

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO.1305 OF 2022

& I.A. NO. 4028, 4639 of 2022

(Arising out of judgement and order dated 23.08.2022 passed by the National Company Law Tribunal, Ahmedabad Bench in CP(IB)No.11/AHM/2021)

In the matter of:

EBPL Ventures Pvt Ltd
4/3 Nehru Parisar, Nehru Nagar
Behind Hero Honda Show Room
Bhilai Chhattisgarh 490020

.....Appellant

Vs

Sarguja Rail Corridor Pvt. Ltd.
(Now known as Adani Track Management Services Pvt Ltd)
Adani Corporate House,
Shantigram,
Near Vaishno Devi Circle
SG Highway Khodiyar
Ahmedabad 382421
Gujarat

.....Respondent

Present

For Appellant: Mr Gaurav Mitra, Mr Ankeet Sareen, Mr Piyush Pushkar,
Ms Prachi Johri, Advocates.

For Respondent: Mr Krishnendu Datta, Sr Advocate, Ms Aakanksha Kaul,
Mr Adit Khurana, Mr Aman Sahani, Ms Ashima Chopra,
Mr. Yash Tandon, Advocates.

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

The present appeal is filed by the Appellant, EBPL Ventures Pvt Ltd (hereinafter referred to as “**Operational Creditor**” or “**OC**” or “**EBPL**”) against the order dated 23.08.2022 passed by the Ld. NCLT, Ahmedabad in CP(IB) No.11/AHM/2021, wherein the application under Section 9 of the

Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**IBC, 2016**”) filed by the applicant against the Corporate Debtor, Sarguja Rail Corridor Pvt Ltd (hereinafter referred to as “**Corporate Debtor**” or “**CD**” or “**SRCPL**”) was dismissed.

2. The brief facts of this case as per appeal paper book are as under:

i) Sarguja Rail Corridor Pvt. Ltd. (later the name was changed to Adani Track Management Services Private Limited) was ordered the contract to build railway line on behalf of South East Central Railway Zone (SECR). SRCPL awarded separate contracts to Gannon Dunkerley and Company Limited (hereinafter referred to as “**GDCL**”) and M/s Vijay Nirman Company Private Limited (hereinafter referred to as “**VNCPL**”). The work was sub-contracted to the appellant EBPL by both the contractors, GDCL and VNCPL.

ii) SRCPL issued a Letter of Intent (LOI) on 21.05.2014 to GDCL and on 07.08.2014 and 05.12.2015 to VNCPL for execution of work relating to part of the project. The contractor VNCPL gave work to sub-contractor EBPL through two contracts dated 15.05.2015 and 21.05.2017. The GDCL sub-contracted the work to the Appellant, EBPL on 13.05.2015. The contracts of the Appellant with GDCL dated 13.05.2015 and with VNCPL dated 15.05.2015 and 21.05.2017 were similarly worded.

iii) M/s Howe India Pvt. Ltd. was appointed the project consultant and project manager of the said project.

iv) Initially, SRCPL awarded contract to GDCL for construction through work order dated 01.08.2015 collectively amounting to Rs. 21.27 crores for OHE and P-way work (Phase IIA- 33 to 54 Kms.) which was later reduced to Rs. 18.06 crores on reduction of scope of work. Similarly, SRCPL also awarded contract dated 07.08.2014 and 05.12.2015 to VNCPL for construction of

private railway sidings (phase IIB-54 to 70 Kms. and phase IIC-70 to 75.56 Kms.).

v) Apparently, disputes arose between the appellant EBPL and the contractors GDCL and VNCPL and the completion of the project was stalled.

vi) VNCPL further awarded contracts of construction of P-way works and OHE works for Phase II B/C for Rs. 26.70 crores vide work order dated 16.06.2016 and work order dated 31.12.2016. There was also subsequent change in scope without any increase in the contract value.

vii) In its application under Section 9 before the Ld. NCLT, the applicant, EBPL (Sub-contractor) alleged that payments were not forthcoming from GDCL and VNCPL (Contractors) and then the respondent, SRCPL (Principal Employer) stepped in as principal owner and agreed in writing to make all the payments due to be paid by contractors. It is alleged that the Corporate Debtor directly substituted itself in the shoes of GDCL and VNCPL and agreed to make payment and in return the appellant was asked to ensure that final pending works, including commissioning of the project, are completed.

viii) The applicant relied upon the minutes of the meeting dated 09.04.2018 and the Indemnity Bond dated NIL in support of its contention that liability of GDCL and VNCPL has been taken over by SRCPL and as amount exceeding Rs. 1 crore is due to the applicant, the application under Section 9 ought to have been admitted against SRCPL.

3. The Ld. NCLT in the impugned order dated 23.08.2022 dismissed the application under Section 9 of IBC, 2016 and held as under:

5. Heard the learned counsels for both sides and perused the material on record. It is noted that the Respondent awarded work for engineering, procurement, and construction (EPC) of private railway sidings to the GDCL vide contract dated 13.05.2015 for Phase IIA (33 Km to 54 Kms) for Rs. 230 crores, and further

awarded contracts dated 15.05.2015 & 05.01.2016 for Phase IIB (54 Km to 70 Kms) for Rs. 171 crores and for Phase IIC (70 Km-75. 77 Kms) for Rs. 35,37,89,327/- respectively to VNCPL. The works relating to OHE and linking of tracks were further awarded to the applicant in turn by the GDCL and VNCPL.

The GDCL vide work order dated 01.08.2015 bearing reference No. D/CE/003840 awarded the work of design, supply, erection, and commissioning of overhead equipment (OHE) of rail track (33Km to 54 Kms) for Rs. 10,72,00,000/- and vide work order dated 01.08.2015 bearing reference No. D/CE/003841 for construction work for supply, laying, linking, testing, and commissioning of permanent way work of Rail Track (33 Km to 54 Kms) for Rs. 10,55,30,000/- of phase IIA to the applicant. The total contract amount was of Rs. 21,27,30,000/- both the aforesaid works. It is not in dispute that the value of the work orders was thereafter reduced to Rs. 18.06 crores due to the reduction of the scope of phase-IIA work.

6. The VNCPL also awarded works to the applicant vide work order dated 16.06.2016 bearing reference no. VNCPL/SRCPL/2016-2017/EBPL/003 for OHE works for Rs. 13,37,00,000/- and work order dated 31.12.2016 bearing reference no. VNCPL/SRCPL/2016-2017 IEBPL/ 10A for the execution of P-way work for Rs. 13,33,00,000/- for Phase- IIB and IIC respectively. The total contract value was of Rs. 26.70 crores. The aforesaid works were duly completed by the applicant and completion certificates have been issued by the Respondent on 25.06.2018 and also by the SECR on 25.07.2018.

