IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ

CP (IB) No.12/ALD/2021

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

M/s Morex Corporation Limited

Having its registered office at:

Workshop 06, 11/F, Lemmi Centre,
No. 50, Hoi Yuen Road, Kwun Tong,
Kowloon, Hong Kong
Email: jathin@yamaribbon.com

...Applicant/Operational Creditor

Versus

Jindal Poly Films Ltd.

Having its registered office at:

Registered Number: - 3979,
19th, K.M. Hapur,
Bulandshahr Road, P.O. Gulaothi,
Bulandshahr, UP- 245408
Email: csjpoly@jindalgroup.com

...Respondent/Corporate Debtor

Order pronounced on 14th December, 2023

CORAM:

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

-Sd- -Sd-

PRESENT-

Ms. Sonali D Pawar, Adv. : For the Operational Creditor

Sh. Alok Dhir alongwith
Ms. Mahima Ahuja,
Ms. Varsha Banerjee &
Sh. Shishir Dwivedi proxy
for Sh. Manu Khare, Advs. : For the Corporate Debtor

ORDER

1. The instant application is filed on 29.09.2020 by **M/s Morex Corporation Ltd.** (hereinafter referred as '**Applicant/Operational Creditor**') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "**I & B Code, 2016**") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "**the Rules**") against **M/s Jindal Poly Filma Ltd.** (hereinafter referred as '**Respondent/Corporate Debtor**'. The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as '**CIRP**') against the Respondent/Corporate Debtor due to default in payment of total outstanding Operational Debt of Rs.3,42,60,000/- (Rupees Three Crore Forty Two Lakhs Sixty Thousand Only) of which principal amount is Rs. 3,00,00,000/, interest amount is Rs. 33,60,000/ and Air freight charges are Rs. 9,00,000/.

2. Briefly stated facts of the present case as averred by the Applicant/Operational Creditor in its Application filed in Form-5 containing part I, II, III, IV & V are that:-

i. The Applicant M/s Morex Corporation Ltd. is based in Hong Kong, which is into the business of import and export. Respondent M/s Jindal Poly Films is a company which is into the business of manufacture of SSMMS material and other allied business and has its registered office at 19th, K.M. Hampur, Bulandshahr Road, P.O. Gulaothi, Bulandshahr, UP.

ii. The Applicant submits that a purchase order was placed with the Corporate Debtor that represented to the Operational Creditor for supply of non-woven fabric (SSMMS) of a particular gsm and slit width (hereinafter referred as "***the contracted goods***") in February 2020, which was to be delivered at the factory premises of M/s Yama Ribbons and Bows Company Limited, China whose office in India was coordinating the entire deal.

iii. The Applicant states that as agreed with the Corporate Debtor, the Order should get ready on or before 15.03.2020 and the Corporate Debtor assured timely delivery of the goods

on a prerequisite that the entire amount has to be paid in advance. The Applicant agreed to this condition of the Corporate Debtor. The Applicant conveyed their requirement vide email dated 02.03.2020 which was a bulk requirement of 30MT's non-woven fabric under the shipment terms-CIF basis with Estimated Time of Delivery on or before 15.03.2020. The Corporate Debtor was requested to share the type, cost & specification of non-woven fabric which is in inventory. The Applicant vide another email dated 02.03.2020 intimated that the shipping terms as FOB and the quantity as 20MTs. The Applicant requested for the date on which the cargo will be ready, however the Corporate Debtor failed to convey the date of readiness of material. The Corporate Debtor responded through an email dated 03.03.2020 with the Proforma Invoice for supply of the contracted goods of 20MT but failed to mention the date when the shipment will be ready.

iv. The Applicant vide email dated 04.03.2020 sent a Purchase Order for 100MT wherein the Corporate Debtor was also intimated that the samples along with pallet photographs to be sent by 06.03.2020 and material should be dispatched on

16.03.2020. The Corporate Debtor was also intimated that test report of product and certificate along with pictures of palletized cargo shall be sent.

v. The Applicant states that the Corporate Debtor sent the samples on 03.03.2020 and after testing when the sample was cleared, the Applicant requested the Corporate Debtor to convey the earliest date of dispatch. After negotiation, the Operational Creditor released the advance payment, first paying an amount of Rs.1,61,28,750/- (USD 215050) on 04th March 2020 and further an amount of Rs. 1,38,71,250 (USD 184950) on 12.03.2020, totaling to Rs.3,00,00,000/-. Thus, it has been emphasized in the Application that the Applicant performed its part of contract and released the advance amount.

vi. Finally Order for 50000Kgs of non-woven fabric was placed by the Operational Creditor vide a Purchase Order dated 12.03.2020 specifying the terms of delivery as being on or before 23.03.2020. Later, the Applicant intimated to the Corporate Debtor that entire amount has been paid and the shipment has to be ready at least 2 days in advance i.e. by or before 21.03.2020 so that the import formalities are

completed. The Corporate Debtor assured for timely delivery of the contracted goods. The copy of the Purchase Order dated 12.03.2020 along with email dated 12.03.2020 has been annexed as **Annexure I** with the application**.**

vii. The Applicant also booked a charter flight as the Corporate Debtor assured timely delivery and paid an amount of Rs.9,00,000/- as an advance to book the Charter Flight as the consignment was to be shipped on time. The Applicant states that he was asked vide email dated 17.03.2020 to request the Corporate Debtor to share the pallet dimensions, and other details pertaining to the consignment, and further requested that the cargo must be handed over 24 hours before the flight so that all other formalities can be completed. The copy of the email dated 17.03.2020 has been annexed as **Annexure J** with the application.

viii. The Applicant states that vide their email dated 18.03.2020, they reminded the Corporate Debtor that the cargo had to be handed over by or before 23.03.2020 as per the Contract. The Corporate Debtor, however, responded saying that the production has been delayed due to some production issues and the contracted goods can be dispatched only by 24th or

25th March, 2020, which as per the Operational Creditor was in plain contravention of the terms of the original contract. The Applicant immediately raised objection and clearly stated that the Applicant will suffer huge losses, if the Corporate Debtor fails to deliver the contracted goods on 23.03.2020 and the delivery has to be happened on 23.03.2020 as per the Original Contract and no other date can be agreed upon for delivery. The copy of the emails dated 18.03.2020 of the Applicant as well as the Corporate Debtor have been annexed as **Annexure L** with the application.

ix. The Applicant states that they did not receive any update from the Corporate Debtor for the consignment as to whether the consignment is ready or not. The Corporate Debtor ultimately failed to fulfill its commitment of producing and dispatching the contracted goods on time i.e. 23.03.2020. The Applicant states that due to COVID-19 pandemic, the Government of India declared a nationwide lockdown from 25.03.2020 and even then, the Corporate Debtor did not update on anything to the Applicant and therefore, the Applicant has concluded that the consignment was not ready for dispatch till 23.03.2023.

x. As further averred by the Applicant that it terminated the contract on 23.03.2020 when the Corporate Debtor failed to produce and supply the contracted goods and asked for refund of the advance amount paid by it vide an email dated 01.04.2020 sent by it to the Corporate Debtor. The Applicant further stated that the Corporate Debtor failed to respond to this email which as per the Applicant, amounted to admission of the Corporate Debtor to proceed with the cancellation/termination of contract and refund of the amount paid by the Applicant. The copy of the email dated 01.04.2020 has been annexed as **Annexure O** with the application.

