

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

CP No. (IB)- 62/9/JPR/2022

(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:
SHAKIR

Prop. of Zaara Enterprises

Registered Office at: L-1, 12/642,
Sangam Vihar New Delhi- 110062.

E-mail: zaara@zaaraenterprises.com

...Applicant/Operational Creditor

VERSUS

M/S FRUITFUL BUILDCON PVT. LTD.

Registered Office at: "Govind House"
Plot No. 8A, Kanota Bagh Behind RBI,
Takteshai Road, JLN Marg, Jaipur-
302004.

E-mail: jkdgroup@gmail.com

...Respondent / Corporate Debtor

For Petitioner/Operational Creditor
For Respondent/Corporate Debtor

: Ankur Singhal, Adv.
: Pradeep Kr. Chaudhary, Adv

Sg/-

Sg/-

Order Pronounced On: 16.07.2024

ORDER

Per: Shri Rajeev Mehrotra, Technical Member

1. This Application is filed by *Mr. Shakir*, Proprietor of *Zaara Enterprises* ('Operational Creditor' / 'Applicant') seeking to initiate Corporate Insolvency Resolution Process ('CIRP') in the matter of *M/s Fruitful Buildcon Private Limited* ('Corporate Debtor' / 'Respondent'), under Section 9 of the Insolvency and Bankruptcy Code ('IBC' / 'Code'), 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The registered office of *Zaara Enterprises* is situated at L-1, 12/642, Sangam Vihar New Delhi- 110062. The alleged default on the part of the Respondent for the non-payment of operational dues amounts to Rs. 1,04,46,084/- (Rs. One Crore Four Lakhs Forty-Six Thousand and Eighty-Four Only).
3. The Corporate Debtor, *M/s Fruitful Buildcon Private Limited*, is a private company incorporated under the Companies Act, 1956 in 2001. The Corporate Debtor has an Authorised Share Capital of Rs. 22,00,00,000/- (Rs. Twenty-Two Crores Only) and a Paid-Up Share Capital of Rs. 15,51,56,660/- (Rs. Fifteen Crores Fifty-One Lakhs Fifty-Six Thousand Six Hundred and Sixty Only).
4. The Corporate Debtor had issued/ placed the work order upon the Applicant in respect of the work to be executed at Hilton Hotel, Jaipur, however, no

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payments have been made to the Applicant with respect to the said transaction. Thereafter, the Applicant has issued a Demand Notice under Section 8 of the Code on 02.07.2022 for the payment of money alongside interest, Rs. 1,04,46,084/- (Rs. One Crore Four Lakhs Forty-Six Thousand and Eighty-Four Only), which is enumerated in Part IV of the Application:

1.	Total amount of debt, Details of transactions on account of which debt fell due, and the Date from which such debt fell due.	<u>Amount of Debt Due:</u> Rs. 1,04,46,084/- (Rs. One Crore Four Lakhs Forty-Six Thousand and Eighty-Four Only). Debt had fall due soon after receipt of Tax Invoices dated 09.05.2022.															
2.	Amount claimed to be in default and the date on which the default occurred	<table><tr><th>DUE DATE</th><th>NO. OF DAYS FROM DUE DATE TILL 01.07.2022</th><th>DEFAULT AMOUNT (in Rs.)</th><th>INTEREST @18% p.a.</th></tr><tr><td>09.05.2022</td><td>53 days</td><td>57,49,237/-</td><td>1,50,268/-</td></tr><tr><td>31.05.2022</td><td>31 days</td><td>46,96,847/-</td><td>71,804/-</td></tr></table> Interest @18% will be charged on the said default amount from the said due date till its realisation.				DUE DATE	NO. OF DAYS FROM DUE DATE TILL 01.07.2022	DEFAULT AMOUNT (in Rs.)	INTEREST @18% p.a.	09.05.2022	53 days	57,49,237/-	1,50,268/-	31.05.2022	31 days	46,96,847/-	71,804/-
DUE DATE	NO. OF DAYS FROM DUE DATE TILL 01.07.2022	DEFAULT AMOUNT (in Rs.)	INTEREST @18% p.a.														
09.05.2022	53 days	57,49,237/-	1,50,268/-														
31.05.2022	31 days	46,96,847/-	71,804/-														

5. The Applicant filed this Application based on following details of transactions, on account of which debt fall due:

5.1. The Corporate Debtor had issued/ placed the work order upon the Operational Creditor on 01.08.2021, in respect to the work to be execute at Hilton Hotel, Jaipur. Further, the Applicant was assigned

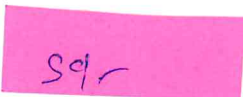
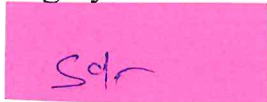
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with extra work, which was approved and acknowledged through emails by the Corporate Debtor. The work was completed in March 2022, and pursuant to joint inspection and verification by the Operational Creditor, Corporate Debtor and Consultant, an Abstraction Sheet was prepared, signed and executed in the presence of all the parties on 29.03.2022, on behalf of the Corporate Debtor and Consultant.

