sub-contract. So it is to be held that every sub- contract has to be treated as separate and independent for its conclusion. It is not the case of the Corporate Debtor, there is a clause available in the agreement(s) in to adjust dues from the petitioner as against other dues i.e. set off. As pointed out by the Corporate Debtor, there are clauses available in the Agreements in question with regard to amicable settlement of the issue, liquidated damages etc. Admittedly, it is not the case of Corporate Debtor, the issue in question is referred to Arbitration. The Corporate Debtor, in their Written submission dated 16th June, 2017 merely stated that the Operational Creditor has invoked Arbitration Clause and referred the disputes to the Arbitral Tribunal vide its letter No. JIL/CFA/L-117-B/128 dated 21st April, 2017 even without filing any supporting document to that extant to examine it by the Tribunal. As stated supra, the Corporate Debtor has not responded to statutory Demand notice issued by the Operation Creditor. Even the so called the defence of Liquidated damages on the part of Corporate Debtor, has admittedly not invoked by it. Moreover, it is serious disputed fact to be decided as



to who is at fault, and thereafter only, quantum of damages/claim will arise. As stated supra, the Operational Creditor has un-equivocally rejected the baseless contentions of the respondent. At same time, we are not going into merits of so called existence of dispute raised on behalf of respondents but only analysing prima facie whether any substance is there even to consider those contention. The Tribunal/Court/Adjudicating Authority cannot simply take into judicial cognizance of vague and baseless allegation(s) even without filing substantial evidence supporting those averments.

20. As stated supra, in order to initiate CIRP U/s 9, the first step is for Operational Creditor to give proper demand notice u/s 8 of IBC. Admittedly, the respondent did not avail opportunity of 10 days given under the said provision. And the so called reply dated 16.03.2017 is cannot be called a reply to the Demand notice issued under the provisions of IBC and the Rules made there under.

It is not in dispute that the petitioner and respondent are involved in several sub - contracts and the Adjudicating Authority cannot go into roving enquiry about each sub-contract assigned to the petitioner by the respondent and it can consider only with reference to issue revolve around the Demand notice in question. Admittedly, the petitioner has made out a case with regard to the outstanding amount as per the impugned demand notice in question.

In the absence of any agreement between the parties for set off, no party unilaterally can do it. And it should be mutually agreed between the parties. It is not case of respondent that the petitioner has accepted for the so called set off/adjustments/liquidated damages.



21. As per the arbitration clause made in the sub-contract agreement, an Engineer appointed by the respondent is Competent Authority to decide dispute with regard to outstanding amount of the respondent. It is for the respondent to refer the disputed question of outstanding amount to the arbitration as per the clause availability in the agreement in question. Admittedly it is not the case of the respondent that the issue in question is referred to arbitration. The respondent can very well can invoke arbitration clause available in the agreement in question and it can be conveyed to the Operational Creditors when a demand notice issued under the provisions of IBC. Therefore, it is to be held that there is no existence of dispute in instant case. And the contentions raised by the respondent with regard to alleged dispute are hereby rejected. It is not tenable for the Corporate Debtor to raise alleged dispute after filing the case under IBC, as detailed supra. It is to be held that there is a default and debt as defined under code and the respondent failed to point out any dispute, in pursuance to the demand notice under the IBC as stated supra. Moreover when the works under sub-contract was executed, it is against the principles of natural justice to put the petitioner on defence, when claims are made by the Operational Creditor. It is paramount duty of the petitioner to settle the dues of sub-contractor. The plea of liquidated damages is also not tenable, after the petition is filed.



22. We have perused the documents filed by the petitioner as well as the respondent and there is no dispute, and it is prima-facie case that there is a debt default on part of the respondent, as defined under the Code.
23. As per definition of default u/s 3 default means non payment of debt when whole or any part or instalment of the amount of debt as become due and payable and is not repayable by the debtor of the Corporate Debtor of the

case may be. As stated supra, it is not the case of respondent there is no outstanding payable to the petitioner but their contention rather allegation, on the contra, is that petitioner is liable to pay them.

24. Mr. Achin Goel, the learned counsel for petitioner has cited several cases as mentioned supra in support of his case. One of the cases cited by him is the Judgment rendered in the case of Kirusa Software Private Limited as decided by the Hon'ble NCLAT in Company appeal (AT) (Insolvency) 6 of 2017. However, the decision in the case is aside the judgement of Hon'ble NCLAT passed in the case, by the Hon'ble Supreme Court of India in CA No. 9405 of 2017 filed by Mobilox Innovations Private Limited, vide judgement dated 21st September, 2017.