xi. The Applicant further submits that on 13.04.2020, it called upon the Corporate Debtor on telephone asking it to pay back the entire amount paid in advance as the contract was cancelled due to non-manufacturing of the contracted goods on time. However, the Corporate Debtor vide email dated 13.04.2020 instead proposed to supply the contracted goods for sale locally i.e. in India and requested for further amount. The Applicant once again vide email dated 15.05.2020 requested the Applicant to refund back the entire amount at

the earliest. The copy of the email dated 13.04.2020 of the Corporate Debtor and email dated 15.05.2020 of the Applicant has been annexed as **Annexure P** with the application**.**

xii. The Applicant submits that a Legal Demand Notice demanding payment under section 8 of the Insolvency and Bankruptcy Code, 2016 was served upon the Corporate Debtor. This Demand Notice in Form 3 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was sent vide email dated 15.05.2020. The Corporate Debtor responded to the legal demand notice vide their email dated 21.05.2020. Copy of the email dated 15.05.2020 and copy of the legal demand notice in Form 3 have been annexed as **Annexure Q** and **Annexure R** respectively with the Application. Copy of the email dated 21.05.2020 of the Corporate Debtor along with the response letter dated 20.05.2020 to the demand notice has been annexed as **Annexure S** with the Application**.**

xiii. The Applicant submits that they sent their rejoinder statement vide email dated 25.05.2020 to the reply sent by the Corporate Debtor. The Applicant has in their rejoinder

reiterated their contention as mentioned in the various previous communication as well as demand notice. The Applicant has placed on record that the Corporate Debtor has agreed to give preference of delivery to the Applicant if Applicant pays double the amount and 100% advance. The Applicant on this assurance paid the amount but the Corporate Debtor failed to perform its part of Contract. The copy of the email dated 25.05.2020 along with rejoinder of the Applicant has been annexed as **Annexure T** with the application.

xiv. The Applicant states that the Corporate Debtor vide email dated 21.07.2020 showed their willingness to manufacture some alternate GSM product. The Applicant further vide their email dated 04.08.2020 once again brought to the notice of the Corporate Debtor that as time was essence of contract so the question of agreeing to purchase any material/goods of different GSM does not arise and the Applicant does not agree for any new proposals except refund. The copies of the email dated 21.07.2020 of Corporate Debtor and email dated 04.08.2020 of the Applicant has been annexed as **Annexure U** with the application.

xv. The Applicant submits that the amount paid by the Applicant to the Corporate Debtor was towards the material/contracted goods to be produced and supplied which thus forms an operational debt under the Code. By not manufacturing and delivering the contracted goods on time i.e. on or before 23.03.2020, the Corporate Debtor has made itself liable to repay the entire debt amount along with interest. Although the Demand Notice was sent to the Corporate Debtor, the Corporate Debtor did acknowledge the receipt of the entire amount but however, offered to deliver some alternate goods of different specification, which is in deviation of the contract as time was essence of contract and the material ought to have been ready for shipment on or before 23.03.2020 and not on any another date. As the Corporate Debtor is unable to repay the unpaid operational debt, the Operational Creditor decided to initiate CIRP against the Corporate Debtor by filing the present application u/s 9 of the I & B Code, 2016.

xvi. The Applicant further submits that the Applicant's Bank is based in Hong Kong and the same is not amenable to the Laws of India, hence the Bank has refused to issue Certificate

to the Applicant as the Bank is not amenable to the Indian Laws. The Applicant relies on the case of *Macquarie Bank Limited Versus Shilpi Cables Technologies Ltd* wherein the Hon'ble Apex Court has held that Bankers Certificate is not mandatory and for non-production of the same, does not vitiate the proceedings.

xvii. The Applicant also contends that it has reason to believe that the Corporate Debtor is insolvent as is evident from the records that the Corporate Debtor has admitted its liability, but it is unable to repay its admitted liability. Thus, in view of the Operational Creditor, the Corporate Debtor has committed default as defined under section 3(12) of the Insolvency and the Bankruptcy Code and hence, is liable to be put under CIRP as per the provisions of section 9 of the Code.

3. The Respondent/Corporate Debtor has submitted its reply countering all the averments made in the Application stating that the present Insolvency and Bankruptcy petition filed by M/s Morex Corporation Ltd is only for seeking recovery of its disputed claims by agitating the disputed facts in proceeding

u/s 9 of the I & B Code, which is not permissible under law. Following counter submissions have been made by the Respondent against the present application pleading for its dismissal:

i. As the dispute is with regard to illegal termination of the Contract, it cannot be adjudicated by this Tribunal because CIRP is not a money claim nor a suit or litigation, and therefore, the present Application ought to be dismissed on this short ground itself. It is also contended that neither any debt is due, nor any sums are payable to the applicant in the terms of the provisions of the Insolvency and Bankruptcy Code, 2016.

ii. The Respondent submits that pursuant to the initial discussions with the Applicant, the Applicant herein issued a final purchase order for supply of 50 MT goods and requested the Respondent to issue a fresh Proforma Invoice for 50 MT goods at the agreed revised price. The Respondent accordingly issued the Proforma Invoice on 09.03.2020 for supply of 50 MT of contracted goods and as agreed, adjusted the 50% payment given by the Applicant

under the earlier Purchase Order dated 04.03.2020. The same is also reflected in the Proforma Invoice dated 09.03.2020 and upon acceptance of the said Proforma Invoice, the Applicant issued Final Purchase Order dated 12.03.2020 and accordingly, released the balance advance payment and thus, making 100% payment in advance.

iii. The Respondent states that they issued proforma invoice dated 9.3.2020 for supply of non-woven fabric SSMMS-White 25gsm Silt worth 175 mm, 155mm and 255mm totaling to a quantity of 50 metric ton (hereinafter referred as "**the contracted goods**") for an amount of USD 400000- with delivery date on 24/25-March-2020. As agreed between the parties, the advance amount of USD 2,15,050-, which was given against the earlier Purchase Order dated 04.03.2020, was adjusted in this Proforma Invoice, as mutually agreed between the parties.

iv. The Respondent further submits that as per Purchase order No. MOREX/2020/0311, dated 12.3.2020, delivery was required to be made on or before 23.3.2020 to the forwarder of the Applicant, which has been annexed as

ANNEXURE-CA-03 with the reply affidavit and also annexed with the Application.

v. As the goods were manufactured and ready for shipment, the representative of carrier, Sri Shahvez Jafary by e-mail dated 19.3.2020 apprised the Applicant as well as the Respondent of the dimensions and the gross weight of the freight so that maximum freight could be transported. Further, it was informed that the shipment was needed to be cleared and handed over to GHA MIAL by 24.3.2020 as March 25 was customs holiday. A copy of the email dated 19.3.2020 has been annexed as **ANNEXURE-CA-04** with the reply.

vi. It is further submitted that after the receipt of advance from the Applicant on 12.03.2020, the Respondent manufactured the goods as per terms of Contract for onward shipment scheduled on 23.03.2020. However, in the meantime, Government of India, Ministry of Commerce and Industry, Department of Commerce Issued notification dated 19.3.2020 prohibiting the export of the said contracted goods due to Covid-19 pandemic. On account of such ban, goods manufactured for the

Applicant could not be shipped. A copy of notification dated 19.3.2020, has been annexed as **ANNEXURE NO. CA-05** with the Reply. It is also stated in the reply that in order to make efforts for supply of the contracted goods, the Respondent took up this issue with the Government of India through Director General of Foreign Trade seeking permission to allow export of the said goods to the Applicant but no relaxation of prohibition for export was granted by the Government of India.

