

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.35/MB/2020

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

G4S SECURITY SYSTEMS (INDIA) PRIVATE LIMITED

[CIN: U74899DL1994FTC060753]

Registered Office:C-16, Community Centre

Janakpuri, Behind Janak Cinema

New Delhi -110058.

...Operational Creditor

Vs.

B. E. BILLIMORIA AND COMPANY LIMITED

[CIN:U45200MH1962PLC012268]

Registered Office: Shiv Sagar Estate, 'A' Block

2nd Floor, Sr. A.B. Road

Worli, Mumbai-400018

Maharashtra.

...Corporate Debtor

Pronounced: 25.07.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances : Hybrid

Operational Creditor: Adv. Shweta Bharti, Adv. Sanjay Sinha

Corporate Debtor: Adv. Nupur Shah i/b Adv. Yash Jariwala

ORDER***[PER: SANJIV DUTT, MEMBER (TECHNICAL)]*****1 BACKGROUND:**

- 1.1 This Application bearing C.P.(IB) No.35/MB/2020, was filed by G4S Security Systems (India) Private Limited, the Operational Creditor on 02.01.2020 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 through Mr. Deepak Sharma, General Legal Counsel duly authorised in this behalf to initiate Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of B.E. Billimoria and Company Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is considered as a leading security solutions provider and offers almost every security product and service available in the market. The Corporate Debtor is a civil engineering construction contractor.
- 1.3 The Corporate Debtor obtained goods and services from the Operational Creditor as per Work Orders dated 10.10.2018 and 17.10.2018 issued for supply, installation, testing and commissioning of “Fire Alarm System Works” for a real estate project named “North Eye” which was being developed by the Corporate Debtor in Noida (UP). The total debt claimed by the Operational Creditor to be in default in the Application amounts to Rs.48,29,928.76/- (Forty-Eight Lakhs Twenty-Nine Thousand Nine Hundred and Twenty-Eight Rupees and Seventy-Six Paise). It is alleged that this debt accrued since January, 2019 and February, 2019 due to the Corporate Debtor's non-compliance with the

terms of the said Work Orders issued in favour of the Operational Creditor. The Corporate Debtor failed to pay the aforesaid amount of operational debt even after repeated follow-ups by the Operational Creditor, according to it.

- 1.4 Therefore, the Operational Creditor duly served Demand Notice dated 31.10.2019 upon the Corporate Debtor, as per the provisions of Section 8 of the Code. Despite this, the Corporate Debtor neither took steps to clear the outstanding operational debt nor bothered to reply to the Demand Notice in any form. This led to the Operational Creditor preferring the present Application for initiation of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF THE OPERATIONAL CREDITOR

- 2.1 The Corporate Debtor was developing a real estate project by the name and title of "North Eye, Cape Town" in Sector 74, Noida (UP) and availed the services of the Operational Creditor for the said Project. The Corporate Debtor issued a Letter of Acceptance dated 16.08.2018 bearing No.BEBL/456 in response to the final offer made by the Operational Creditor for the above project. Pursuant thereto, the Corporate Debtor released in favour of the Operational Creditor, a Work Order dated 10.10.2018 bearing No. BEBL/653 for supply, installation, testing and commissioning of "Fire Alarm System Works" for the North, East, and West Wing of the said Project. The Corporate Debtor issued a second work order in favour of the Operational Creditor dated 17.10.2018 bearing No.BEBL/680 for "Fire Alarm System Works" for the Central Wing of the said project.