7. The moot question in the present application is whether the respondent can be treated as a debtor to the applicant on the basis of the Minutes of Meeting [MoM] dated 09.04.2018. If yes, then whether there is a pre-existing dispute between the applicant and respondent? The present application is filed based on the minutes of the meeting dated 09.04.2018 & the Indemnity Bond Cum-Undertaking thereon given by the applicant separately in respect of the work awarded by GDCL and VNCPL wherein it is clearly stated (para 2 of the MoM) that all the terms and conditions of the work orders issued by GDCL/ VNCPL to the applicant shall remain unaltered. It is also mentioned that the GDCL offered an amount of Rs. 25.50 crores including the additional claim for extra work as a full and final settlement work order price which was not acceptable to the applicant. Thereafter, the applicant approached the respondent; and the respondent, without going into the details of the claim for extra work and to attempt the amicable settlement of the case between the applicant and GDCL, agreed for the revised contract price of Rs. 26 crores plus applicable GST on the work (including the additional claim for extra work) awarded by

GDCL as full and final settlement which was accepted by the applicant. The clause of the Indemnity Bond refers for agreement on terms of payments for payment of the differential amount (i.e., Rs. 26 crores less the amount actually paid by the GDCL, after verification and reconciliation) in three stages - 50% of the due amount to be released within two working days of signing EIG documents, 25% to be released within 2 working days of obtaining EIG approval by SECR; and the balance amount to be released within two working days from the date of commissioning and placement and removal of rake with OHE loco. Similarly through the separate MoM and Indemnity Bond dated 09.04.2018 in respect of the extra claim on VNCPL, it was agreed that the differential amount of Rs. 1.70 crores plus GST shall be payable to applicant on the same terms. Though as per these MoM and Indemnity Cum Undertaking, the respondent had agreed that differential amount i.e. Rs. 26 crores less the gross values actually paid for GDCL after verification and reconciliation respect of the work awarded by GDCL and settled amount of Rs. 1.70 crores plus GST on to the work awarded by VNCPL was to be paid to the applicant as per the terms set out in the said Minutes/ Indemnity Bond, but that nowhere has mentioned as to who amongst respondent, GDCL or VNCPL would pay the money. It is also noted that as per clause 2 of Indemnity Bond-cum-Undertaking, the applicant has clearly stated that it was appointed as a subcontractor by the GDCL and VNCPL for the execution of the awarded work of railway siding. Hence, the contention of the applicant that it became a direct contractor to the respondent on the strength of above stated MoMs and Indemnity Bond does not sustain. For ready reference, the relevant paras of the MoM & Indemnity Bond-cum-Undertaking dated 09.04.2018 are reproduced hereunder;

Minutes of Meeting dated 09.04.2018

(between SRCPL and GDCL)

“3. All other terms and conditions of the work orders issued by GDCL to EBPL shall remain unaltered”

INDEMNITY BOND-Cum- UNDERTAKING

(MoM with respect to GDCL)

1. "We, EBPL Ventures Pvt Ltd (for short "EBPL" are willingly giving this irrevocable and unconditional indemnity bond - cum - undertaking to Sarguja Rail Corridor Pvt. Ltd. (for short "SRCPL" in the following terms.
2. We state that we were appointed as a sub-contractor by Gannon Dunkerley & Co. Ltd (for short "GDCL") for execution of work under Work Order No. D/CE/003840 dated 01.08.2015 for OHE

works and Work Order No. D/CE/003841 dated 01.08.2015 for P-Way work for contract values of Rs. 10.72 Cr & Rs 10.55 Cr respectively (collectively Rs.21.27 cr.). The said collective value was subsequently amended to Rs. 18.06. However, we were required to undertake certain works beyond the scope of work under the aforesaid work orders and consequently we believe that we are entitled for revision of the aforesaid amended value of work orders to Rs 31.00 Cr. For this purpose, we have approached GDCL with the relevant document evidence and have requested GDCL to consider our claim for extra work and make payment after verifying our claim.

3. GDCL has reviewed the documents of additional claims and have offered to revise the work order value to Rs. 25.50 cr. including the additional claim for extra work, as a full and final settlement work order price. However, it is not acceptable to us and hence we have approached the principal Employer SRCPL for settlement of our issue.
4. SRCPL is yet to go through the details of the claim of extra work. However, pending this as an attempt of amicable settlement of this case, have offered to us a revised all inclusive contract price of Rs. 26 cr plus applicable GST. We have considered and we fully agree for settling the revised collective work orders price at 26 cr plus applicable GST as full and final settlement amount towards all work done by us pursuant the aforesaid work order. SD shall be refunded as per the books of accounts as agreed upon.
5. SRCPL has agreed that the differential amount i.e. Rs. 26 Cr less the gross values actually paid and to be paid to or on behalf of EBPL, after verification and reconciliation, as per the terms of payment agreed as under:
 - i) 50% of the due payment shall be released within two working days of signing EIG documents.
 - ii) 25% of the due payment shall be released within two working days of obtaining EIG approval by SECR
 - iii) Balance payment shall be released within two working days from the date of commissioning and placement and removal of rake with OHE loco "

Minutes of Meeting dated 09.04.2018

(between SRCPL and VNCPL)

“3. All other terms and conditions of the work orders issued by VNCPL to EBPL shall remain unaltered”

INDEMNITY BOND - cum - UNDERTAKING

(MoM with respect to VNCPL)

1. "We, EBPL Ventures Pvt Ltd (for short 'EBPL') are willingly giving this irrevocable and unconditional indemnity bond - cum - undertaking to Sarguja Rail Corridor Pvt Ltd (for short 'SRCPL' in the following terms.
2. We state that we were appointed as a sub-contractor by Vijay Nirman Co. Pvt Ltd (for short "VNCPL") for execution work under Work Order No. VNCPUSRCPL/0016-17 /EBPL/003 dated 16.06.2016 for OHE and Work Order No. VNCPL/SRCPL/0016-17/EBPL/010 dated 12.12.2016 for OHE P-Way work for contract values of Rs.13.37 Cr & Rs.13.33 Cr respectively (collectively Rs. 26.70.cr.). However, we were required to undertake certain works beyond the scope of work under the aforesaid work orders and consequently we believe that we are entitled for additional cost of about Rs. 8.00 Cr. including GST. For this purpose, we have approached VNCPL with the relevant document evidence and have requested VNCPL to consider our claim for extra work and make payment after verifying our claim.
3. Since an amicable settlement with VNCPL could not be reached we have approached the principal employer SRCPL for settlement of our issue.
4. SRCPL is yet to go through the details of the claim for extra work. However, pending this as an attempt of amicable settlement of this case, they have offered to us an additional all inclusive settlement of Rs. 1.70 cr. VNCPL shall return the bank guarantee submitted by EBPL as a security towards this said advance on commissioning of track along with OHE. We have considered and we fully agree the same as full and final settlement. The SD if any shall be refunded as agreed upon.
5. SRCPL has agreed that the settled amount i.e. Rs 1.70 Cr, shall be paid as per the terms of payment agreed as under:
 - i) 50% of the due payment shall be released within two working days of signing EIG documents.
 - ii) 25% of the due payments shall be released within two working days of obtaining EIG approval by SECR.
 - iii) Balance payment shall be released within two working days from the date of commissioning and placement and removal of rake with OHE loco "

8. It is noted that following the agreement that was reached as per Minutes of the Meeting dated 09.04.2018, the respondent itself had paid to the applicant Rs. 1,91,71,970/- for GDCL and Rs. 93,50,000/- for VNCPL on 17.04.2018.