vii. The Respondent further submits that by an e-mail dated 1.4.2020 from the Applicant, the Respondent was informed that Applicant has *suo moto* terminated the contract. A copy of the e-mail dated 1.4.2020, has been annexed as **ANNEXURE NO CA-06** with the Reply.

viii. The Respondent further submits that the Applicant thereafter, sent a legal notice u/s 8 of the I & B Act, 2016 dated 15.5.2020 claiming the refund of the amount on the basis of their unilateral termination of the contract. A copy of the legal notice dated 15.5.2020, has been annexed as **ANNEXURE NO. CA-07** with the Reply**.** The Respondent replied to the above demand notice by a letter dated

20.5.2020 denying the contents of the demand and further the existence of dispute with regards to the unilateral termination of contract dated 1.4.2020. The Respondent was still ready to deliver the goods to the Applicant subject to lifting of prohibition that was imposed vide notification dated 19.3.2020 by the Government of India due to Covid-19.

ix. The Respondent also submits that the prohibition placed by the Government of India for a short duration would not invalidate the agreement/contract and would not cause the termination in any manner. It has been further argued that the Applicant on one hand alleged terminating the contract by their e-mail dated 1.4.2020 and on the other hand, they were pursuing with the Corporate Debtor till 19.08.2020, which is evident from the regular exchange of messages with representatives of both the parties. A copy of the WhatsApp communications has been annexed as **ANNEXURE-CA-08** with the reply showing that conversation continued between the concerned officials of the Applicant and the Corporate Debtor till the lifting of ban i.e. 19.08.2020, in which the Applicant was constantly

enquiring about lifting of ban and supply of material/contracted goods**.**

x. The Respondent also submits that all goods as per the specifications referred, were manufactured timely and were kept in the warehouse. It is contended by the Corporate Debtor that in case of the refusal of the Applicant to take delivery of goods once the ban is lifted or unilaterally terminating the contract itself amounts to a commercial dispute between the parties, thus, in view of such serious dispute the provisions of the I & B Code, 2016 cannot be resorted to as such dispute is commercial in nature attracting the terms of a contract.

xi. The Respondent submits that the ban on SSMMS fabrics of 25 gm fabric or more was lifted by the Director General, Foreign Trade vide notification dated 28/2015-2020 dated 18.8.2020. Thereafter, the Respondent/Corporate Debtor through its email dated 31.08.2020 requested the Applicant to nominate their forwarder for handing over the material which was lying in its stock. The copy of email dated 31.08.2020 has been annexed as **Annexure No. CA -11** with the Reply

xii. In respect of there being a pre-existing dispute between the Applicant and the Corporate Debtor on supply of material, the Respondent/Corporate Debtor relied on the decision of the Hon'ble Supreme Court in case of **Mobilox Innovations (P) Ltd. vs. Kirusa Software (P) Ltd., (2018) 1 SCC 353**.

xiii. The Respondent contended that the communication relied upon by the applicant are prior to the date of actual contract. The Contract dated 12.03.2020 was executed for complete quantity of 50 MT goods. Any money paid prior to the said order was mutually discussed and adjusted against the present Contract dated 12.03.2020. Applicant itself was not confirmed about the quantity to be purchased and was consistently changing its requirement of materials and shipment delivery terms and the time was not the essence as claimed by the Applicant.

4. The Operational Creditor filed a rejoinder countering all the contentions raised in the reply filed by the Corporate Debtor and made the following averments:

i. That the Respondent has not raised dispute to the claim of the Applicant. The Corporate Debtor has admitted to have received the amount as claimed by the Applicant and the Corporate Debtor has failed to deliver the goods as promised. The Corporate Insolvency Resolution Process is not a recovery proceeding which the Applicant is very well aware of but the incapacity of the Corporate Debtor to deliver the goods after taking the operational costs from the Applicant qualifies for initiating CIRP against the Corporate Debtor.

ii. The Corporate Debtor even after receiving the advance, has not started to manufacture the goods till 18.03.2020 as per the dimensions and requirement of the contract which is evident from the contents of the paragraph under reply. The Corporate Debtor anticipated the proposed ban in advance and did not act on the order of the Applicant.

iii. That the time was of essence of contract and hence, the date of delivery was agreed by the parties. The non delivery of goods by or before 23.03.2020 will frustrate the entire contract which the Corporate Debtor was well aware of. The Corporate Debtor cannot interpret the message

conversation unilaterally. The Corporate Debtor has failed to mention the date when the goods were manufactured or any Communication stating that the goods are manufactured by or before 23.03.2020.The Corporate Debtor has stated that the Applicant cannot question the readiness of the shipment which very clearly shall be interpreted that the goods were not manufactured as per requirement.

iv. That the Hon'ble Apex Court has already settled the position in case of **Macquirine Bank v. Shlpi Cables Technologies Limited** wherein it has been held that the non production of Bankers certificate cannot defeat the Application. The Respondent has failed to raise dispute as mentioned in Section5 (6) Of the Code i.e. by filing a Suit or Arbitration and merely making statement that goods were manufactured before 23.03.2020 cannot be considered as a dispute as per the Code.

v. That the Corporate Debtor has annexed entire set of documents already annexed by the Applicant, however, has very conveniently not annexed any document which

shows that the goods were manufactured as per the contract and before 23.03.2020.

5.1 During the hearing of the case, the main issue that is before us is to see whether there was pre-existing dispute or not. In this regard, the Corporate Debtor contended that he manufactured the goods as per the specification provided by the Operational Creditor in its Purchase Order dated 12.03.2020 and it was ready for dispatch on 20.03.2023 but due to ban imposed by the Govt of India vide its notification dated 19.03.2020 on export of such goods, it could not be exported. As per the Corporate Debtor , the dispute arose when the Operational Creditor unilaterally terminated the contract on 01.04.2020 despite telling to it that the advance money given by it was utilized by the Corporate Debtor in manufacturing the contracted goods and the Corporate Debtor being ready to supply the goods for sale in local market or to wait till the ban is lifted by the Govt of India on export of such goods and telling clearly on 20.03.2020 that it was not possible to refund the advance money after the notification for ban was issued. However, the Operational Creditor disputed the fact of goods having been manufactured by the Corporate Debtor on the date when notification of ban was issued and hence, is of the opinion

that the advance money could have been very well refunded after ban was imposed and as the advance money was not refunded by the Corporate Debtor even after termination of the contract and being specifically demanded for refund of advance money, the Corporate Debtor is in default in terms of the provision of section 9. In order to ascertain the fact whether goods were manufactured or not as per the terms of the contract, the Corporate Debtor was asked to file the requisite details in the hearing held on 11.04.2023 hence, following order was passed

> *"After arguing for some time, the Ld. Sr. Counsel for the Corporate Debtor seeks a short adjournment to file an affidavit with regard to the utilization of the funds received from the Corporate Debtor as advance money for manufacture of goods along with the details of raw material inventory, equipments and other utilities used for the said purpose, keeping in view the argument taken by the Ld. Sr. Counsel for the Operational Creditor that the Corporate Debtor has failed to mention the date when the goods were manufactured or any communication stating that the goods are manufactured by or before 23.03.2020. Matter to come up for hearing on 9th May, 2023."*