One of the relevant para of the Hon'ble Supreme Court in the said judgment, with reference to the present is para 45 which is extracted below for ready reference:

“Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.”

Under para 4, it is further stated that “the Demand notice sent by the respondent was disputed in detail by the appellant in its reply dated 27th December, 2016 which set out the e-mail of 30th January, 2015.

In the instant , as stated supra ,the respondent has not admittedly raised any dispute by giving a reply to the



impugned demand notice dated 20.02.2017 issued by the petitioner, under IBC as stated supra. It has given a reply dated 16.03.2017, as extracted supra, which is not at all reply to the statutory notice issued under IBC. Therefore, we are of the considered view that there is a debt and default and there is no existence of the dispute as contended by the respondent.

25. The petitioner/Operational Creditor, in one of the prayers, prayed the Tribunal to appoint Resolution Professional or Interim Resolution Profession under the Code. Accordingly, we have asked one Dr.K.Lakshmi Narsimha, Ph.D (Law), who is a qualified Insolvency Professional, and practicing in various Courts including before this Bench, in the City and he is willing to act as IRP in the instant case. Accordingly, he has given his willingness in prescribed Form No. 2 dated 09th October, 2017. We are satisfied that there is no disciplinary proceedings pending against him. We have examined the documents filed by him, and found he is fully eligible to be appointed as IRP in the case.
26. On perusal of the petition along with supported documents and pleadings of respondents and relevant law, we are convinced that the instant petition (application) is complete in all respects, as prescribed under section 9(2) of Code, and satisfied/fulfilled all the conditions prescribed under section 9(5) of the Code so as to admit the case, and to pass consequential order by invoking powers conferred on the Adjudicating Authority under sections 13,14,15 and 16 of Code..
27. In view of the above facts and circumstances of the case, we are of the considered opinion that it is a fit case for admission.
28. In the result, the following order/directions are passed by invoking the powers conferred upon Adjudicating



Authority, under Sections 9(5) 13,14,15,16, 17, 18, 19, 20, 21, 22 and 25 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016:-

- a) We hereby admitted the Company petition bearing CP(IB)No. 45/09/HDB/2017.
- b) We hereby appointed Dr K Lakshmi Narasimha, Ph.D, R/o H No 16-11-20/13, Saleem Nagar-2, Opp. Tahsildar Office/MRO Bhavan, Near TV Tower Malakpet, Hyderabad-500036 Telangana (IBBI/IPA-001/IP-00107/2017-2018/10214 dated 23-05-2017) as Interim Resolution Professional, by exercising powers under section 16 of IBC, 2016.
- c) We hereby declare the following Moratorium by prohibiting the following actions:-
 - (i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority:
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002);



(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(v) Direct to cause a public announcement of the initiation of Corporate Insolvency Resolution Process immediately as prescribed under section 15 (1) and (2) of Insolvency and Bankruptcy Code, 2016 and on www.ibbi.gov.in (designated website of Insolvency and Bankruptcy Board of India, circulated vide IIBI/IP/PUBLIC ANN/221 dated 01.02.2017) and email to public.ann@ibbi.gov.in, in addition to other accepted modes of publication immediately and call for submission of claims as per Section 15 of the IBC read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Company is also directed to publish the same in their Official website.



(vi) We direct the Interim Resolution Professional to constitute a Committee of Creditors, after collation of all claims received against the Corporate Debtor and determination of financial position of Corporate Debtor, as per Section 21 of IBC. The First meeting of the committee of creditors, shall be held within 7 days of the constitution of committee of creditors and their decision has to be communicated to the Tribunal as per Section 22 of the IBC.

(vii) Direct the personnel of Gayatri Projects Limited, its promoters or any other person associated with the management of Gayatri Projects Limited, to assist and cooperate with Interim

Resolution Professional to provide access to documents and records and management of the affairs of the Company.

(viii) We direct the Interim Resolution Professional to strictly adhere to all extant provisions of the Insolvency and Bankruptcy Code, 2016 and Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and shall report his actions promptly to this Tribunal by way of sworn affidavit.

(ix) Post the case on 02.11.2017



Sd/-
RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-
RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL

for Dy. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER. CP(12) NO. 45/69/HDB/2017
निर्णय का तारीख
DATE OF JUDGEMENT. 10.10.2017
प्रति तैयार किया गया तारीख
COPY MADE READY ON. 16.10.2017