9. It is the say of the respondent that it had step in as a facilitator to settle the dispute between the applicant with GDCL/VNCPL as per clause 11.11 of the General Conditions of the Contract and the role of the respondent as a facilitator of the

dispute is further clarified from the tripartite agreement dated 27.06.2018 which was executed between VNCPL, applicant, and Respondent wherein it is mentioned that VNCPL and the applicant acknowledged and confirmed that the Respondent had paid to the applicant an amount of Rs. 95,20,000/- (Rs. 93,50,000/- and Rs. 1,70,000/- as a TDS) on behalf of the VNCPL and to the extent of such payment, the Respondent stands discharge towards its payment obligation to VNCPL and the balance 50% of the remaining amount shall be paid by VNCPL after reconciliation of amount. Relevant paras of tripartite agreement dated 27.06.2018 are reproduced hereunder;

“Now, therefore, the parties hereby agree and this agreement witnessed as follows;

1. VNCPL and EBPL hereby acknowledge and confirm that SRCPL has made following payments directly to EBPL on behalf of VNCPL and to the extent of such payment, SRCPL stand discharged towards its payment obligation to VNCPL under the contract no SRCPL/Ph-IIB/5700135126 dated 15th May 2015.

Table A: Details of Payment:

Date of payment	Amount paid to EBPL(Rs.)	TDS deducted and deposited in name and on account of (Rs.)	Total Payment including GST (Rs.)
17-04-2018	93,50,000	1,70,000	95,20,000

EBPL hereby acknowledge the receipt of aforesaid payment and confirms that to the extent of the aforesaid payments, obligation of VNCPL to make these payments to EBPL under its agreement with VNCPL stand discharged. - Further, VNCPL acknowledge and confirm that SRCPL had deducted TDS on the aforesaid payment in compliance with the applicable laws and VNCPL shall further comply with all the applicable laws including requirement of deduction of TDS for the payments made to EBPL on its behalf.

That for the time being, without going through the details of the claim for extra work, SRCPL offers to pay EBPL an additional all-inclusive settlement of Rs.1.70 Cr plus applicable GST (hereinafter called as 'settled amount') which has already been paid by SRCPL (50% on behalf of VNCPL) as per table A above and balance (50%) shall be paid by VNCPL on reconciliation of accounts and EBPL agrees to the settled amount as full and final settlement of its claim on VNCPL except other than routine GST,

TDS & contractual amount reconciliation for the works of complete track kilometre executed in both the orders of P-way and OHE.

- 2. THAT VNCPL agrees to the settlement and claims that it has given mobilization advances and other recoveries to EBPL which are pending and shall be adjusted by VNCPL against the settled amount. EBPL agrees for the same and both VNCPL and EBPL shall jointly reconcile the account and shall settle the pending adjustment. The complete account reconciliation shall be done by VNCPL with EBPL for the work finally completed by EBPL.*
- 3. THAT VNCPL agrees to pay the Rs.85 lac (Rupees Eighty-five lac only) plus applicable GST i.e. balance 50% of the settled. amount to EBPL after adjustment of the pending recoveries and reconciliation of the account and EBPL agrees to the same. After account reconciliation, if there is any amount due towards EBPL then VNCPL shall pay the balance amount of EBPL ".*

10. *As per clause 11.4 (Appendix- VII, General Terms and Conditions) of the GDCL Contract, the applicant will not claim its right against the Respondent under any circumstances and create contractual obligations of the Respondent towards the applicant. As per clause 11.11 of the said contract the respondent reserves rights upon written intimation to the contractors (GDCL and VNCPL) to make payments due hereunder directly to the applicant whenever the respondent has reason to believe that the Contractor (s) has not paid or is likely not to pay the such supplier (the applicant) and an amount is due on a timely basis. The relevant paras of the contract (VNCPL and GDCL Contracts) are reproduced hereunder;*

“11.4 regardless of whether or not the contractor obtains approval from the Employer for a Sub Contractor or whether the contractor uses a Sub Contractor recommended by Employer, use of a Sub Contractor by the contractor will not under any circumstances; (a) give rise to any claim by the Contractor against the Employer if such Sub Contractor breaches its subcontract or contract with the contractor; (b) give rise to any claim by such Sub Contractor against the Employer; (c) create any contractual obligation of the Employer towards the Sub Contractor; (d) give rise to a waiver by Employer of its rights to reject any Defects or deficiencies or defective work; or (e) in any way release that Contractor from being solely responsible to Employer for the Work to be performed under the Contract.”

"11.11 the Contractor shall make payments to all Sub Contractors, unless otherwise specified in the Contract, in accordance with the respective agreements between the Contractor and its Sub Contractors such that Sub Contractors will not be in a position to enforce liens and/or other rights against Employer or any of its Affiliates, the Works or any part thereof. Contractor shall provide and shall obtain from all Sub Contractors and deliver to Employer, waivers of all unpaid liens under all applicable Laws. Employer reserves the right, upon written intimation to Contractor, to make payments due hereunder directly to Sub Contractors of Contractor whenever Employer has reason to believe Contractor has not paid or is likely not to pay such suppliers amounts due to them on a timely basis, provided that Employer shall give the Contractor notice prior to making such payments. In the event Employer makes such payments to Sub Contractors, Contractor shall immediately credit, secure or repay to Employer, the amount of such payments."

11. In view of the above facts, we are of the considered view that the respondent has played a role as a facilitator to settle the dispute so that construction of railway siding work is not delayed/ hampered. Hence, mere facilitation of the dispute cannot create a right in favour of the applicant to file this present application against the respondent as it debtor; and as such the present section 9 application against the respondent is not maintainable.

12. Though we hold that the respondent is not a debtor of the applicant, however, we further analyzed the matter from the perspective of the pre-existing dispute. In the context it is noted that the applicant had issued proforma invoice bearing no. EBPL/P.I/272 on 04.01.2019 of Rs. 13,56,72,000/- upon the VNCPL too and on that basis the applicant issued a demand notice to VNCPL on 06.10.2020. The applicant also issued one more proforma invoice with the same invoice no. (bearing no. EBPL/P.I/272) on 06.01.2019 of Rs. 22,12,90,900/- upon the respondent. The applicant issued a demand notice dated 01.12.2020 which was delivered to the respondent on 07.12.2020, along with an invoice of Rs. 22, 12,90,900/-. The applicant at para-4 of its rejoinder has stated that once the Respondent was agreed to pay the dues no scope remains for any to be played by the subsidiary companies (GDCL & VNCPL). Meaning thereby, at the one hand the applicant is saying the respondent is only liable to pay the dues and on the other hand the applicant issued a demand notice to VNCPL for

Rs.13,56,72,000/-. Hence, the applicant cannot be allowed to probate and reprobate on the same fact. Moreover, how two invoices of different amounts and dates can be issued to two different entities with the same invoice number? So, upon considering evidence and material on record, we have noted that there is a serious dispute pending between the parties to this application, about the existence of the Operational Debt against the respondent and its alleged default by the respondent. In view of the Hon'ble Supreme Court ruling in the case of "MobiloX Innovations Private Limited Versus Kirusa Software Private Limited", (2018) 1 Supreme Court Cases 353:2017 SCC online SC 1154: (2018) 1 Supreme Court Cases (Civ) 311 that requires details investigation/ inquiry of the disputed facts and for that reason too the application cannot be admitted.

13. *Accordingly, CP (IB) No. 11 of 2021 stands rejected and disposed of."*

(Emphasis Supplied)

4. The Learned Counsel for the appellant referred to various clauses of the General Conditions of Contract between the contractors (GDCL and VNCPL) and employer (SRCPL). It is stated that the agreement with terms of the contract have been altered by the minutes of meeting held on 09.04.2018 wherein representatives of the SRCPL, GDCL and the appellant were present.