5.2 Pursuant to the order of this Tribunal dated 11.04.2023, the Corporate Debtor filed an additional affidavit on 26.07.2023 with regard to the utilization of the funds received from the Corporate Debtor as advance money for manufacturing of goods stating that:

i. Jindal Poly Films Ltd. (Division Global Nonwovens) is India's leading manufacturer of 'Spunmelt' & "Spunbond Nonwoven Fabric catering to the medical and hygiene section. It is India's first company to install a Multi Beam composite Spun melt Production Facility with State-of-the-Art technology (Reicofil 45) from Reifenhauser, Germany with investment on plant & machinery/production facility worth Rs. 1500 crores approx. and its manufacturing facility has been operational since 2015 with the production capacity of 60,000 MT/ year.

ii. That after the receipt of advance from the Applicant/Operational Creditor, Respondent/ Corporate Debtor started manufacturing of ordered quantity of goods i.e. 50 MT to be supplied to the operational creditor by 23.03.2020, details of which are annexed as **ANNEXURE-R-1** of the Additional Affidavit. This Annexure shows the details of raw material for manufacturing of SSMMS-White, 25 GSM available with the Respondent for the month of March 2020. Further, the details of stock of finished goods SSMMS-White, 25 GSM ready for dispatch as available with the Respondent for the month of March

has been annexed as **ANNEXURE-R-2** of the Additional Affidavit.

iii. That **Annexures R-1** and **R-2** shows that the Respondent/Corporate Debtor had sufficient raw material available to manufacture the requisite ordered goods under the contract in question, and also had manufactured the ordered quantity of goods of 50 MT which were ready for dispatch by 23.03.2020.

iv. In order to establish the authenticity of Annexures R-1 and R-2, these two annexures are certified by the statutory auditor. It has also been mentioned that they have been extracted from the computerized and automatically managed system maintained in SAP software by the Respondent/Corporate Debtor and have been duly authenticated and verified by Mr. Narayan Gawade who is working as Senior Manager, Commercial in the Respondent/Corporate Debtor Factory at Nasik. A certificate u/s 65B of Evidence Act certifying the authenticity of the Annexure- R-1 and R-2 has also been annexed as **Annexure R-3** with the Additional Affidavit.

v. Stock records and records of finished goods verified by the Statutory Auditor along with the certificate of the Statutory Auditor to this effect has also been annexed as **Annexure R-4** with the Additional Affidavit.

vi. By referring to above documents as attached in Annexure R-1, R-2, R-3 and R-4, it has been shown by the Ld. Counsel of the Corporate Debtor that the goods were manufactured by the Respondent on 19.03.2020 and the same was communicated to the Applicant on 20.03.2020. The said communication is part of Reply of Respondent as part of **Annexure CA-08** of the Reply filed on behalf of Respondent (**page no. 42- 43**). Because of the said communication, it has been contended by the Respondent/Corporate Debtor that the Applicant/Operational Creditor could not have terminated the contract by itself or even it could have asked for permission from Respondent/Corporate Debtor for the same.

vii. It is also stated that the Respondent further set aside the goods after manufacturing to put them in a deliverable state by appropriating the goods to the contract in

question. Copy of the packaging list of the relevant period has been annexed as **ANNEXURE-R-5** with the application. Since the goods were in a deliverable state, full amount payable under the contract was received in advance and the goods were appropriated to the contract with due notice to the Applicant/Operational Creditor.

viii. It has also been argued that the only reason behind Applicant/Operational Creditor not willing to accept the goods and unwilling to perform as per the contract, is that at the time of purchase, the price of the goods had decreased in the Chinese market. The same is also evident from the email sent by Applicant/ Operational Creditor on 01.04.2020 to the Respondent/Corporate Debtor as Annexure- CA-06 of the Reply filed on behalf of Respondent/Corporate Debtor (Page no. 26). Since the goods were already manufactured on 19.03.2020 i.e. before the date of delivery, it is contended by the Corporate Debtor that it was the responsibility of the Applicant/Operational Creditor to bear whatever losses that arose from the transaction subsequently on account of the government ban.

ix. It is further emphasized that the amount of Rs. 3,00,00,000/- received from the Applicant/Operational Creditor was utilized towards the manufacture of goods in form of purchase of raw material, to cover further manufacturing costs, overheads, profits and other operational expenses and goods were manufactured in plant at Nasik, Maharashtra and therefore, the present proceeding cannot be a recovery tool especially when the Respondent /Corporate Debtor is a listed company in a fully functioning state employing over 2000 employees and is completely solvent. Also, as there is pre-existing dispute between parties with regard to unilateral termination of contract and/or not taking of delivery of goods already manufactured and therefore, the present application u/s 9 is not legally tenable and liable to be dismissed.

5.3 Copy of above Additional Affidavit of the Corporate Debtor has also been supplied to the Ld. Counsel of the Operational Creditor. Though, no counter affidavit has been filed by the Operational Creditor but contents of this Additional Affidavit have been countered by the Operational Creditor in written submission filed subsequently, which is discussed in paras as follows.

6.1 Both Applicant and Respondent have filed written arguments twice. The arguments taken by both parties are briefly discussed here before deciding the matter.

In the first written arguments, the Applicant/Operational Creditor reiterated the grounds on which this Application u/s 9 of the I & B Code has been filed praying that the same may be admitted. It is argued that there is no dispute as regards the amount paid in advance nor there is any dispute with regards to amount claimed to be in default. There are no documents on record to indicate manufacturing was completed on or before 21.03.2020. The email from Respondent dated 21.07.2020 states that they are ready and willing to deliver the material of different GSM which meant goods were never manufactured or were sold. Further, Section 65 of Indian Contract Act 1872 sets out the "obligations of person who has received advantage under void agreement, or contract that becomes void"; - When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. In support of its arguments, reliance has been placed on certain decisions of the Courts relating to dispute

on refund of payment made in advance, dispute being before issue of notice under section 8 and claim cannot be disputed by raising counter claim etc. These decisions as referred by the Applicant in its written submission are as under: - .

(a) **Consolidated Construction Consortium Ltd. Vs. Hitro Energy Solutions Pvt. Ltd. (Civil Appeal No. 2839/2020) Supreme Court of India (2022) ibclaw.in09 SC.** "*Brief: The Hon'ble Apex Court has decided the issue " C. Whether a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt. It is then that we come to the core of the dispute – while the appellant "Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt"*

(b) **Ashwin Shantilal Shah V/s. Sakura Signs Private Limited (2020) ibclaw.in 204 NCLT**: In this case the Ld. NCLT Mumbai bench held that "The Adjudicating Authority observed that the Petitioner has paid an amount of Rs. 15,00,000/- in advance for the supply of the goods and is entitled to claim the said amount back in the absence of the delivery of goods by the Corporate Debtor. Hence, there is a clear establishment of advance paid by

the Petitioner and default in refunding that advance by the Corporate Debtor. Owing to the inability of the Corporate Debtor to pay its outstanding amount, this is a fit case to be admitted u/s 9 of the Code"

(c) **Ada Cellworks Wireless Engineering Private Limited Versus Global Towers Limited:** - - Ld. NCLT held that Advance paid is an operational debt and admitted the Petition under section 9.