- 2.2 The Work Order specified that the Operational Creditor would commission systems already installed in the East and West Wings by the previous contractor at no cost to the Corporate Debtor. The clauses regarding "Scope of Works" in both Work Orders indicated that the Operational Creditor's scope of work for the project was not limited to the items included in the respective Bill of Quantities (BOQ) and could be supplemented, added, or deleted by the Project Manager/Engineer-in-Charge. The completion time for the First Work Order was 24 months from 10.10.2018, until 09.10.2020 and for the Second Work Order was 24 months from 17.10.2018 until 16.10.2020.
- 2.3 According to the terms and conditions of the Work Orders dated 10.10.2018 and 17.10.2018, the Operational Creditor raised two invoices bearing Invoice No.ESDI000020/NDA18 for Rs.10,16,267/- and Invoice No. ESD1000023/NDA18 for Rs.25,16,704/- dated 31.12.2018. Later, the Operational Creditor raised another two invoices on 31.01.2019 bearing Invoice No.ESDI000035/NDA18 for Rs.59,38,438/- and Invoice No. ESDI000036/NDA18 for Rs.7,83,520/-. However, the Corporate Debtor made only part payments and defaulted on payment of the balance operational debt of Rs.48,29,928.76/- in respect of the above invoices.
- 2.4 Despite 20 email communications sent by the Operational Creditor from 22.03.2019 to 10.05.2019 to follow up with the Corporate Debtor for release of payment, the Corporate Debtor evaded acknowledgment of emails for nearly three months. Finally, on 10.05.2019, the Corporate Debtor sought certification of due payments to which the Operational Creditor responded with appropriate documentation on 15.05.2019 and again called upon the Corporate Debtor to

- release the payment. On 21.05.2019, the Operational Creditor sent a final reminder for payment of outstanding dues. The Corporate Debtor issued a Cheque No. 440329 dated 29.05.2019 for Rs.3,00,000/- which was dishonored due to 'insufficient funds'. Again, a reminder email dated 12.06.2019 was addressed to the Corporate Debtor to follow up on the status of the outstanding payment which was never replied to by the Corporate Debtor.
- 2.5 The Customer Ledger maintained by the Operational Creditor from 21.10.2017 to 21.10.2019 indicates an operational debt of Rs.48,29,928.76/- due from the Corporate Debtor. Despite repeated efforts, the Corporate Debtor has not paid the outstanding dues. A Demand Notice dated 31.10.2019 was issued under Section 8 of the Code calling upon the Corporate Debtor to pay Rs.48,29,928.76/- along with interest @ 18% per annum and litigation expenses of Rs.50,000/- within 10 days from receipt of the said Notice. The demand notice was duly served upon the Corporate Debtor on 05.11.2019 and till the date of filing Application, the Operational Creditor had not received any Notice of Dispute under the Code from the Corporate Debtor in reply to the aforementioned Demand Notice.
- 2.6 The default by the Corporate Debtor was triggered in January and February, 2019 and the same is subsisting and continuing till date.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 The Corporate Debtor *vide* its Affidavit-in-Reply dated 25.09.2023 made the following submissions and raised several objections:-

- 3.2 The Corporate Debtor is not only a solvent company but also a well-known civil engineering company. It cannot be said to be insolvent or bankrupt. The present application is misconceived and mala fide and has been filed only with an intention to pressurise the Corporate Debtor and extort money from it.
- 3.3 There is no non-payment of debt in the present case attributable to the Corporate Debtor or even an obligation of the Corporate Debtor under the Work Orders awarded to the Operational Creditor by the Corporate Debtor. On the contrary, it is the Corporate Debtor who has a counter claim on the Operational Creditor. There is no default committed by the Corporate Debtor within the meaning of Section 3(12) of the Code.
- 3.4 The Operational Creditor has made an attempt to mislead this Tribunal by presenting only a concocted version of the actual facts and circumstances in bits and pieces in order to obtain a favourable order. The Operational Creditor has not disclosed the entire communication by the Corporate Debtor disputing the invoices raised by the Operational Creditor. The Operational Creditor has suppressed the fact that the Corporate Debtor has already paid a substantial amount under the disputed invoices. In fact, it is the Corporate Debtor who is required to recover the excess amount.
- 3.5 The Corporate Debtor was awarded a contract with M/s Supertech Limited in the year 2011 for construction of its ongoing 'North Eye' Project in Noida (UP). The Operational Creditor was engaged for the installation of 'Fire Alarm System Works' for the North, East, West and Central Wings of the said project. For this

purpose, the Corporate Debtor awarded two work orders dated 10.10.2018 and 17.10.2018 to the Operational Creditor. Subsequently, the Operational Creditor raised invoices totalling Rs.1,02,54,928/- out of which Rs.54,25,000/- has already been paid. The Operational Creditor claims that the balance amount of Rs.48,29,928/- is still outstanding towards the said invoices. The scope of work included supply, installation, testing and commissioning and handing over to the client, etc., as per the specifications, drawings, BOQ items, etc., to the satisfaction of the Project Management Consultants (PMC)/Client and the Project-in-charge as well as obtaining licenses, permits and statutory approvals pertaining to the said installation work.