4.1 The Learned Counsel for the appellant also referred to Indemnity Bond, specifically, para 4, 5, 6 and 10 of the said Indemnity Bond. Further, he referred to emails dated 11.08.2018, written by Mr. Viral Gandhi which promised payment of 50% of the due amount within two working days of submission of signed documents of phase IIA and 50% on submission of signed EIG documents for phase IIA, IIB and IIC. The indemnity bond is already reproduced above in the order of the Ld. NCLT.

4.2 The Learned Counsel for the Appellant submitted that they have dropped their allegations under Section 9 relating to VNCPL, as there existed a tripartite agreement between SRCPL, VNCPL and the Appellant. He stated

that his claim now relates only to work allocated to GDCL which they have completed at the behest of SRCPL.

4.3 It was submitted that the work was done on the behest of SRCPL, Indemnity Bond was issued to SRCPL and certification of work was obtained by SRCPL. The SRCPL had paid 50% of the remaining amount but had failed to pay balance 50%. In this context, the Learned Counsel for the Appellant referred to the minutes of meeting dated 09.04.2018 (page 45 to 46 of Convenience Compilation) and the indemnity bond cum undertaking (undated) (page 47 to 52 of the CC). The minutes show that the meeting was attended by representatives of SRCPL, GDCL and EBPL. However, it is contention of the Appellant that minutes was not signed by GDCL. The minutes of said meeting are reproduced below:

“MINUTES OF MEETING

Date: 09.04.2018

Venue: Bilaspur

Attendees:

SRCPL:UV Phani Kumar (CEO); Kailash Varma: PV Rao: Sanjay Pathak; Viral Gandhi; GDCL: J.K. Samaiya.

EBPL: Ajay Agrawal: Jayesh Rawal

Subject: SRCPL Phase-II A(Ch.33-54 km)-P Way and OHE Works

Following were discussed and agreed;

- 1) EBPL have submitted an indemnity bond cum undertaking enclosed Herewith.*
- 2) Detailed discussion were held on EBPL's extra claims on GDCL and finally it was agreed that the collective work order values of P-Way and OHE work shall be revised as Rs.26 Cr. The differential amount shall be payable to EBPL as mentioned in the enclosed bond.*

- 3) *All other terms and conditions of the work orders issued by GDCL to EBPL shall remain unaltered.*
- 4) *EBPL shall signed all the documents and declarations related to EIG application immediately on signing of this minutes of meetings.*
- 5) *By signing and submitting the EIG application, the termination notice issued by GDCL shall stand withdrawn and cancelled.*

Sd/-

For EBPL

For GDCL

Sd/- 09.04.2018

For SRCPL

4.4 The Learned Counsel for the Appellant submitted that indemnity bond has been recognised in the said minutes of meeting and as per para 5 of the indemnity bond the liability for payment of the differential Rs. 26 crores less the gross value actually paid, was on SRCPL. For easy reference, the indemnity bond cum undertaking is reproduced below:

“1) We, EBPL Ventures Pvt Ltd (for short "EBPL") are willingly giving this irrevocable and unconditional indemnity bond-cum-undertaking to Sarguja Rail Corridor Pvt Ltd (for short "SRCPL") in the following terms.

2) We state that we were appointed as a sub-contractor by Gannon Dunkerley & Co. Ltd (for short "GDCL") for execution of work under Work Order No. D/CE/003840 dated 01.08.2015 for OHE works and Work Order No. D/CE/003841 dated 01.08.2015 for P-Way work for contract values of Rs. 10.72 Cr & Rs. 10.55 Cr respectively (collectively Rs.21.27 cr.). The said collective value was subsequently amended to Rs. 18.06. However, we were required to undertake certain works beyond the scope of work under the aforesaid work orders and consequently we believe that we are entitled for revision of the aforesaid amended value of work orders to Rs.31.00 Cr. For this purpose, we have approached GDCL with the relevant document evidence and have requested GDCL to consider our claim for extra work and make payment after verifying our claim.

3) GDCL has reviewed the documents of additional claims and have offered to revise the work order value to Rs 25.50 Cr including the additional claim for extra work, as a full and final settlement work order price. However, it is not acceptable to us

and hence we have approached the Principal Employer SRCPL for settlement of our issue.

4) SRCPL is yet to go through the details of the claim for extra work. However, pending this as an attempt of amicable settlement of this case, have offered to us a revised all-inclusive contract price of Rs 26 Cr plus applicable GST. We have considered and we fully agree for settling the revised collective work orders price at Rs 26 Cr plus applicable GST as full and final settlement amount towards all work done by us pursuant to the aforesaid work order. SD shall be refunded as per the books of accounts as agreed upon.

5) SRCPL has agreed that the differential amount i.e. Rs 26 Cr less the gross values actually paid and to be paid to or on behalf of EBPL, after verification and reconciliation as per the forms of payment agreed as under:

(i) 50% of the due payment shall be released within two working days of signing EIG documents.

(ii) 25% of the due payments shall be released within two working days of obtaining EIG approval by SECR.

(iii) Balance payment shall be released within two working days from the date of commissioning and placement and removal of rake with OHE loco.

6) EBPL shall sign all documents, applications, declarations, indemnities etc. that may be required for obtaining EIG approval to the satisfaction of SRCPL.

7) However, in case EBPL is required to sign any other documents, EBPL hereby irrevocably and unconditionally undertakes to do the same immediately. If, for whatsoever reason, EBPL is unable to sign certain documents, Mr. Sanjay Tiwari of GDCL shall be authorised to affix his signature and his signatures shall be deemed to be treated as our signature and authorisation on our behalf for the purposes of EIG approval and EBPL shall be bound by the same.

8) EBPL will complete their scope of work in all respects, as called for vide the above referred contacts, EBPL shall extend all support for obtaining the EIG approval.

9) EBPL confirms that all the materials supplied and consumed in the project are as per the required specification and quality standard and same have been duly inspected and certified by the competent agencies like CORE/RDSO/RITES/Consignee. EBPL

confirms that they have provided all inspection certificates and wherever the inspection certificates have not been provided, the same will be provided within two days of signing of this bond.

10) EBPL confirms that no substandard work has been executed in the project and EBPL fully takes the responsibilities and indemnify SRCPL against any loss or damage due to any substandard work.

11) Mr. Ajay Agrawal, the signatory of this indemnity bond to SRCPL and GDCL and this bond shall be binding on EBPL, its successors and permitted assigns. We have willingly signed this indemnity and this is not signed under any undue pressure or coercion.

12) In case of any clarification required in respect to this letter or in case of any dispute arising of this letter or related thereto, the decision of SRCPL shall be final and binding on EBPL without any protest or demur.”

4.5 On specific query by the Bench, the Learned Counsel for the Appellant submitted that appellant’s contract with GDCL continued. This is also recognised in para 5 of the MoM which records that the termination notice issued by GDCL stands withdrawn and cancelled. It was submitted by Learned Counsel for the Appellant that as per said indemnity bond the balance 50% is yet to be paid by SRCPL, which is cause for filing of application under Section 9 by the Appellant.