(d) **Pedersen Consultants India Pvt. Ltd. v. Nitesh Estates Limited [Company Appeal (AT) (Insolvency) No.720 of 2019], NCLAT**. The Court held that 'Claim', means a right to payment even if it is disputed. Merely because the Corporate Debtor has disputed claim by showing there is certain counter claim, it cannot be held that there is pre-existence of dispute

(e) **Ahluwalia Contracts (India) Limited V/s. Raheja Developers Limited (Company Appeal (AT) (Insolvency) No. 703/18**. The Hon'ble NCLAT held that "Claim" means a right to payment even if it is disputed.

(f) **Mobilox Innovation Private Limited Versus Kirusa Software Private Limited 2017 1 SCC Online SC 353** -

The Hon'ble Supreme Court has held that the dispute must be raised prior to the issuance of demand notice. Furthermore the dispute has to be real and not hypothetical or illusory and must be supported by documents.

(g) Macquarie Bank Limited Versus Shilpi Cable Technologies Limited: *The Hon'ble Apex Court held that a Bankers certificate under Section 9 is not a pre-condition to trigger the Code.*

As regards the content of the Additional Affidavit of the Corporate Debtor as discussed in para 5.2 above, following submissions have been made by the Operational Creditor in a written submission filed on 08.12.2023

i. The Respondent in their additional affidavit dated 26.05.2023 mentioned in Paragraph 5 (**at Page No.3**) that goods were manufactured on 19.03.2020. However, this statement contradicts their own email at **Annexure L** of main Application at **Page No. 77** wherein the Respondent has informed that they will need some time to manufacture the goods and the goods will be ready for delivery only by 24th or 25th March 2020. Copy of another email annexed as

Annexure P (**Page NO. 93**) of Section 9 Application the Respondent has demanded further amount to supply the same material locally i.e. within a period of 7 days the rate in February 2020 doubled thereafter in the month of April 2020 again the Respondent is trying to take advantage of the situation and demanded further amounts for the same set of goods.

ii. The table annexed to the Additional Affidavit of the CD cannot be relied upon as the same is a concocted document and not any certified extract. The table at **page 7A** is alleged to be an inserted document as a bare comparison with other tables there is showing glaring differences. Also, the name of material is mentioned as 25sgm SSMM SHO WHITE and not 25gsm SSMMS HO WHITE. **Page no. 15** of the same affidavit claims to be replica of this page no 7A which is also a concocted document as the material mentions "25sgm SSMMMS HO, WHITE" which is a major defect to prove that the document cannot be relied upon.

6.2 In its both written submissions, the Corporate Debtor has mainly argued on there being a pre-existing dispute with regards

to unilateral termination of contract on 01.04.2020 and delivery of goods not being taken by the Operational Creditor even after the ban was lifted despite the facts that the goods were already manufactured on 19.03.2020 and ready for delivery on 20.03.2020 but delivery for export was banned vide a notification dated 19.03.2020 of the Govt. of India and hence, the application filed by the Applicant u/s 9 of the IBC, 2016 is not in accordance with the provisions of section 9.

As regards the pre-existing dispute, reliance has been placed by the Corporate Debtor on the case of **Transmission Corporation of Andhra Pradesh Ltd. vs. Equipment Conductors and Cables Ltd., AIR 2018 SC 2965**, wherein the Supreme Court has observed that *the object of the Code is to initiate Insolvency Process against the Corporate Debtor only in clear cases where a real dispute between the parties as to the debt owed did not exist. The IBC was not intended to be a substitute to a recovery forum and that whenever there was existence of a real dispute; the IBC Provisions cannot be invoked. Once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority*

must reject the application under Section 9(5)(2)(d), if notice of dispute has been received by the operational creditor.

As regards the pre-existing dispute, reliance is also placed on the case of **Rohini Industrial Electricals Ltd. Vs. National Textiles Corporation Ltd.**, wherein it was held by the NCLAT that *Adjudicating Authority is not in a position to determine the dispute on question of fact as to work completed or not completed or rectified or not. The que stion as to whether on rectification of the work, the Corporate Debtor accepted the liability and thereby there was nonexistence of dispute is a question of fact which can be determined only by Court of competent jurisdiction and not in an application under Section 9 of the Code.*

Another decision of the NCLAT in **Nayan Shah Vs. Viral Rajarashi Mehta & Anr.**, has been referred in which, it has been held that*: "from the decision of Hon'ble Supreme Court it is clear that in a petition under Section 9 the Corporate Debtor has the right not only right to show that there is an existence of dispute about quality of goods or services provided, but also, he has right to dispute the 'debt' including the quantum of payment. If the 'debt' has been disputed, the question of default does not arise."*

One more decision of the Hon'ble NCLAT in the case of ***Anita Jindal v. M/s Jindal Buildtech Pvt. Ltd. &Anr. (Company Appeal (AT) (Insolvency) No. 512 of 2021) Authority*** has been referred in which it has been held that*: "13. … Be that as it may, the Adjudicating Authority, is not a 'debt collection forum'. The Hon'ble Supreme Court in a catena of Judgements has held that IBC tackles 'Insolvency and Bankruptcy' and that it is not the objective of the IBC that CIRP should be initiated to penalize a Solvent Company for non- payment of dues. The scope and objective of IBC is to bring about 'Resolution' of an Insolvent Debtor and is definitely not a 'Recovery Proceeding'."*

6.3 As regards the issue relating to pre-existing dispute raised by the Respondent/Corporate Debtor, the Applicant/Operational Creditor during the course of the hearing of the case, has also filed an affidavit dated 29.07.2021 stating as under :-

> *4. The Applicant states that the brief facts of the case are that the Applicant has placed order of goods with the Corporate Debtor against which the Applicant has paid the entire amount. The Corporate Debtor failed to manufacture and deliver the goods on time i.e. by or before 23.03.2020.*
>
> *5. The Applicant states that the Applicant followed up with the Corporate Debtor for repayment of the amount as the Corporate Debtor failed to deliver the goods as time was essence of contract. The Applicant states that a demand notice dated 15.05.2020 under IBC was issued to the Corporate Debtor. The Corporate Debtor in their response*

dated 20.05.2020 to the Demand notice did not raise a dispute nor did they mention as to when were the goods actually manufactured.

6. I say that the Corporate Debtor in their previous communication via emails has never stated that the goods have been manufactured. I say that the Corporate Debtor in their email dated 18.03.2020 (Annexure B-6 of the Application) stated that the goods have not been manufactured and they can deliver only by 25.03.2020 and in another email dated 31.08.2020 (Annexure V) proposed to manufacturer alternate GSM material for sale in India. I say that this email of the Corporate Debtor clearly goes to show that the goods were not manufactured by or before 23.03.2020 as till August 2020 the Corporate Debtor had offered to manufacturer them which is clear admission that no goods has ever been manufactured by them as per the order and payment received by the Corporate Debtor.

7. I say that in their response to demand notice the Corporate Debtor has not raised any dispute but have simply stated that they were ready and willing to deliver the goods. The Corporate Debtor has not raised any dispute as the term "dispute" shall have meaning as defined under the Code meaning a Suit or Arbitration proceedings pending prior to issuance of Demand Notice. As no such suit or arbitration proceedings are pending or have been initiated by the Corporate Debtor hence there is no pre-existing dispute between the parties.

8. The Term "dispute" has been defined under Section 5(6) of the Code as "dispute" which includes a suit or arbitration proceedings relating to-existence of the amount of debt, quality of goods or a breach….". A bare perusal of the above two definitions and also as held by the Hon'ble Apex Court as well as Appellate Court that dispute cannot be a mere statement but has to be some concrete steps i.e. initiation of some proceedings more particularly suit or arbitration. Here in the present case no such proceedings have been filed or even mentioned by the Corporate Debtor in their reply. There is no pre-existing dispute between the parties.