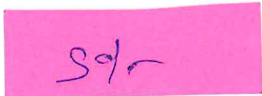
- 5.2. The Operational Creditor *vide* email dated 06.04.2022, requested Corporate Debtor to release the payment. Further, the Operational Debtor had written a letter dated 17.04.2022, offering to hand over the keys to the Corporate Debtor. However, the Corporate Debtor received the keys on 02.05.2022.
- 5.3. The Corporate Debtor had not settled the tax invoices despite acknowledging the receipt of the same. The Operational Creditor made requests to settle the payment, however, no payment has been made by the Corporate Debtor. Copies of the unpaid tax invoices dated 09.05.2022 and 31.05.2022 are annexed as Annexure A10 (Colly).
- 5.4. The Operational Creditor has been maintaining a running ledger account in respect of the transactions executed with the Corporate Debtor. As per the said ledger account the sum of Rs. 1,04,46,084/- (Rs. One Crore Four Lakhs Forty-Six Thousand and Eighty-Four

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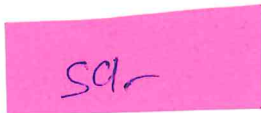


Only) is due and payable by the Corporate Debtor to the Operational Creditor.

- 5.5. The Operational Creditor had issued demand notice to the Corporate Debtor on 02.07.2022, according to the provisions of the Code. The notice was duly served upon the Corporate Debtor on 05.07.2022. The corporate Debtor has replied to the said notice vide reply dated 30.07.2022, alleging the false and frivolous defences.
6. The Applicant submitted a Compliance Affidavit mentioning the list of work order, extra work, work done, payment due and payment receipt. The total amount of debt stated by the Applicant in respect to the work done is Rs. 1,64,51,948/- (Rupees One Crore Sixty-Four Lakhs Fifty-One Thousand Nine Hundred and Forty-Eight Only). The Applicant further stated that a total of Rs. 60,05,866/- (Sixty Lakhs Five Thousand Eight Hundred and Sixty-Six Only) has been received from the Corporate Debtor.
7. Consequent to notice issued by this Adjudicating Authority, the Respondent has filed its reply *vide* Dairy No. 35/2020 dated 08.01.2020, and stated that:
- 7.1. The work order dated 01.08.2021 was issued in favour of the Applicant and the total cost of the work was Rs. 76,70,000/- (Rupees Seventy-Six Lakhs and Seventy Thousand Only) inclusive of GST. The work order contains that 20% of the amount is to be paid in advance and the same has been paid to the Applicant.



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- 7.2. As per the work order, the work assigned was required to be completed by 30.09.2021; however, it was not completed on time, indicating that the Applicant breached its commitment. The Respondent further alleged that the quality of the work done by the Applicant was poor, unfinished, and not as per the specification. It is submitted further that the deficiencies were rectified by the Applicant on its own costs and efforts.
- 7.3. The work, which was originally due by September 2021, was completed in March 2022. Due to delay in completion of work by the Applicant, the Respondent had to bear revenue loss of 7 months and incurred additional operational cost.
- 7.4. It is submitted that there exists a serious dispute between the parties regarding the verification of bills, workmanship, quality of work, quantity verification etc. which can be seen from the email communication submitted by the Applicant itself.
- 7.5. The Respondent had already paid Rs. 60,91,578/- (Rupees Sixty Lakhs Ninety-One Thousand Five Hundred and Seventy-Eight Only) to the Applicant through cheques against the aforesaid work order. The Respondent annexed the ledger and the bank statement with its reply as Annexure R1 and R2 respectively.
- 7.6. The Applicant in its Application has nowhere mentioned that sum of Rs. 60,91,578/- (Rupees Sixty Lakhs Ninety-One Thousand Five



Hundred and Seventy-Eight Only) has been received. Instead, the Applicant mentioned a fictitious bill of Rs. 1,04,46,084/- (Rs. One Crore Four Lakhs Forty-Six Thousand and Eighty-Four Only) which has been issued without any basis, and therefore the Respondent denied the same. Moreover, the copy of book of accounts and abstraction sheet submitted by the Applicant as Annexure 5 (Colly) does not establish in any manner that the amount so claimed was due or any default has occurred on the part of the Respondent.