- 3.6 The Operational Creditor failed to obtain necessary statutory approval for key materials such as “no burn” cable (Fire Retardant Low Smoke) in writing from the consultant/PMC. Without any such written approval, the Operational Creditor went ahead and laid the fire survival cable for fire alarm at the said project and raised invoices in this regard, despite being informed of this irregularity multiple times *vide* e-mails dated 21.05.2019, 11.07.2019 and 03.08.2019. Further, the Operational Creditor did not adhere to the scope of work specified in the contracts, including obtaining approvals for shop drawings and executing work strictly according to required standards. This was conveyed to the Operational Creditor *vide* e-mails dated 04.04.2019, 04.05.2019 and 21.05.2019. However, the Operational Creditor chose to disregard the said conditions of the work order and unilaterally carried out the installation work as per its own whims and fancies.

3.7 The Operational Creditor has relied on clause 15 of the work order. However, it is specifically mentioned in the said clause that payment shall be released as per certified quantities only. The invoices raised by the Operational Creditor were submitted to the client on 31.01.2019 and PMC certified the said bill for an amount of Rs.39,00,000/-. It was because of the non-approval of the material and shop drawing, which was an obligation of the Operational Creditor under the work orders that the PMC/client had put on hold the quantities in the invoices raised by the Operational Creditor. Accordingly, as per the certified payment, the Operational Creditor was entitled only to a payment of Rs.39,00,000/-. However, admittedly the Operational Creditor has already received an amount of Rs.54,25,000/- from the Corporate Debtor and thus claim of the Operational Creditor is not justified and is also contrary to the payment terms of the said work orders.

3.8 Moreover, according to the payment terms of the work order, retention of 5% of the gross bill amount was to be deducted which the Operational Creditor failed to show in its invoices. Further, the Operational Creditor overcharged for certain materials and wrongly claimed expenses under the head of installation. For example, as per the payment terms of the said work order, material purchased by the Operational Creditor was to be charged under the head of material advance at the rate of 65% of the item rate. However, the Operational Creditor has claimed the same under the head of installation at the rate of 80% of the item rate. The material is still lying in the store of the Operational Creditor at the site in the said project. The Corporate Debtor has time and again requested the Operational Creditor to repossess the same. The said material alone is worth

- Rs.30 Lakhs which is being claimed by the Operational Creditor from the Corporate Debtor under the disputed invoices.
- 3.9 The Operational Creditor raised running bills for the installation work under the work orders without approval of drawings and in contravention of payment terms agreed under the said work orders. A dispute as to the quality of goods and services as well as existence of debt has been raised by the Corporate Debtor time and again. The dispute between the parties is not a feeble legal argument but is duly supported by corroborative evidences. Email communications and correspondence between the parties much prior to the Demand Notice go on to establish the fact that there is a pre-existing dispute between the parties regarding the quality of work done, the dispute in the invoices raised and the deficiency on part of the Operational Creditor, which is not being solved because of deliberate carelessness of the Operational Creditor. Thus, the present Application is not maintainable and cannot be proceeded under the Code.
- 3.10 At the time of hearing, Ld. Counsel for the Corporate Debtor has placed reliance on the judgments of Hon'ble Supreme Court and NCLAT in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Ltd. (2018) 1 SCC 353, Kay Bouvet Engineering Limited Vs. Overseas Infrastructure Alliance (India) Private Limited. (2021) 10 SCC 483, Innoventive Industries Limited Vs. ICICI Bank, Pedersen Consultants India Private Limited Vs. Nitesh Estates Limited [CA (AT)(INS) No.720 of 2018]*** and ***Naik Environment Engineers Private Limited Vs. Indiabulls Constructions Limited [CA (AT)(INS) No.790 of 2019]*** in support of its case.