It is further submitted by the Operational Creditor in its written submission filed on 08.12.2023 that the Respondent vide email dated 13.04.20 requested the Applicant to sell the material in local market and demanded further amount. In response to the demand notice, the Respondent has not raised any dispute with regards to the demand raised by the Applicant. The Respondent in email dated 21.07.2020 showed their willingness to manufacture alternate GSM- product not the one originally agreed for, which goes on to show that either the goods were already sold or never manufactured at all. During pendency of the case, a virtual meet was held on 12.04.2022 upon request of the Respondent where the Legal manager and other representatives from Respondent were present who proposed to sell the material locally and pay the proceeds to Applicant or wait for another COVID wave when the cost of material will escalate.

6.4 The Corporate Debtor also raised the issue that for a disputed claim, a solvent company cannot be put under CIRP. In this regard, they referred to a decision in case of ***M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. & Ors. Civil Appeal No. 4583 of 2022, order dated 15.07.2022*** of the Hon'ble Supreme

Court in which it is held that: "*The NCLT, exercising powers under Section 7 or Section of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. 32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.*"

As regards the Respondent Company/Corporate Debtor being a solvent company, it has been stated in the written submission that the Respondent has a net worth of INR 3500 crores approximately and has a turnover of more than INR 3000

crores approximately thus, the admission of the Corporate Debtor herein over a disputed amount of Rs. 3 crores approximately would be highly unjust and against the intention of the legislature. It is also mentioned that the Corporate Debtor is a listed company and is fully functional and having over 2000 employees.

6.5 In the written submission of the Respondent/Corporate Debtor, another argument regarding the application being barred by Section 10A of the Code, has also been taken. The Corporate Debtor pointed out that the Applicant has taken date of default as 24.03.2020 in Part IV of the Application u/s 9, stating that the Debt fell due from 24.03.2020, i.e., the date when the corporate debtor could not supply the material as per Purchase Order dated 12.03.2020. However, in the opinion of the Corporate Debtor, the date of default could be taken as 01.04.2020, which is the date when the contract for supply of goods was terminated by the Operational Creditor that can be considered a valid cancellation in case there is no dispute on termination of the contract. It is also emphasized that there is no debt (considering the earlier submission that there is pre-existing dispute on cancellation of the contract) and if such debt exists, it is only when the Applicant

through its email dated 01.04.2020 cancelled the Purchase Order, such debt became due and therefore, as per the Corporate Debtor, the date of default can be taken as 01.04.2020 only. The established position of law under Section 10-A of the Code is that no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any dispute arising on or after 25th March, 2020 for a period of 6 months or such further period, as may be notified and the same was extended up to 24.03.2021. The alleged default occurred on 01.04.2020, i.e., when the Applicant had cancelled the Purchase Order, thus bringing it into the ambit of Section 10-A, and rendering the present Application not maintainable. In this regard, the Corporate Debtor relied on the case of **Ramesh Kymal vs. Siemens Gamesa Renewable Power Pvt. Ltd., AIR 2021 SC 833**, decided on 09.02.2021.

As regards to the issue of the Application being barred u/s 10A raised by the Corporate Debtor in the written submission, the Applicant/Operational Creditor submitted in another written submission filed on 08.12.2023 that the Respondent has raised the issue of Section 10A which has not been pleaded in any of their

reply or additional reply. That Section 10A issue has to be raised in pleadings and cannot be raised in final arguments not in written submissions. The Section 10A bar will not be applicable as the date of default is 24.03.2020. That date of default will be followed by date of termination and it cannot be other way round. The termination cannot be prior to date of default. The Respondent has also agreed to deliver the goods by 23.03.2020 and failure on part of Respondent to supply the goods on 23.03.2020, has therefore been considered as date of default. It is contended by the Applicant that the Corporate Debtor during its arguments has taken plea of date of termination as date of default just to take advantage of Section 10A. It is further pointed out by the Applicant/Operational Creditor that the legal notice was issued on 15.05.2020 which is prior to issuance of notification of Section 10A. The notification for Section 10A was issued on June 4, 2020. Therefore, the date of default cannot be said to be made up, as the legal demand notice is prior to the notification.

FINDINGS AND ORDERS

7. We have heard the matter in which arguments of Ld. Counsels of both parties have been considered along with the submissions

made in application and also reply, rejoinder and affidavits filed during hearing as discussed above. Later, arguments taken up in the written submissions filed by both parties have also been considered

8. Before adjudicating on the admission of the present application u/s 9 as per section 9(5), two issues are before us, which are to be decided,

(i) existence of pre-existing dispute between two parties ; and

(ii) the application being barred under section 10A.

9.1 As regards the first issue of pre-existing dispute , the facts of the case as discussed in details in foregoing paras are briefly that the Applicant approached the Respondent for placing an order for manufacturing and supply of goods of a particular specification to be exported to a company in China against which the Applicant paid the entire amount of Rs. 3,00,00,000/- in advance as demanded by the Corporate Debtor on the basis of the profarma invoice dated 09.03.2020 issued by it and purchase order dated 12.03.2020 was issued by the Applicant for purchase of 50 MT of non-woven fabric SSMMS-White as per details given below:-

PO DETAILS

PO NUMBER	PO DATE	PAYMENT TERMS	DELIVERY TERMS
MOREX/2020/0311	12-MAR-2020	100% advance payment before dispatch	On or before 23rd March 2020 should be handover to the our forwarder

ORDER DETAILS

S. No.	Description Goods	Quantity ((In Kg) +/- 10%)	FOB Price (In USD/Kg)	Amount in USD
1	SSMMS-White, 25gsm, Slit Width 175MM Along Stretch wrapped with edges protection foam and cardboard on top and bottom-core id – 3”	3400	8.00	272000
2	SSMMS-White, 25gsm, Slit Width 155MM Along Stretch wrapped with edges protection foam and cardboard on top and bottom-core id – 3”	8000	8.00	64000
3	SSMMS-White, 25gsm, Slit Width 255MM Along Stretch wrapped with edges protection foam and cardboard on top and bottom-core id – 3”	8000	8.00	64000
TOTAL FOB VALUE : **FOUR HUNDRED THOUSAND DOLLARS**				400000

-Sd- -Sd-

9.2 As per the terms of the above purchase order, the contracted goods were to be delivered by the Corporate Debtor to the forwarder of the Operational Creditor on or before 23.03.2020. In fact, the Operational Creditor in its application, has given details of various negotiations that was held with Corporate Debtor starting from 02.03.2020 in which quantity of supply of goods as well as time line for supply of goods and price of goods were changed from time to time and even once order was cancelled as the sample testing done by the Operational Creditor had failed but finally, when Purchase Order dated 12.03.2020 was issued by the Operational Creditor for purchase of 50 MT of contracted goods, the delivery term was fixed as 'on or before 23.03.2020 to be handed over to the forwarder of the Operational Creditor"

9.3 Later, when goods could not be supplied on 23.03.2020 due to ban imposed by the Govt of India on export of the contracted goods, the Operational Creditor cancelled the contract on 01.04.2020 and demanded refund of the advance money paid to the Corporate Debtor. In present application, it has been alleged by the Operational Creditor that goods were not manufactured by 23.03.2020 as per the Purchase Order hence, the Corporate