4.6 The Learned Counsel for the Appellant referred to the email correspondence with Mr. Viral Gandhi who was the project manager on behalf of Howe Engineering Projects (I) Pvt. Ltd. who were entrusted the project management consultancy of the project by SRCPL. It was submitted that Mr. Viral Gandhi, in the email dated 11.04.2018 had stated that 50% of the due payment shall be released within two working days of signing of EIG documents for Ph-IIA and 50% of the due payment shall be released within

two working days of signing of EIG documents for Ph-IIB & IIC. It was submitted that EBPL was registered as a vendor vide email dated 10.04.2018 with the Adani Group.

4.7 It was submitted that residual work and residual payment, as per minutes of meeting dated 09.04.2018 constitute separate side contract. It was submitted that appellant had carried out all the activities required as per para 5 (i), (ii) and (iii) of Indemnity Bond including signing of EIG documents, obtaining EIG approval by SECR (South East Central Railway) commissioning and placement and removal of rake with OHE loco.

4.8 The Learned Counsel relied on SECR certificate dated 29.08.2020 which approved EBPL Ventures Pvt. Ltd. (Appellant herein) as electrical contractor for OHE work of SRCPL. The said certificate records that the OHE lines were charged with A.C. supply on 10.05.2018 for electrical traffic service and now is working satisfactory.

4.9 The Learned Counsel for the Appellant also referred to similar certificate dated 12.07.2018 wherein the Appellant was certified as approved electrical contractor for OHE work of SRCPL. He further referred to email dated 11.05.2019 from the Adani Group inquiring whether the Appellant was a MSME under MSME Act. This email was replied by the Appellant on 12.05.2019 confirming that it is a registered MSME organization.

4.10 The Learned Counsel for the Appellant also referred to invoices for the work done and further submitted that no payment has been received against two invoices dated 14.05.2018, being EBPL/P.I/268 and EBPL/P.I/269 for Rs. 97,60,275.84 each. It was submitted that the amount due from SRCPL relating to the contractor GDCL in itself is more than threshold value of Rs. 1

crore specified under Section 4 of the IBC, 2016 and thus the application under Section 9 should have been admitted.

5. The Learned Sr. Counsel for the Respondent submitted that two identical contracts were made with GDCL and VNCPL wherein portions of work relating to the new railway line was contracted by SRCPL to GDCL and VNCPL. In the documents SRCPL is referred to as “Employer” and GDCL and VNCPL were referred as “Contractors”. GDCL and VNCPL sub-contracted the work to the appellant, EBPL.

5.1 Subsequently, due to differences between GDCL and EBPL and between VNCPL and EBPL the completion of the project was getting delayed. SRCPL facilitated discussions and identical minutes were drawn with EBPL, GDCL and SRCPL, and between EBPL, VNCPL and SRCPL. Identical second set of minutes were drawn. A tripartite agreement was signed with VNCPL, the appellant and SRCPL. Though, in its application before the Ld. NCLT under Section 9, the appellant had also taken up alleged debts relating to VNCPL but the said allegations are now dropped in the appellate proceedings as admitted by the Learned Counsel for the appellant, there by recognising that it was always responsibility of VNCPL to pay to EBPL.

5.2 Similar understanding existed regarding payments due between GDCL and EBPL. Though the minutes of the meeting dated 14.10.2019 were initially not signed by the applicant, it was only on 06.04.2020 that the appellant returned the signed minutes vide email dated 06.04.2020. It was essentially because of the delay in returning the signed minutes that the tripartite agreement between GDCL, EBPL and SRCPL was not signed on lines of the tripartite agreement already executed between VNCPL, EBPL and SRCPL.

5.3 It is the submission of the Learned Sr. Counsel for the Respondent that Appellant had itself withdrawn allegations relating to VNCPL, and because GDCL MoM is on identical footing, on this ground itself the appeal should be dismissed.

5.4 Reference was made to the minutes of meeting dated 14.10.2019 placed at page No. 101 to 104 of the Convenience Compilation wherein point no. 4 of the agenda was as follows:

“Bases the minutes of meeting dated 10th April, 2018 it was agreed between the parties M/s GDCL and M/s EBPL that M/s GDCL will make payments to M/s EBPL as per following

- i. INR 1,74,29,063*
- ii. INR 87,14,532*
- iii. INR 87,14,532*

Against Point No. 4(i) as above, payment of INR 1,95,20,551 (i.e including GST) was made by M/s SRCPL on behalf of M/s GDCL to M/s EBPL (dated 17th April, 2018) and balance instalments as per point 4(ii) and point 4(iii) are yet to be paid by M/s GDCL”

(Emphasis Supplied)

After discussion, as per the said Minutes, the following was decided:

“Agenda-4

Action: M/s SRCPL will make above two payments (i.e including GST) to M/s EBPL as per agenda No.4(ii) on behalf of M/s GDCL within 10 days of agreed date by M/s GDCL as per agenda 1 as above i.e. 21st October, 2019 through M/s EBPL has requested for processing of payments before 25th October, 2019 on which SRCPL has conveyed that it will be attempted on fast track basis on receipt of confirmation as per agenda 1.”

(Emphasis Supplied)

5.5 The Learned Sr. Counsel referred to P.S-1 of MoM dated 14.10.2019 wherein the following is recorded:

“P.S:1. EBPL requests to SRCPL for release of the due balance GST amount of 1,80,00,000/- (Rs. One crore eighty Lakhs only) on

behalf of GDCL as EBPL shall give GST Invoice to GDCL for availing GST credit of the same amount.”

These minutes are duly signed by Mr. Ajay Agarwal on behalf of EBPL.

5.6 It was submitted that payments, if any, made or promised by SRCPL were on behalf of GDCL. There were no contractual obligation of SRCPL to pay the amounts to EBPL. Reference was made to the general condition of the contract between SRCPL and GDCL, and it was submitted that identical clauses were also in the contract with VNCPL.

5.7. It was further submitted that basic responsibility for completion of project was on SRCPL and since the conduct of the appellant was holding up the completion of project, SRCPL only acted as a facilitator and there was no direct contractual obligation of SRCPL to pay any amount to EBPL.

5.8 The Learned Sr. Counsel referred to minutes of meeting dated 09.04.2018 and submitted that simultaneously an exercise was done to reconcile the accounts and as per the document placed at page 53 of Convenience Compilation, there were differences in accounts and the amounts were subject to reconciliation. This sheet has been signed by J.K. Samaiya on behalf of GDCL and Mr. Ajay Agarwal on behalf of EBPL on 10.04.2018.

5.9 It was submitted that pendency of reconciliation of accounts in itself is a pre-existing dispute, as held in the case of *“Amit Wadhwani v. M.s Global Advertisers [Company Appeal (AT) (Ins.) No. 616 of 2021]”*.