4. REJOINDER BY THE OPERATIONAL CREDITOR

- 4.1 With respect to contention of the Corporate Debtor that it has funds and is a profit making company, the Operational Creditor submits that such claims are utterly false as the Operational Creditor has duly demonstrated that cheque No.440329 dated 29.05.2019 issued by the Corporate Debtor in favour of the Operational Creditor had been dishonoured owing to insufficiency of funds in the bank account of the Corporate Debtor. This shows that the Corporate Debtor had willfully defaulted in making payment towards the due and legitimate, yet unpaid, operational debt owed to the Operational Creditor.
- 4.2 It is submitted that the allegations brought forward by the Corporate Debtor pertaining to the submission of the built drawings and prior approval of the material from the PMC are nothing but false and the e-mail communications as annexed with the Reply by the Corporate Debtor are nothing but a mere ploy to mislead this Tribunal and avoid payment of legitimate dues of the Operational Creditor.
- 4.3 As regards the Corporate Debtor's plea of no default having been committed under the Code, the Operational Creditor submits that this contention is mala fide and deceptive and is aimed at evading its liability. It is submitted that no objections were raised by the Corporate Debtor against twenty emails from 22.03.2019 to 10.05.2019 wherein the Operational Creditor had sought updates on pending payments. Further, the Corporate Debtor admitted to the Operational Debt by an email communication dated 04.04.2019 wherein the Corporate Debtor had expressed apologies for delayed payments and made a

commitment to release the due payment to the Operational Creditor. Thus, the said email forms a clear and undisputed admission by the Corporate Debtor towards the unpaid operational debt owed by the Corporate Debtor to the Operational Creditor.

4.4 The Corporate Debtor's stance on unpaid payments changed only after the Operational Creditor demanded payment *vide* a stern email/letter dated 21.05.2019 highlighting the Corporate Debtor's unprofessional conduct. This change suggests that the Corporate Debtor has come up with cooked-up stories to illegitimately evade payment obligations.

4.5 The Operational Creditor submits that it had obtained prior approval from the PMC and the Corporate Debtor before laying the survival cable for the fire alarm in 2018. The Corporate Debtor had confirmed the order for the "No Burn" Make cable by email dated 12.12.2018. Material delivery schedules were shared for approval by the Corporate Debtor and were duly confirmed by the Corporate Debtor by email communication dated 17.12.2018 and all actions were taken by the Operational Creditor only after confirmation from the Corporate Debtor. All built drawings, including AutoCAD, were provided to the Corporate Debtor as highlighted in an email communication of the Operational Creditor dated 15.05.2019. Further, the invoices were raised only after making all the necessary submissions and taking all necessary approval from the PMC and Corporate Debtor for the despatch of the material at the site of the Project. Further, the Corporate Debtor had initially submitted that PMC had only certified Rs.39,00,000/-. However, at a later instance, the Corporate Debtor submitted

- that the PMC could only certify invoices to the extent of Rs.69,00,000/-. Such inconsistency only exposes the attempt of "the Corporate Debtor to misguide this Tribunal.
- 4.6 It is submitted that the email communications dated 21.05.2019, 11.07.2019 and 03.08.2019 were issued by the Corporate Debtor after repeated follow-ups by the Operational Creditor seeking payment. These communications are aimed at evading its payment obligations. Moreover, in view of the submission made with respect to pre-existing dispute and the alleged issue *qua* the invoices issued by the Operational Creditor do not merit any consideration whatsoever by this Tribunal for the purpose of adjudication of the captioned Application.
- 4.7 The Operational Creditor denies having not obtained any approval for the shop drawings and unilaterally started its installation work at the site of the said Project or there being any irregularities of whatsoever nature. The Operational Creditor submits that the Corporate Debtor has raised the irrelevant issue with respect to the deduction of 5% of the gross value of the bill amount towards the retention money and it can be considered by the Corporate Debtor itself while issuing the payment advice at the time of making the said payment towards unpaid invoices, which the Corporate Debtor has withheld despite there being absolutely no valid reason whatsoever to that effect. Further it denies the Corporate Debtor's claims of overcharging and wrong billing. It argues that the Corporate Debtor failed to raise these issues earlier, even after receiving invoices or during the tenure of provisioning of services.

4.8 The Operational Creditor contends that allegations raised by the Corporate Debtor towards suppression of material facts and of payments deserve outright rejection as these are wholly vague and fallible. The Operational Creditor has provided a Customer Ledger and Outstanding Debt computation to demonstrate the payments made by the Corporate Debtor and the balance outstanding amount.