Debtor became liable for refund of advance amount of money which has not been repaid by it hence, it is in default for which CIRP is to be started against it. For drawing its conclusion of goods not being manufactured on the contracted date of delivery i.e. 23.03.2020, the Operational Creditor has relied on the facts as mentioned in the Application that vide email dated 18.03.2020, the Operational Creditor reminded the Corporate Debtor that the cargo had to be handed over by or before 23.03.2020 as per the Contract. The Corporate Debtor, however, responded saying that the production has been delayed due to some production issues and the material can be dispatched only by 24th or 25th March, 2020 which was in plain contravention of the terms of the original contract. On receiving this e-mail, the Applicant immediately raised objection and clearly stated that the Applicant will suffer huge losses if the Corporate Debtor fails to deliver the material on 23.03.2020 and the delivery was to be made on 23.03.2020 as per the Original Contract and no other date can be agreed upon for delivery. After this e-mail, the Applicant states that they did not receive any update from the Corporate Debtor for the consignment as to whether the consignment is ready or not. The Corporate Debtor ultimately failed to fulfill its commitment of producing and

dispatching the material on time i.e. 23.03.2020. The Applicant states that due to COVID-19 pandemic, the Government of India declared a nationwide lockdown from 25.03.2020 and even then, the Corporate Debtor did not update on anything to the Applicant and therefore, the Applicant has concluded that the consignment was not ready for dispatch till 23.03.2023. In its written submission also, it states that the Cargo clearance agent contacted the Corporate Debtor for pallet dimension but the Corporate Debtor informed that there is some delay in production and material will not be ready by or before 21.03.2020. This was deviation from contract as the date of delivery was revised from 15.03.2020 to 16.03.2020 then to 18.03.2020 and finally to 21.03.2020 and this shows that Corporate Debtor has not even started with the production of the material. It was informed to the Corporate Debtor that material has to be ready by or before 21.03.2020 and not on 24.03.2020. The last communication from the Corporate Debtor was 18.03.2020 with no update as to the status of production.

9.4 Thereafter, lockdown was declared and the goods were never delivered. Thus, on the basis of these facts, the Operational

Creditor has inferred that goods were not manufactured by 23.03.2020 but no conclusive evidence could be produced by it to show that the goods were not ready to be dispatched on the final date either on 21.01.2020 (*the date on which the goods were required to be delivered to the forwarder before completing the formalities with Custom Department in order to airlift the cargo)* or 23.03.2020 (*the date mentioned in the Purchase Order*). The same very averments were reiterated in a Compliance Affidavit dated 29.07.2021 filed by the Operational Creditor when it was asked specifically to show that there is no pre-existing dispute but no conclusive evidence either in form of any physical inspection report or any supporting data could be produced by the Operational Creditor to show that contracted goods were not ready to be dispatched on 23.03.2020.

9.5 However, the undisputed fact is that due to notification of the Govt of India dated 19.03.2020 putting ban on the export of contracted goods with immediate effect, the goods could not be delivered to the forwarder of the Operational Creditor, which was to be exported to China. Other emails on which the Operational Creditor has relied pertain only to correspondences having been

taken place between parties before the final date i.e. 23.03.2020 on which goods were required to be delivered and the Corporate Debtor has never shown its inability to supply the contracted goods by 23.03.2020 and just because no update on the status of production was communicated by the Corporate Debtor after 18.03.2020 as alleged by the Operational Creditor, it cannot be said conclusively that goods were not manufactured by 23.03.2020.

9.6 Keeping in view the above allegations made by the Operational Creditor, the Corporate Debtor was asked to produce necessary evidence to show that the contracted goods were manufactured by the contracted date and if goods were ready for delivery, the default is to be explained. In compliance of our direction, an additional affidavit dated 26.05.2023 was filed by the Corporate Debtor as it has already been discussed in para 5.1 of this order. In this Additional Affidavit, extract from stock register were attached showing that contracted goods were manufactured and were available in stock of sufficient quantity to be supplied to the Operational Creditor as per the purchase order dated 12.03.2020 but could not be supplied due to ban imposed by the

Govt of India but the Corporate Debtor was always ready to supply the goods even during ban period for local use as well as for export after ban was lifted. It has also been contended that refund of advance was not possible as the money received as advance had already been utilized in manufacturing of the contracted goods but the Corporate Debtor never refused to supply the contracted goods.

9.7 In this regards, the Corporate Debtor further explained in its written submission filed on 11.12.2023 narrating the sequence of events showing that it never defaulted on meeting the terms of the contract of Purchase Order dated 12.03.2020 for supplying the contracted goods and the dispute on refund of advance amount arose only because of unilateral termination of the said contract by the Operational Creditor on 01.04.2020 and therefore, there is a pre-exiting dispute with regards to refund of advance money of Rs. 3,00,00,000/- to the Operational Creditor and the same was mentioned in the reply dated 20.05.2020 submitted in response to demand notice dated 15.05.2020 u/s 8 sent by the Operational Creditor. In this regard, it is stated by the Corporate Debtor that the submission of the Applicant is that the advance payment made against the Purchase Order dated 12.03.2023 culminated into a

debt as the material in question was not ready for dispatch as on the date of delivery. The Respondent disputed these assertion made by the Operational Creditor stating that the material in question was ready for dispatch on 23.03.2020 as the same were manufactured on 19.03.2020. The said fact has been presented before us by corroborating not only from the communications exchanged between the parties but also, from the extract of the stock register placed before us in an Additional Affidavit.

9.8 It has been shown to us by referring the e-mails exchanged between the parties on 19.03.2020 with regards to the packing of the contracted goods as available on page no 88 and 89 of the Application wherein on request of the forwarder to pack the goods in certain manner, it is replied by the Corporate Debtor that "*As requested, we are going to make 10 rolls bundle for the 50 tons order for Yama ribbons to accommodate higher volume in your carrier. Technically our production team feel that the total weight of 306 kgs per pallet is difficult to handle and damages can happen during transit. However, we are going to pack 10 rolls per bundle per pallet as you have requested for it. Global nonwoven shall not be held*

responsible in case of any transit damage that may or may not arise"

The fact of contracted goods were manufactured and were ready for dispatch on 23.03.2020 is further corroborated by the WhatsApp messages exchanged between both parties till 14th May, transcripts of which are attached in ***Annexure CA-8 of the Reply*** filed by the Corporate Debtor. In messages of 17th March 2020, the Operational Creditor has written that *Air Charter guy told us the material has to dispatch on 23rd only .....* So, there is no point in raising the doubt by the Operational Creditor now that goods were not manufactured on 19th March and hence, contract has become void and advance money should have been refunded. Even in WhatsApp messages of 20th March, when the Operational Creditor came to know about the notification of the Govt of India banning the export of the contracted goods, and the Corporate Debtor asked to decide the course of action and let them know and also suggesting to sell the goods in local market, the Operational Creditor replied that "*they will let the Corporate Debtor know in few minutes"* and only raised a possibility that in case *if the order is cancelled, there will be refund from the Corporate Debtor*. On such