7.7. The Respondent alleged that the Applicant is treating the Code as a tool for recovery. It is submitted that the Respondent is still a solvent company and thus CIRP proceedings-initiated u/s 9 of the Code are not maintainable and therefore prayed for the dismissal of this Application.

8. The Respondent filed an Interlocutory Application ('IA') (IBC) No. 420/JPR/2023, for bringing additional and necessary documents on record which was disposed of *vide* Order dated 13.10.2023, thereby the said additional submissions were duly taken on record. In the said IA, the Respondent broadly reiterated the earlier contentions. In addition, the Respondent emphasised on Annexure 9 (Colly) from the Applicant's Application and stated that the said Annexure contains the email communications exchanged between the parties which shows that serious pre-existing dispute between the parties. The Respondent stated that the





Applicant had sent an email dated 04.06.2022, in which it wrongly claimed the due amount and falsely mentioned that the payable amount is Rs. 1,64,51,950/- (Rupees One Crore Sixty-Four Lakhs Fifty-One Thousand Nine Hundred and Fifty Only). The Respondent highly disputed the mentioned amount and replied vide email dated 05.06.2022, stating that the value of the work order was Rs. 70,00,000/- (Rupees Seventy Lakhs Only) against which Rs. 60,00,000/- (Rupees Sixty Lakhs Only) was already paid in advance. The Respondent further submitted that the Applicant was asked to first get the bills verified from the consultant employed by the Respondent and it was made clear that the Applicant had been claiming different and false amount in every email. Thereafter further conversations took place between the parties on 06.06.2022, 25.06.2022, 27.06.2022 and 05.07.2022 which refers to the pre-existing dispute between the parties. The Respondent annexed the emails exchanged between the parties as Annexure A-1 (Colly).

9. The Applicant filed IA (IBC) No. 41/JPR/2024, seeking certain documents/information from the Respondent which was disposed of *vide* Order dated 21.02.2024. The Applicant submitted through this IA that it had issued two tax invoices upon the Respondent and the details are as follows:

<i>S.No.</i>	<i>Dated</i>	<i>Tax Invoice No.</i>	<i>Taxable Amount</i>	<i>GST Amount</i>	<i>Final Amount</i>
1	09.05.2022	ZE/RJ/22-23/003	86,90,765.25	15,64,337.74	1,02,55,103.00
2	31.05.2022	ZE/RJ/22-23/004	39,80,378.81	7,14,468.18	46,96,846.99



<i>S.No.</i>	<i>Dated</i>	<i>Tax Invoice No.</i>	<i>Taxable Amount</i>	<i>GST Amount</i>	<i>Final Amount</i>
<i>TOTAL</i>			1,26,71,144.06	22,80,805.92	1,49,51,950.00

Further, the Applicant submitted that it had filed the copies of Form GSTR-1 & GSTR-3B with the Application, however the Respondent has not filed the copies of GSTR-2A. Also, the Respondent has not replied on the question raised by this Adjudicating Authority that whether the Respondent had taken the input of the GST Amount in respect of the aforementioned tax invoices. The said IA was allowed and the Respondent was directed to file copy of the Form GSTR-2A for the months from April 2022 to March 2023.

10. The Respondent filed Reply to the IA No. 41/JPR/2024 vide Dairy No. 400/2024 dated 15.02.2024 stating as follows:

10.1. The Respondent denied the allegations made by the Applicant and contended that it has not obtained any input tax credit of the bills raised by the Applicant.

10.2. It is submitted that to ascertain whether any GST Input Credit was ever taken by the Respondent as alleged by the Applicant, apart from GSTR-2A, other documents viz Forms GSTR-2B, GSTR-3B and GSTR-9 etc. would also be required for deciding the issue.

11. The Respondent filed Additional Affidavit vide Dairy No. 824/2024 dated 05.04.2024. In this Affidavit the Respondent filed copies of Forms GSTR-2A (for April 2022 to March 2023), GSTR-2B (for April 2022 to May 2023),

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GSTR-3B (for April 2022 to March 2023), GSTR-9 (for FY 2022-2023) and calculation sheet as Annexure AA/1, Annexure AA/2, Annexure AA/3, Annexure AA/4 and Annexure AA/5 respectively. The Respondent reiterated in this Affidavit that no input tax credit was availed against the disputed bills of the Applicant.

12. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, and the Documents enclosed therewith.
13. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of the Laws of Limitation, as the date of default as per part-IV is on 09.05.2022, and the Application was filed before this Adjudicating Authority on 16.08.2022. Hence, the period of three years after the default occurred had not been exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
14. The submissions of the Respondent emphasised on existence of disputes between the parties, thus before delving into the other ingredients of Section 9 of the Code, we will first look into the issue of existence of any dispute before filing of the instant Application. Thus, the primary issue emerging



for consideration is whether there is a pre-existing dispute with respect to the amount claimed to be due in the application or not.

15. Admittedly, the Applicant has failed to disclose in detail the pre-existing disputes between the parties. Further, from the communications annexed by the Respondent in its Reply and IA(IBC) No. 420/JPR/2023, it can be demonstrated that the parties were constantly in discussions over pre-existing and unresolved disputes.
16. The main defence of the Respondent is based on the existence of a prior dispute before the issuance of demand notice under Section-8. Their argument is based on the following e-mail communications dated 04.06.2022, and reply email communication dated 05.06.2022. The further conversations took place between the parties on 06.06.2022, 25.06.2022, 27.06.2022 and 05.07.2022. The email communication dated 04.06.2022 and reply email communication dated 05.06.2022 are extracted below for ready reference:

Email dated 04.06.2022:

"On Sat, Jun 4, 2022 at 6:12 PM Zaara enterprises <zaara@zaaraenterprises.com> wrote:

Date:- 04th June 2022

To

Mr. Ritesh Agarwal

Fruitful Buildcon Pvt Ltd

Branch of (Hilton Hotels Management India Pvt Ltd)

42, Mangalam Geej

Sd/-

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Garh House, HawaSadak,
GeejgarhVihar Colony,
BaisGodam, Jaipur,
Rajasthan 302006

Kind Attn: 1) Mr Ritesh Agarwal (Hilton Hotel Jaipur Branch)
2) Management of Hilton Hotels Management India Pvt. Ltd.

Ref: First Request Letter dated 13 May 2022
Second Request Letter dated 28 May 2022
Final Call letter for reverification of quantities of bill dated
20 may 2022

Sub: Third Request letter to the Hilton Management releasing
payment for Hilton Hotel Jaipur-rooftop work of interior and civil
work.

Dear Sir,

Pursuant to the above, it is in furtherance to the above letters for
releasing the payment towards Hilton Hotel (Jaipur Unit) rooftop
work for interior and civil work done, through work order no:-786
on dated 01/08/2021.

To the reference of rooftop work of interior and civil work, we
have been requesting for releasing the payment since 22nd March
2022 and we have sent numerous request and reminders to Mr.
Darshan (Authoriser of Hilton Hotel Jaipur) to release the
payment outstanding for the work done. It is pertinent to note that,
till date as per work order no.786 dated 01/08/2021 clause no. 2
of payment terms we haven't the received the minimum agreed
amount i.e. 95% of the total agreed amount. It is to be
acknowledged that there has been no delay in our work and
services rendered till dated and but to the contrary there is being
continuous delay from your side towards the clearing the payment
just by giving excuses of unavailability of the signing authorities
etc Due to non-payment, our labourers and petty contractors are
being affected badly and they do not have fund to survive their
daily needs.

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Our Due amount summary is as follow: -

Payable amount of final bill is: - Rs. 1,64,51,950/- (One crore sixty-four lakhs fifty-one thousand nine hundred fifty only).

We want to request with great gratitude that Hilton Hotel is among the world's top leading brand. We most humbly request to the Hilton management that please issue your direction to the Hilton Jaipur so as to release our payment at utmost priority and oblige.

Thanking you,

Yours faithfully,

For M/s Zaara Enterprises

H. Office:- L-I-12/642 sangamVihar

New Delhi 110062”

Reply Email dated 05.06.2022:

“On Sun, 5 Jun 2022 at 15:21, Darshan Jadon <jadondarshan@gmail.com> wrote:

Dear Mr. Arif,

*On the subject of your above mail, I want to tell you that all the things written by you are false and baseless. **As per the work order we have already paid you Rs.60 lakhs in advance for which no bill has been given by you till now even after a lot of follow up by the finance team, value of work order is Rs. 70 lakhs only.** Apart from that work has been delayed by 6 months by you, that's a huge revenue loss and cost of operations as well, your company is whole responsible for that.*

This order has been given by Fruitful Buildcon Pvt. Ltd. so there is no need to involve Hilton management in this regard and not liable as well. You should get your bills to be verified from the consultant (UOR) as every mail you are writing different and false amount.