5.10 The Learned Sr. Counsel referred to the tripartite agreement with VNCPL wherein in clauses 2 and 3 it has been admitted that there is settlement of mobilization advance and other amounts. Similar settlement was to be done with GDCL also. Further stated that reconciliation exercise

was done by an independent Chartered Accountant Firm, and its report is placed at 248 of the Convenience Compilation. The Chartered Accountant's Firm, on examination of accounts, have given the following conclusions:

"Overall conclusion:

1. *Actual payment released by GDCL to EBPL till date as a direct payment mode, i.e. excluding the direct payment made by SRCPL to EBPL on behalf of GDCL*
 - a. *Pre GST regime:*
 - i. *Rs. 67,173,294 (According to GDCL statement)*
 - ii. *Rs. 67,173,294 (Accepted by EBPL also)*
 - b. *Post GST regime:*
 - i. *Rs. 37,549,629 (According to GDCL statement)*
 - ii. *Rs. 37,549,629 (Accepted by EBPL also)*
2. *Actual payment released by GDCL on behalf of EBPL as in-direct payment mode (payment released to EBPL's supplier / contractors/labours etc)*
 - a. *Post GST regime:*
 - i. *Rs. 67,396,576 (According to GDCL statement)*
 - ii. *Rs. 67,396,576 (Accepted by EBPL also)*
3. *Direct payment made by SRCPL to EBPL on behalf of GDCL*
 - i. *Rs. 19,520,551 (According to SRCPL, 50% paid as per indemnity bond provided by EBPL)*
 - ii. *Rs. 19,520,551 (Accepted by EBPL also)*
4. *During the course of our discussion with EBPL and GDCL team, it was observed that various amounts were debited to GDCL in the books of EBPL on account of services given/material supplied without valid GST invoices (in case of post GST period). All the amounts debited should be substantiated with relevant GST invoices; however, till date we have not received the copies of valid GST invoices from EBPL team. Further it has already resulted in delay in deposit of GST liability by EBPL.*
5. *We have also been provided the minutes signed dated April 10, 2018 meeting wherein between GDCL and EBPL agreed for the total value of contracts D/CE/003840 dated August 1,2015 and D/CE/003841 dated August 1, 2015 pertaining to Phase 2A for OHE and PWAY works respectively as INR 26,00,00,000 (excluding GST).*
It was duly discussed and concluded in the meeting held on October 14, 2019 at SRCPL's office that EBPL shall provide us adequate supporting evidences/invoices in respect of certain

payments or other adjustments which are claimed by EBPL from GDCL in relation to such project as mentioned in minutes signed April 10, 2018. However EBPL has not provided us any such information to us till now.

6. As per EBPL ledger in the books of GDCL, total amount of Rs. 71,240,158 is debited to EBPL by GDCL in respect of the expenditure incurred by GDCL in relation to the project. As per GDCL, such amount is debited to EBPL because such work was supposed to be carried out by EBPL as per the agreed terms of contract, however they have not executed such work.

Please refer Annexure 1 in relation to the details verified and supporting documents received for Rs. 71,240,158.

7. GDCL and EBPL: Account Reconciliation Summary for SRCPL Ph-IIA

7. GDCL and EBPL: Account Reconciliation Summary for SRCPL Ph-IIA

1	2	3	4	5	6	7	8=3+4-5-6-7
SN	Description	W/o tax Amount (Rs. Cr)	Applicable GST	WCT	TDS	BOC W	Net Payable
1	Total Revised payable value which was subject to expense and payment reconciliation	26.00	-	-	-	-	-
2	Pre GST regime payment done	6.72	-	0.13	0.13	0.07	6.38
3	Post GST regime applicable payment	19.28					-
	Work not executed by either parties	2.30 *	-				-
	Work done post GST period	16.98	2.04 **		0.34	0.17	18.51
4=2+3b	Net payable.	23.70	2.04	0.13	0.47	0.24	24.89
5	Directly paid by GDCL to EBPL	10.47	-	-	-	-	10.47
6	Payments made by GDCL on behalf of EBPL	6.74	-	-	-	-	6.74
7	Payment made by SRCPL to EBPL on behalf of GDCL	1.95	-	-	-	-	1.95
8	Expense done by GDCL on behalf of GDCL	7.12	-	-	-	-	7.12
9=5+6+7+8	Total Payments + Expense	26.28	-	-	-	-	26.28
10=4-9	Difference payable	-	-	-	-	-	(1.39)

** As per information and explanations given to us, there is pending work amounting to Rs. 2.30 crores which is not yet executed by either parties i.e. GDCL and EBPL. Such work was required to be executed by these parties in accordance with the contract terms.*

*** As per information and explanations given to us, total payment made to EBPL includes payment towards applicable GST which is in accordance with the terms and conditions specified in the contract.*

8. *Based on the information provided to us and as tabulated above in point no.7, no amount is payable to EBPL in the said matter.*

(Emphasis Supplied)

5.11 It was submitted that as per the report of the independent Chartered Accountant Firm, no amount is payable to EBPL.

5.12 It was further submitted that even if Employer SRCPL has made some payments to the sub-contractor on behalf of the contractor, it can not to be said to be a new contract or novation of contract. Learned Sr. Counsel referred to the judgment of Hon'ble Supreme Court in the case of *Essar Oil Ltd. v. Hindustan Shipyard Ltd. & Others*, (2015) 10 SCC 642, paras 24, 25, 27 and 29 to support his contentions. The relevant part of the judgment is reproduced below:

“24. It is true that ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between ONGC and the respondent for making direct payment to the appellant, possibly because the respondent was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of ONGC was likely to be adversely affected. ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between ONGC and the respondent, it is clear that so

as to facilitate the respondent, ONGC had made payments on behalf of the respondent to the appellant directly.

25. Simply because some payments had been made by ONGC to the appellant, it would not be established that there was a privity of contract between ONGC and the appellant and only for that reason ONGC cannot be saddled with a liability to pay the amount payable to the appellant by the respondent.

.....

27. We are in agreement with the view expressed by the majority of the Arbitral Tribunal. In our opinion, the High Court had committed an error by not considering the above facts and by observing that the appellant will have to take legal action against ONGC for recovery of the amount payable to it. If one looks at the relationship between the appellant and the respondent, it is very clear that the respondent had given a sub-contract to the appellant and in the said agreement of sub-contract, ONGC was not a party and there was no liability on the part of ONGC to make any payment to the appellant. Moreover, we could not find any correspondence establishing contractual relationship between ONGC and the appellant. In the circumstances, ONGC cannot be made legally liable to make any payment to the appellant. As stated hereinabove, only for the sake of convenience and to get the work of ONGC without any hassle, ONGC had made payment to the appellant on behalf of the respondent without incurring any liability to make complete payment on behalf of the respondent.

.....

29. For the aforesaid reasons, we do not agree with the view expressed by the High Court and the impugned judgment' delivered by the High Court is set aside. ONGC shall not be liable to make payment, as rightly decided by the Arbitral Tribunal, to the appellant but the payment shall have to be made by the respondent, who had given a sub-contract to the appellant. Majority view of the Arbitral Tribunal on the above issue is confirmed and the view of the High Court is not accepted. The respondent shall accordingly make payment to the appellant."

5.13 The Learned Sr. Counsel for the Respondent submitted that proceeding under Section 9 of the IBC, 2016 are summary proceedings and the Tribunal cannot go beyond the written documents and contracts. He drew attention to the facts that some amount is due from EBPL to GDCL, and GDCL has

initiated proceedings under Section 138 of Negotiable Instruments Act regarding bounced cheques which is still pending.

6. In its rejoinder, the Learned Counsel for the appellant stated that minutes of meeting dated 14.10.2019 are not signed by GDCL or SRCPL therefore should not be used as evidence. In their own written submissions before the Ld. NCLT, the respondents had refused to acknowledge the said minutes stating that due to long delay in submission of the minutes it is not certain as to what transpired in the said meeting. Since there was tripartite agreement with VNCPL, the appellant had withdrawn its allegations relating to VNCPL. However, lack of such tripartite agreement with GDCL is evidence that these transactions were different. The Learned Counsel for the Appellant reiterated its submissions that since there was a proposal to make further 50% payment, they were asked to undertake Vendor registration and also regarding their MSME registration, and these actions indicated that the appellant had become a direct sub-contractor of SRCPL.