possibility indicated by the Operational Creditor, the Corporate Debtor replied immediately that unfortunately material has been already produced and they are trying to get this embargo lifted and till the ban is lifted, they will keep the material in their warehouse and ship it for export after ban is lifted and then, it is replied by the Operational Creditor to *proceed as discussed and wait till Monday 23rd March* and then, it is written that *keep the material ready for 23rd*. Such conversation on WhatsApp between both parties leaves no room for doubt that contracted goods were manufactured by 20th March and were lying with the Corporate Debtor to be delivered by 23rd March as per the Purchase Order dated 12.03.2020 but in view of the ban imposed on export of the contracted goods on 19.03.2020 by the Government of India, the Respondent could not deliver them for export but it was ready to supply the material to the Operational Creditor locally as well on which the Operational Creditor only asked it to wait till Monday 23rd March. After 23rd March also, there was no whisper on cancelation of the contract but suddenly on 01st April, the Operational Creditor cancelled the contract despite knowing very well that goods were manufactured as per the requirement of its Purchase Order dated 12.03.2020. Now, for getting refund of its

advance money, the Operational Creditor is making a futile attempt by arguing that goods were not manufactured on 19.03.2020, the date which has no relevance as per the Purchase Order dated 12.03.2020 as per which, the contracted goods were required to be delivered by 23.03.2020 and also, later confirmed as per email as well as the WhatsApp messages exchanged with the Corporate Debtor as discussed above. During the hearing, the Respondent has also placed on record its stock register of raw material and stock register of finished goods for the month of March, 2020 which indicates that the Respondent had double the quantity manufactured in stock as compared to the 50 MT of material that had to be supplied to the Applicant. It is further submitted that the Respondent on a daily basis holds the capacity to manufacture 100 MTs of material every day, the same is evident from the bare perusal of the stock register. In view of the above facts as verified by us, we come to the conclusion that goods were manufactured by the Corporate Debtor and it could not be delivered for export on the contracted date due to the ban imposed by the Govt of India at the relevant time but the Corporate Debtor was always ready to deliver the goods for local sale during the period of ban as well as for export after the ban was lifted.

Therefore, unilateral cancellation of the contract by the Operational Creditor by email dated 01.04 2020 and demanding the refund of advance money has certainly given rise to a dispute between both parties due to there being no default on the part of the Corporate Debtor in meeting the terms of the contract and the Corporate Debtor having not been given any notice or not being consulted before termination of the contract. Therefore, while replying to the demand notice u/s 8, the Corporate Debtor in its reply dated 20.05.2020 has disputed the termination of the Contract terming such cancellation as illegal. Such dispute between both parties on termination of contract as well as dispute on meeting the terms of the contract as regards to completing the manufacturing of contracted goods in our opinion would fall under the category of pre-existing disputes between parties, especially when the terms of delivery for export as per the contract could not be met by the Corporate Debtor due to the reason beyond its control in view of the ban imposed by the Govt of India on export of such goods and the Corporate Debtor being always ready for delivery of contracted goods for local sale during ban and for export after ban was lifted but the Operational Creditor not agreeing with such offer of the Operational Creditor even after being fully aware

that goods were manufactured within specified time period but could not be delivered due to reason beyond the control of the Corporate Debtor and hence, any claim arising on account of such disputed course of action by the Operational Creditor would not be fit to be covered as maintainable in terms of the provision of the section 9 of the I & B Code.

The Hon'ble NCLAT in the case of **Industrial Electricals Ltd. Vs. National Textiles Corporation Ltd.**, has also held that *Adjudicating Authority is not in a position to determine the dispute on question of fact as to work completed or not completed or rectified or not. The question as to whether on rectification of the work, the Corporate Debtor accepted the liability and thereby there was nonexistence of dispute is a question of fact which can be determined only by Court of competent jurisdiction and not in an application under Section 9 of the Code.* Therefore, in this case also, the fact of fulfilment of terms of contract in completing the manufacturing of goods and its delivery as per the terms of contract cannot be conclusively determined by this tribunal but the facts remain that there is a dispute as regards the termination of contract on 01.04.2020, which is much before the date of

sending the demand notice i.e. 15.05.2020 and hence, we are of considered view that there is a pre-existing dispute as envisaged under section 8 and section 9(5)(ii)(d) of the I & B Act as per the ratio laid down by the Hon'ble Supreme Court in case of **Mobilox Innovation Private Limited Versus Kirusa Software Private Limited 2017 1 SCC Online SC 353**

10. It is also worth to note that the Corporate Debtor i.e. M/s Jindal Poly Film Ltd is a listed company of B.C. Jindal Group and is one of a largest manufacturer in packaging industry and a profit earning company widely traded on NSE and BSE. There is no evidence produced by the Operational Creditor to show that this is not a solvent company except raising doubts about its solvency as its claim for refund of advances could not be paid due to the reason of the same being disputed as it has already been discussed in details. It has been held by the Hon'ble Supreme Court in case of ***M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. & Ors. Civil Appeal No. 4583 of 2022, order dated 15.07.2022*** that: "*The NCLT, exercising powers under Section 7 or Section of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that*

CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. 32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed." Therefore, in the present case also, the claim of the Operational Creditor being disputed and the Corporate Debtor being a solvent company, it cannot be put under CIRP just because a disputed claim of the Operational Creditor is not paid.

11. In view of our findings as discussed in aforesaid paras, we find that the Operational Debt of Rs. 3,42,60,000/- shown in Part IV of the present application u/s 9 claimed to be arising on account of the advance money paid is not being refunded after failure of the

-Sd- -Sd-

Corporate Debtor in supplying the material as per contract, is a disputed claim in which dispute has arisen on 01.04.2020 because of unilateral cancellation of contract by the Operational Creditor consequent to a dispute with the Corporate Debtor over the fulfilment of the terms of the contract hence, such dispute is found to have arisen much before the demand notice u/s 8 was issued on 15.05.2020, and accordingly is a pre-existing dispute for which the Corporate Debtor intimated in the reply submitted in response to the demand notice sent u/s 8, and therefore such application u/s 9 is liable to be rejected as per the provision of section 9(5)(ii)(d). Therefore, we **dismiss** the present petition/application filed under Section 9 due to being a disputed operational debt of the nature of pre-existing dispute.

As the present application filed under section 9 is not found maintainable on the issue of pre-existing dispute, the second issue has not been adjudicated upon by us relating to application being barred under section 10A as this issue was not raised under pleadings and only taken up in the written submission and also, the date of default mentioned in Part IV of the application as 24.03.2020 is before the date of 25.03.2020 when the provision of

-Sd- -Sd-

section 10A has become applicable. The date of default to be taken as 01.04.2020 being the date of cancellation of contract, as contended by the Corporate Debtor, has not been considered by us keeping in view the fact that the cancellation of contract on 01.04.2020 has been disputed by the Corporate Debtor in order to show the existence of a pre-existing dispute in relation to the operational debt claimed in the application and the same has already been adjudicated upon by us hence, date on which dispute has arisen cannot be taken as date of default when a particular date has already been taken by the Operation Creditor in demand notice u/s 8 and the application u/s 9 on which default by the Corporate Debtor in meeting the terms of contract i.e. 24.03.2020 as claimed by the Operational Creditor, is occurred.

12. Accordingly, the petition **CP (IB) No.12/ALD/2021** filed by the Operational Creditor u/s 9 of the Insolvency & Bankruptcy Code, 2016 is hereby dismissed.

-Sd-

(Ashish Verma)
Member (Technical)

-Sd-

(Praveen Gupta)
Member (Judicial)

14th December, 2023

Sarim Husain
(LRA)

CP (IB) No.12/ALD/2021