*Regards,
Darshan”*



17. In *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited*, para 34, the Hon'ble Supreme Court laid down the conditions precedent for triggering the CIRP under Section 9 of the Code. Para 34 is as follows: -

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (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 the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 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 one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

Therefore, to initiate CIRP in the present matter, the conditions have to be satisfied. At this juncture it is also important to quote the judgment of the Hon'ble Supreme Court in *M/s S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Limited*, which reads as follows:

“32. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

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18. It has very well been established that under Section 9 of the Code, to initiate CIRP proceedings, the Applicant is required to prove that the debt is due, has not been paid and is an undisputed debt. Correspondence between the parties is general proof of dispute in matters pertaining to Section 9 of the Code. The Hon'ble Supreme Court in '*Transmission Corporation of Andhra Pradesh Limited*' V/s. '*Equipment Conductors and Cables Limited*,' (2019) 12 SCC 697, while deciding the issue of Pre-Existing Dispute and in '*Mobilox Innovations Pvt. Ltd.*' Vs. '*Kirusa Software (P) Limited*'- 2017 1 SCC OnLine SC 353 has clearly laid down the law that the 'existence of dispute' must be Pre-Existing' i.e. it must exist before the receipt of the Demand Notice or invoice, as the case may be.
19. Based on the email communications mentioned above, along with various other emails included in the parties' submissions, it is evident that the parties are continually disputing various matters and have not reached a consensus. In an email dated 04.06.2022, the Applicant stated that Rs. 1,64,51,950 (one crore sixty-four lakhs fifty-one thousand nine hundred fifty) is due from the Respondent. However, in a reply email dated 05.06.2022, the Respondent denied that the said amount was due and asserted that the value of the work order is Rs. 70 lakhs only.
20. Moreover, we observed from the Compliance Affidavit submitted by the Applicant and the IA (IBC) No. 41/JPR/2024, filed to include additional documents in the record, that there is a discrepancy in the amounts stated in

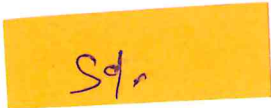
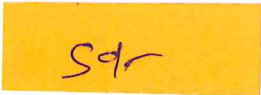
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both submissions. In the Compliance Affidavit, the Applicant stated that the total debt due is Rs. 1,64,51,948 (Rupees One Crore Sixty-Four Lakhs Fifty-One Thousand Nine Hundred and Forty-Eight). However, the amount reflected in the tax invoices submitted with the aforementioned Interlocutory Application is Rs. 1,49,51,950 (Rupees One Crore Forty-Nine Lakhs Fifty-One Thousand Nine Hundred and Fifty). Additionally, the Applicant admitted in the Compliance Affidavit that it had received Rs. 60,05,866 (Rupees Sixty Lakhs Five Thousand Eight Hundred and Sixty-Six) from the Respondent by 31.12.2021. *Prima facie*, the figures presented to us in different submissions vary and therefore lack clarity.

21. We have perused the e-mail communication dated 04.06.2022, and reply e-mail communication dated 05.06.2022, and are satisfied that the Respondent had raised pre-existing dispute with respect to the amount claimed by the Applicant.
22. It is well settled that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument, it would suffice for the Adjudicating Authority to reject the application filed under Section 9 of the Code, the Adjudicating Authority being precluded from determining as to whether the Corporate Debtor would be successful or not, with regard to the said dispute, at the time of decision making.
23. We therefore answer the issue as follows:



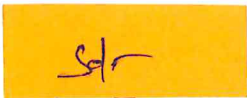


In the facts and circumstances of the present case, we are of the considered view that the Respondent has been able to raise a plausible contention regarding the pre-existence of “dispute” between the parties before the issuance of the demand notice.

24. In the instant case, the ingredients laid down under Section 9 read with the requirements laid down by the judicial pronouncements are not fulfilled. Therefore, in the present matter, owing to the pre-existing dispute between the parties, we are not inclined to initiate CIRP of the Corporate Debtor.

25. Therefore, the Application numbered as *CP No. (IB)- 62/9/JPR/2022* is dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016, and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.

26. Pending applications, if any, shall stand disposed of. Let the copy of the Order be served to the parties.



DEEP CHANDRA JOSHI,
JUDICIAL MEMBER



RAJEEV MEHROTRA,
TECHNICAL MEMBER