4.9 In its written submissions, the Operational Creditor has placed reliance on the judgements of Hon'ble Supreme Court in ***Mobilox Innovations Private Limited vs. Kirussa Software Private limited (2018) 1 SCC 353, Kay Bouvet Engineering Limited V. Overseas Infrastructure Alliance (India) Private Limited. (2021) 10 SCC 483*** and contended that the dispute raised by the Corporate Debtor is nothing but a moonshine defence. Counsel for the Operational Creditor also invited attention to judgments of Hon'ble NCLAT in ***Mukesh Goel Vs Aldous Commodities Private Limited [CA (AT)(INS) No.1235 of 2023], Deepak Modi Vs. Shalfeyo Industries Private Limited [CA (AT)(INS) No.1019 of 2022], Manipal Media Network Limited Vs. Vishwakshara Media Private Limited [2021 SCC OnLine NCLAT 204], Pedersen Consultants India Private Limited Vs. Nitesh Estates Limited [CA (AT)(INS) No.720 of 2018]***. Reference is also made to the order of coordinate Bench of this Tribunal at Ahmedabad in the matter of ***Raghuveer Buildcon Private Limited Vs. Ketan Construction Limited [C.P (I.B) No.57/9/NCLT/AHM/2019]*** wherein it has been held that every commercial correspondence pointing out some deficiency cannot be treated as evidence of pre-existing dispute.

5. **ANALYSIS AND FINDINGS**

5.1 We have heard the Counsel for both the parties and duly considered the pleadings along with the materials available on record. It is now proposed to deal with the main issues arising in the matter.

5.2 It is well-settled that while examining an application under Section 9 of the Code, the Adjudicating Authority will have to determine:-

- (i) Whether there is an 'operational debt' as defined exceeding the threshold limit under Section 4 of the Code;
- (ii) Whether the documentary evidence furnished with the Application shows that the aforesaid debt is due and payable and has not yet been paid; and
- (iii) Whether there is existence of a dispute between the parties or the record of pendency of a suit or arbitration proceeding filed before the receipt of the Demand Notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is found to be lacking, the application would have to be rejected [***Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353***]. It is also a settled proposition of law that an application under Section 9 of the Code has to be mandatorily admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) are satisfied.

- 5.3 It is well-established that an application under Section 9 of the Code requires strict proof of debt and default. The Applicant must prove with credible evidence and materials that there is an 'operational debt' owed to it by the Corporate Debtor and that there has been a default in payment of such debt on the date on which it fell due and payable. The Operational Creditor in the present case has placed on record copies of work orders, tax invoices, bank statements, Ledger Account of the Corporate Debtor from 21.10.2017 to 21.10.2019, Demand Notice dated 31.10.2019 and certain e-mail correspondences exchanged with the Corporate Debtor from time to time in support of its claim. A perusal of the terms and conditions of the work orders dated 10.10.2018 and 17.10.2018 clearly reveals that as per clause 15(i), 75% of the bill amount for each month was to be released within 10 working days of approval by PMC/Client and balance was to be paid within 21 working days after certification by the PMC/Client and after the receipt of payment from the Client. Further, it was the responsibility of the Operational Creditor to get certified all the measurements and payment was to be released as per the certified quantities.
- 5.4 In this connection, it is noticed from the record that the Operational Creditor has merely annexed copies of tax invoices to the Application but has not placed on record copies of delivery challans and other relevant documents evidencing certified quantities along with approval of the PMC/ Client in this regard. The Corporate Debtor claims that out of the invoices raised by the Operational Creditor and submitted to the client on 31.01.2019, an amount of Rs.39,00,000/- only was certified by the PMC/Client against which the Operational Creditor has already received an amount of Rs.54,25,000/- from the Corporate Debtor. The

Corporate Debtor has placed on record its e-mail dated 10.05.2019 addressed to the Operational Creditor regarding the “balance amount to be paid on priority” informing that “no payment” was yet due to the latter since last certification and that “*further certification from PMC*” was pending “*for paper work to be submitted*” by the latter which had not taken steps for meeting the PMC “for balance certification” and issue related to its work. The Corporate Debtor called upon the Operational Creditor “*to meet PMC with our representative to resolve all issues so that payment can be done as per certification..*”. Thus, it emerges that the Operational Creditor has failed to demonstrate that all invoices claimed to be in default in the present Application were duly certified/ approved by the PMC/Client in terms of the work orders. In the absence of certification as well as approval of PMC/Client, these invoices neither create any payment obligation on the Corporate Debtor nor confer any right on the Operational Creditor to claim payment thereof.