7. Heard and perused the records.

7.1 It is an admitted fact in this case Sarguja Rail Corridor Pvt Ltd (SRCPL) had got the contract from railways to build railway line on behalf of South East Central Railway (SECR) and that SRCPL, referred as Principal Employer, awarded separate contracts to Gannon Dunkerley and Company Limited (GDCL) and M/s Vijay Nirman Company Private Limited (VNCPL), referred to as contractors, for separate sections of the railway line. The contractors GDCL and VNCPL further sub- contracted the work to appellant, EBPL Ventures Pvt Ltd (EBPL), referred to as sub-contractor.

7.2 It is apparent that the work of the railway line was not being completed and it was not being put to operational use because of differences between

sub-contractor EBPL and contractors GDCL and VNCPL. The position regarding complacency of work is best explained by contemporaneous email dated 29.03.2018 written by Howe India, the project management consultant to GDCL wherein the project management consultant wrote as under:

“Please note that GDCL has failed to resolve long-pending dispute with their subcontractor, EBPL which has adversely impacted the EIG approval and SRCPL is unable to utilise the track by electric traction. This delay will further cause us huge financial losses. We are constrained to conduct meeting directly with your subcontractor and make an effort to resolve the disputes. We continuously kept stressing that it was most urgent for GDCL to resolve the issue on topmost priority. However, we regret to state that GDCL could not conclude.

In your absence we will try to do our best to resolve the disputes. Since this dispute is between you and your subcontractor, any cost implication resulting from the resolution, if any, shall be entirely borne by GDCL. The said implication would also include the expenses that would be incurred by SRCPL on account of non-availability of electrical lines for operations. The alternative solution of terminating this subcontractor and engaging alternate subcontractor at this critical stage of the project may lead to multiple complexities and also we don't have sufficient time that would be required for conclusion of matter through this alternative.

Nevertheless we will inform you about the decision that would be taken at your risk and cost.”

(page 304 of Convenience Compilation)

7.3 The principal employer SRCPL stepped in as facilitator and tripartite meetings were held on 09.04.2018 and 14.10.2019 wherein representatives of sub-contractor, contractor and the principal employer were present. In the

case of VNCPL, the process was completed and after the minutes of meeting, tripartite agreement was signed wherein it is clearly spelt out that payment was to be made by VNCPL, or on its behalf. Though the appellant had included the amount involved in the transaction with VNCPL as part of the operational debt in its application before Ld. NCLT under Section 9 of the IBC, 2016, and in the proceedings before the Ld. NCLT, in the present appeal the appellant has withdrawn its allegations regarding VNCPL sub-contract, and as recorded in para 4.2 above, the Learned Counsel for the appellant submitted that they have dropped the allegations relating to VNCPL and their claim now relates only to work allocated by GDCL.

7.4 We have perused the minutes of meeting dated 09.04.2018 relied upon by the appellant in its support. The said minutes are reproduced in para 4.3(supra), and are not being reproduced for sake of brevity.

7.5 As per the minutes of meeting, the meeting was attended by representatives of SRCPL, GDCL and EBPL. The minutes record that EBPL has submitted an Indemnity Bond and the differential amount shall be payable to EBPL. However, nowhere it is mentioned as to who shall make the said payment. The minutes of the meeting also record that all other terms and conditions of the work orders issued by GDCL to EBPL shall remain unaltered and on signing of the EIG application, the termination notice issued by GDCL shall stand withdrawn and cancelled.

7.6 We also note that on our specific query, the Learned Counsel for the appellant fairly admitted that appellant's contract with GDCL continued, as termination notice issued by GDCL stood withdrawn and cancelled.

7.7 We note that another meeting was held between EBPL, GDCL and SRCPL on 14.10.2019. The minutes of this meeting have been signed only by

EBPL, though belatedly. The minutes of meeting dated 14.10.2019, as signed by the appellant, the following is noted in point no. 4 of the agenda:

“Bases the minutes of meeting dated 10th April, 2018 it was agreed between the parties M/s GDCL and M/s EBPL that M/s GDCL will make payments to M/s EBPL as per following

iv. INR 1,74,29,063

v. INR 87,14,532

vi. INR 87,14,532

Against Point No. 4(i) as above, payment of INR 1,95,20,551 (i.e including GST) was made by M/s SRCPL on behalf of M/s GDCL to M/s EBPL (dated 17th April, 2018) and balance instalments as per point 4(ii) and point 4(iii) are yet to be paid by M/s GDCL”

(Emphasis Supplied)

After discussion, the following was decided in the said meeting:

“Agenda-4

Action: M/s SRCPL will make above two payments (i.e including GST) to M/s EBPL as per agenda No.4(ii) on behalf of M/s GDCL within 10 days of agreed date by M/s GDCL as per agenda 1 as above i.e. 21st October, 2019 through M/s EBPL has requested for processing of payments before 25th October, 2019 on which SRCPL has conveyed that it will be attempted on fast track basis on receipt of confirmation as per agenda 1.”

(Emphasis Supplied)

7.8 We have also noted that in PS-I of minutes of meeting dated 14.10.2019, it is admitted that the GST amount shall be released on behalf of GDCL as EBPL has given GST invoices to GDCL. The minutes of the meeting dated 14.10.2019 are duly signed by Mr. Ajay Agrawal on behalf of EBPL and the Appellant is not entitled to refute or challenge the correctness of these minutes. From the facts of this case, it is apparent that SRCPL had made earlier payments on behalf of GDCL.

7.9 We also note that in the original contract between SRCPL and the contractors GDCL and VNCPL, in the General Conditions of Contract (GCC) it has been recorded in paras 11.4 and 11.11 as under:

“11.4 regardless of whether or not the contractor obtains approval from the Employer for a Sub Contractor or whether the contractor uses a Sub Contractor recommended by Employer, use of a Sub Contractor by the contractor will not under any circumstances; (a) give rise to any claim by the Contractor against the Employer if such Sub Contractor breaches its subcontract or contract with the contractor; (b) give rise to any claim by such Sub Contractor against the Employer; (c) create any contractual obligation of the Employer towards the Sub Contractor; (d) give rise to a waiver by Employer of its rights to reject any Defects or deficiencies or defective work; or (e) in any way release that Contractor from being solely responsible to Employer for the Work to be performed under the Contract.”

11.11 the Contractor shall make payments to all Sub Contractors, unless otherwise specified in the Contract, in accordance with the respective agreements between the Contractor and its Sub Contractors such that Sub Contractors will not be in a position to enforce liens and/or other rights against Employer or any of its Affiliates, the Works or any part thereof. Contractor shall provide and shall obtain from all Sub Contractors and deliver to Employer, waivers of all unpaid liens under all applicable Laws. Employer reserves the right, upon written intimation to Contractor, to make payments due hereunder directly to Sub Contractors of Contractor whenever Employer has reason to believe Contractor has not paid or is likely not to pay such suppliers amounts due to them on a timely basis, provided that Employer shall give the Contractor notice prior to making such payments. In the event Employer makes such payments to Sub Contractors, Contractor shall immediately credit, secure or repay to Employer, the amount of such payments.