- 5.5 Further, it will be pertinent to take note of the “Scope of Works” to be undertaken by the Operational Creditor as per Annexure-1 of the Work Order dated 10.10.2018 relevant part of which is extracted below:-

“Your Scope of work covered by this Contract shall be “FIRE ALARM SYSTEM WORKS” for North, East and West wings of our North Eye Cape Town site Noida UP...

Your scope of work includes Supply, Installation, Testing & Commissioning and Handing over to Client etc. as per the specifications, drawings BOQ items etc. to the satisfaction of consultants/PMC/Client and our Project-In-Charge and Co-ordination with Architects/Consultants/PMC/other MEP agencies at site....

Based on the drawings issued to you, you are required to submit the Working/Shop Drawings and get the same approved from consultant. All the materials shall be as per the approved list of materials provided, and shall be got approved from consultant/PMC/Client before procurement.”

Thus, it is evident that the Operational Creditor was required under the terms of the Work Order to prepare and submit Shop Drawings and to get the same approved from the Consultant. In this connection, the Operational Creditor cannot get away by merely claiming that no such objections were raised by the Corporate Debtor in response to twenty e-mails addressed by the Operational Creditor to the Corporate Debtor during the period from 20.03.2019 to 10.05.2019.

- 5.6 It is true that the Corporate Debtor in its email dated 04.04.2019 had expressed regret for not releasing payment to the Operational Creditor. However, the Corporate Debtor had *vide* the same email dated 04.04.2019 also requested the Operational Creditor “*to submit the documents (revised drawing, letter) officially, so that BEBL (Corporate Debtor) can take permission from PMC according to your submission deviated from original approved drawing (sic)*”. Further, the Corporate Debtor *vide* its email dated 04.05.2019 also urged the Operational Creditor to do the needful as directed by the Consultant (Mr. R. M. Singh) with regard to “Fire Alarm System (FAS) Shop Drawings for North Wing and Central Wing”. It is noticed from the record that *vide* email dated 15.05.2019, the Operational Creditor informed the Corporate Debtor that all built drawings [soft copy PDF & AUTO CAD (Computer Aided Design)] had been sent to one Mr. Mithlesh and clarified that conduit route had to be changed/deviated because the

existing conduit was found choked. However, the Operational Creditor has not placed on record any documentary evidence to demonstrate that the said Shop Drawings were got approved from the Consultant as required in terms of the Work Order.

- 5.7 Similarly, a perusal of the above extract of scope of work as per the Work Order also reveals that all materials for the fire alarm systems were to be as per the approved list of materials provided and were required to be got approved from consultant/PMC/Client before procurement. In this connection, it is noticed that the Operational Creditor has placed on record its own internal email communication dated 11.12.2018 and Corporate Debtor's e-mail dated 12.12.2018 to the effect that as per telephonic confirmation of Mr. P.P. Saha (DGM of the Corporate Debtor) and discussion with the Operational Creditor, the former could procure and supply No-Burn make Fire Survival Cable at the Project. Further, the Operational Creditor has provided attachment of an email dated 17.12.2018 purportedly sent by the Corporate Debtor to the Operational Creditor informing that "*as per telephonic confirmation by Mr. P.P. Saha today*", the former could go ahead as per attached Programmed & Material delivery schedule. All the aforesaid e-mail communications bring out that the Operational Creditor procured the No-Burn make Fire Survival Cable after getting the confirmation or approval of the Corporate Debtor whereas it was required to obtain such prior approval from the Consultant/PMC/Client in terms of the Work Order which it failed to do.

5.8 It is noticed from the record that in due course, such lapses and failure to adhere to the terms of the Work Order on part of the Operational Creditor became the main bone of contention or grounds of dispute between the parties. This is amply brought out from perusal of the following e-mail dated 21.05.2019 addressed by the Corporate Debtor to the Operational Creditor:

"Dear Mr Brajendra,

Please see our internal mail to Mr Mithlesh about G4S work.