(Emphasis Supplied)

7.10 A bare perusal of the clauses 11.4 and 11.11 indicates that the prime responsibility of payment to sub-contractor lies on the contractor with the employer reserving its right, with intimation to contractor, to make payments due to sub-contractor, whenever employer has reason to believe contractor has not made the payment on a timely basis, though these payments shall be made on behalf of the contractor and that the contractor is required to immediately credit, secure or repay the amount of such payments to the

principal employer. It is clearly recorded that under no circumstances the sub-contractor can make a claim against the employer.

7.11 The minutes of the meeting dated 09.04.2018 nowhere record that SRCPL has taken over the responsibility of payment, as the payer is not identified. The unilateral Indemnity Bond given by EBPL records in para 11, that the Indemnity Bond is given both to SRCPL and GDCL, and it is binding on EBPL.

7.12 We note that a similar issue was considered by the Hon'ble Supreme Court in *M/s Essar Oil Limited v. Hindustan Shipyard Ltd. & Ors. in Civil Appeal Nos. 3353 and 3355 of 2005* wherein ONGC, as principal employer, had entered into a contract with Hindustan Shipyard Ltd, which in turn has entered into a sub-contract with M/s Essar Oil Limited (the appellant in both the appeals). In paragraphs 24 and 25 of the said judgment, the Hon'ble Supreme Court has noted as under:

24. *It is true that the ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between the ONGC and the respondent for making direct payment to the appellant, possibly because the respondent was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of the ONGC was likely to be adversely affected. The ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between the ONGC and the respondent, it is clear that so as to facilitate the respondent, the ONGC had made payments on behalf of the respondent to the appellant directly.*

25. *Simply because some payments had been made by the ONGC to the appellant, it would not be established that there was a privity of contract between the ONGC and the appellant and only for that reason the ONGC cannot be saddled with a*

liability to pay the amount payable to the appellant by the respondent.”

(Emphasis supplied)

7.13 The said judgment of the Hon’ble Supreme Court has been followed by this Tribunal in the case of *Hardwin Construction Pvt. Ltd. v. ONGC Petro Additions Ltd.*, (2022) ibclaw.in 223 NCLAT wherein it was held that only limited liability to make payment was accepted by the Corporate Debtor subject to certification of the bills by the original contractor, the Corporate Debtor cannot be treated as substituted in place of original contractor.

7.14 This Tribunal in the case of *Sterling and Wilson Private Limited v. Embassy Energy Private Limited in Company Appeal (AT) (CH) (Ins.) No. 161 of 2022* has followed the decision of Hon’ble Supreme Court in *M/s Essar Oil Limited v. Hindustan Shipyard Ltd.* on similar facts and held that there is no privity of contract between the appellant and respondent. It was held in para 14 and 15 of the said judgment, as under:

14. *It is clear from the record that there are no ‘goods and services’ supplied directly by the ‘Operational Creditor’ to the ‘Respondent’ herein and therefore it cannot be said that there is any ‘Operational Debt’ between the ‘Operational Creditor’ and the ‘Respondent’ herein. Merely because the ‘owner’ had given a bona fide assurance that if IEDCL fails to pay the amount they would pay the same on their behalf, the amount will not fall within the definition of ‘Operational Debt’ as defined under Section 5(21) of the Code. Learned Sr. Counsel for the Respondent submitted that all payments ‘due and payable’ by the ‘Respondent’ towards ISPL were made and discharged. The Hon’ble Supreme Court in the matter of ‘**Essar Oil Limited’ Vs. ‘Hindustan Shipyard Ltd. & Ors.’**, has held that when a ‘principal employer’ grants a contract to a Construction Company the sub-Contractors cannot sue the ‘principal employer’ for any issues, if payable, as there is no ‘privity of contract’ between the sub-Contractors and the ‘principal employer’.....”*

15. *This Tribunal is of the considered view that any promise made in the letter dated 17.10.2018, specifically having regard*

to Clause 6.1.4 of the 'Agreement for Civil Works and Construction' entered into between Embassy Energy Private Limited and ISPL, whereby and whereunder, it was clearly specified that the sub-Contractor, would not have any contractual relationship with the owner and would not be entitled to prefer any 'Claims' against the owner, these amounts claimed cannot fall within the definition of 'acknowledgement of debt' in the absence of any contractual relationship between the 'Operational Creditor' and the 'Respondent' herein."

7.15 From the facts of this case as narrated above, and in the light of judicial pronouncements cited above, it can be said that there was no privity of contract between SRCPL and EBPL and it cannot be said that SRCPL had taken over the liability of GDCL in any manner.

7.16 The Ld. NCLT has also, alternatively, given its finding on the pre-existing dispute. We find that accounts between the contractor GDCL and sub-contractor EBPL were not reconciled and this fact was recorded and signed on 10.04.2018 by both the parties (page no. 53 of Convenience Compilation). Clause 4 and 5 of the Indemnity Bond records that claim for extra work and payments are subject to verification and reconciliation.

7.17 We note that subsequently on 21.01.2019, GDCL wrote letter to EBPL wherein GDCL stated that they had provided man and material for executing part of the project which was in the scope of work of EBPL and are also incurring expenditure during defect liability period. GDCL requested EBPL to refund excess amount of Rs. 10.6 crores which was over paid to EBPL at the earliest.

7.18 We also note that subsequently an independent Chartered Accountant's Firm had examined the various claims and counter claims and had given a report placed at page 255 of Convenience Compilation (reproduced in para

5.10 supra) wherein they have concluded that no amount is outstanding towards the complainant EBPL.

7.19 The pendency of reconciliation of account has been treated as a pre-existing dispute by this Tribunal in *Amit Wadhwani v. M.s Global Advertisers [Company Appeal (AT) (Ins.) No. 616 of 2021]*, (2022) ibclaw.in 480 NCLAT, wherein it has been noted as under:

“14. Besides other documents letter dated 11th March, 2020 addressed to the Corporate Debtor issued on behalf of the Operational Creditor makes it clear that for reconciliation of account date was fixed to 14th March, 2020. However, record shows that thereafter no reconciliation of accounts had taken place in between the parties. It goes without saying that in accounting, reconciliation is the process of ensuring that two sets of records are in agreement. Accordingly it can be inferred that in absence of reconciliation of accounts there was pre-existing dispute between the parties. ...”

7.20 From various correspondences on record it is apparent that there was a pre-existing dispute relating to payment due to EBPL. GDCL on 21.10.2019 had made a claim of excess payment of Rs. 10.6 crore to EBPL and had sought its refund.

7.21 We also note that the respondent is a solvent company and is a going concern. It was held in the *Anita Jindal v. Jindal Buildtech Pvt. Ltd. & Anr., Company Appeal (AT) (Ins.) No. 512 of 2021* that IBC cannot be used to penalise solvent companies.

7.22 Considering the conspectus of facts of this case and the judicial guidelines though the judgments cited above, we hold that the appellant has not been able to establish any privity of contract with the respondent. We also

note that there was pre-existing dispute regarding reconciliation of accounts between the sub-contractor and the contractor. We are therefore unable to find any reason to interfere with the impugned order. For the forgoing reasons, this appeal is dismissed, being devoid of merits. All pending IAs, if any, are closed. No order as to costs.

[Justice Yogesh Khanna]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 01.08.2025
Ram N.