*What about they are not responding (1) **Change at site extra conduit without shop drawing submitted officially to us & no permission from PMC (2) Further No Burn cable permission has failed to meet PMC & paper work not completed by G4S. It may lead to HUGE DEDUCTION in bill for official permission. So, deduct the submitted bill accordingly which is not as per approved drawing.***

*I have severally told you & Mr Rizvi to meet PMC & do the needful for official paper work. But you told me that you will meet PMC with Mr Mithlesh, but **NO PROPER ACTION FROM G4S TEAM. We will be helpless further without PMC certification of bill.** You should sit with our team & PMC for proper certifying bill quantity of work done at site....."(emphasis supplied).*

Further, it is observed that the Corporate Debtor vide its email dated 11.07.2019 addressed to the Operational Creditor explicitly reminded that proper paperwork in regard to No Burn cable permission from PMC had still not been completed by the Operational Creditor. It is also noticed that vide another e-mail dated 03.08.2019 addressed by the Corporate Debtor to the Operational Creditor, the latter was again requested to "come forward to get the approval of NO BURN CABLE with proper paper work as required by PMC & Consultant. As further

rejection by PMC about NO BURN cable, we are suffering heavily. PMC has deducted huge amount in BEBL's R.A. bill. Also inform NO BURN CABLE owner to meet again with PMC to resolve further. Hope you will initiate the meeting (with PMC) immediately".

- 5.9 Thus, we find that the Operational Creditor failed to adhere to the terms and conditions of the Work Order by not obtaining required approval for materials and shop drawings and proper certification of its invoices from the Consultant/PMC/Client which were its obligations under the terms of the work orders. We also find that the aforesaid e-mail correspondences raising various issues pertain to the period prior to the issuance of the statutory Demand Notice on 31.10.2019. All these issues unmistakably point towards a pre-existing dispute between the parties as to the liability of the Corporate Debtor to pay the debt claimed to be in default in the Application. It is pertinent to mention that there is also a record of dispute in the Information Utility in the present case. A perusal of the NeSL Report on Record of Default/ Debt/ Authentication dated 03.02.2020 reveals that although the record of financial information (Form C) and the record of default (Part A) indicate a debt and default of Rs.48,29,928.76/- on the part of the Corporate Debtor, the status of authentication of operational debt in question is shown in Part B as "**disputed**" by the Corporate Debtor as on 17.01.2020. Therefore, we are of the considered view that there is clearly a genuine pre-existing dispute between the parties which is not vexatious or frivolous and grounds for which are real and not spurious, illusory, hypothetical. The dispute is backed by concrete and credible evidence and is far from being a patently feeble legal argument or an assertion of fact unsupported by evidence.

- 5.10 Reliance placed by the Operational Creditor on certain judgments of the Hon'ble NCLAT and cited in Para 4.9 above will be of no avail, because the factual matrix of those cases is different and distinguishable from the facts and circumstances of the present case. In the instant case, we find that the plea of pre-existing dispute raised by the Corporate Debtor is neither a moonshine defence nor an afterthought nor mere bluster. There is a record of dispute in the IU, as brought out above. E-mail correspondences between the parties are not in relation to some minor deficiencies but bear ample testimony to the violation of the terms and conditions of the work orders on part of the Operational Creditor leading to dispute as to the quality of goods and services as well as the quantum of debt.
- 5.11 In view of aforesaid discussions, it clearly emerges that the Operational Creditor has failed to demonstrate the existence of an operational debt exceeding the threshold limit under Section 4 of the Code and default thereof which is the *sine qua non* for admission of an application under Section 9 of the Code. Further, it is noticed that there is a record of dispute in the NeSL with regard to the operational debt claimed to be in default by the Operational Creditor. In view of the factual position, we are satisfied that the present Applicant fails to fulfil the criteria laid down for admission under Section 9(5)(i) of the Code. Instead, Section 9(5)(ii)(d) of the Code mandates that the Adjudicating Authority shall reject the application if a notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. In these circumstances, we are of the considered view that the present Application filed by the Operational Creditor deserves to be rejected in terms of Section 9(5)(ii)(d) of the Code.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.35/MB/2020 filed under Section 9 of the Code by G4S Security System (India) Private Limited, the Operational Creditor, for initiating CIRP in respect of B.E. Billimoria And Company Limited, the Corporate Debtor is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Applicant to pursue such other remedies as may be available in accordance with law.

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER(JUDICIAL)**

//LRA-Deepa//