



**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH,
PRAYAGRAJ**

CP (IB) No.80/ALD/2022

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

IN THE MATTER OF:

M/S GANNON DUNKERLEY & CO. LTD

Having its Registered Office at New Excelsior Building 3rd Floor, A.K. Nayak Marg, Fort, Mumbai MH 400001 and its Corporate Office at 86A, Topsia Road (South), Haute Street, 7th Floor, Kolkata-700046

...Applicant/Operational Creditor

Versus

M/S KAPASI INFRACON LLP.

(Erstwhile VSD Infracon LLP), having its Registered Office at H.No. 3/419D, Brahampuri Colony, Near Bank of Baroda, Peper Mill Road, Saharanpur, Uttar Pradesh-247001, also having its corporate office at 527-528, 5th Floor, Tower B, Spazedge Towers, Sector-47, Gurugram, Haryana-122002.

.....Respondent/Corporate Debtor

Order pronounced on 04.09.2023

CORAM:

Sh. Praveen Gupta : Member (Judicial)
Sh. Ashish Verma : Member (Technical)

PRESENT-

Ms. Sweta Gandhi Murgai, Adv. : For the Operational Creditor
Sh. Siddharth Nandwani along with Sh. Tanmay Sadh, Advs.
: For the Corporate Debtor



ORDER

1. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC, 2016'/'Code'**), read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "**the Rules**") on 06.08.2022 by M/s Gannon Dunkerley & Co. Ltd for initiating Corporate Insolvency Resolution Process (hereinafter referred as '**CIRP**') against M/s Kapasi Infracon LLP. (hereinafter referred as the "**Respondent/Corporate Debtor**") in view of the **unpaid operational debt of Rs. 7,76,64,143/-** (Seven Crore Seventy Six Lac Sixty Four Thousand one Hundred and Forty only) that is not paid since **15.07.2022 being the date of default**, comprising of Rs. 7,55,76,999/- as principal admitted due amount in MOM dated 20.05.2022 and interest calculated @ 18% per annum from 20.05.2022 to 15.07.2022 amounting to Rs.28,87,167/-1

2. The M/s Gannon Dunkerley & Co. Ltd. (GDCL) (hereinafter referred as the **Applicant/ Operational Creditor**) is a Company having CIN U51109MH1924PLCOO1107 with registered office located at New Excelsior building , 3rd floor, A.K Nayak Marg, Fort Mumbai-MH 400001.



3. The Kapasi Infracon LLP (Erstwhile VSD Infracon LLP) Corporate Debtor is a Limited Liability Partnership incorporated on 20.08.2019 with identification no. LLPIN No. AAQ-2954, having registered office at H.No. 3/4199D, Brahampuri Colony, Near Bank of Baroda, Peper Mill Road, Saharanpur, Uttar Pradesh - 247001.

4. Briefly stated facts of the present case as averred by the Applicant/Operational Creditor in its application filed in Form-5 containing part I, II, III, IV & V are as discussed in foregoing paras.

5. The Operational Creditor was assigned with a project by the National Highways and infrastructure Corporation Limited (hereinafter referred to as '**NHIDCL**') vide letter of acceptance dated 09.11.2017 for execution of "*Four laning of Jhanji to Demow Section of NH 37 from KM 491.050 to KM 535.250 in the State of Assam under SARDP-NE on Engineering, Procurement and Construction Mode.*"

6. For the purpose of execution of this project, Operational Creditor sub contracted this project to the M/s Kapasi Project LLP vide an agreement dated 29.07.2019. M/s Kapasi Project LLP constituted a new limited liability partnership in the name of VSD



Infracon LLP and new contract dated 20.8.2019 was executed between VSD Infracon LLP and Operational Creditor on the same terms and conditions as contained in original sub contract agreements dated 29.07.2021. Copies of Contract dated 29.07.2021 and 20.08.2021 has been annexed as **Exhibit C** with the Application. Corporate Debtor never disagreed on the execution, validation and contents of the sub contract agreements.

7. It is stated that during the execution of the Project, VSD Infracon LLP vide letter dated 08.04.2021 stated that informed to the Operational Creditor that it has changed its name to Kapasi Infracon LLP and the same information has been updated on the MCA portal, PAN Database of the Income Tax Department and GSTN Portal. Copy of Letter dated 08.4.2021 has been annexed as **Annexure-D** with the Application.

8. It is also stated that on the basis of contract dated 29.07.2019 and 20.08.2019, Operational Creditor appointed Corporate Debtor as the sub-contractor for completion of the Project by 31.12.2021. However, due to non -completion of work as per the scheduled date, NHIDCL extended the deadline till 04.05.2022. Corporate Debtor could achieve only 42% of the financial progress by the end of April. NHIDCL upon non -



completion of work and poor performance terminated the contract with Operational Creditor.

9. As per the terms and condition of the sub contract agreement dated 29.07.2021. Corporate Debtor was required to perform the contract entered between Operational Creditor and NHIDCL for completion of Project. Some of the relevant terms and condition for execution of the project are herein mentioned below:-

“.....

(i) Take on hire and use plants and equipments/vehicles of GDCL available at project site including routine maintenance Clause E3 and E9 of the agreement dated 20.08.2022.

(ii) Bear all expenses towards execution of the project including maintenance and defect liability period of Four years, insurance and commission on bank guarantee submitted by GDCL in favour of its principal NHIDCI and CAR Policy- Clause A5 and A6 of the agreement dated 20.08.2022.

(iii) Use and bear all costs towards the use of leasehold quarries and petrol pump of GDCL to cope up with the project requirement- Clause E4 and E5 of the agreement dated 20.08.2022.

(iv) Retain and use services of sub contractors and engineering staff, support staff, functional staff (skilled-off roll and on roll personnel) engaged by GDCL and bear



the cost/salary/wages for the same. Clause E3, E6, E7 and E9 of the agreement dated 20.08.2022.

(v) Payment towards camp & shed, store inventory, rebar, shuttering & scaffolding material taken over by it. Clause- E9 & Annexure-5 of the agreement dated 20.08.2022.

(vi) Execute the entire project work on site on back to back basis without claiming any amount against GDCL- Clause A13 and E11 of the agreement dated 20.08.2022.”

10. The Operational Creditor asserts that the Corporate Debtor employed the Operational Creditor's resources, including machinery, manual labour, and other assets, to carry out the Project. For the purpose of payment, both the parties entered into agreement dated 05.11.2019 to open Escrow account in State Bank of India for payment of R.A bills raised by the Corporate Debtor in terms of clause A4 of the sub contract agreement dated 20.08.2019. Copy of Escrow Account 05.11.2019 has been annexed as **Exhibit-F** with the Application. Payment has to be made in accordance with the terms specified in sub-contract agreement dated 20.08.2019 and Escrow Agreement dated 05.11.2019. Thus, payments made by the NHIDCL used to get credited in the Escrow Account. Thereafter, the payment gets



divided between parties as per terms specified in the sub-contract agreement dated 20.8.2019 and Escrow agreement dated 05.11.2019.

11. The NHIDCL initially terminated its principal contract with the Operational Creditor. However, following the intervention of the Ministry for Road Transport and Highways during a meeting on 29.08.2019, the contract was reinstated. This reinstatement was immediately communicated to the Corporate Debtor, who was working at the project site and once again confirmed to the Corporate Debtor on November 19, 2019, upon receipt of a communication/letter dated November 19, 2019 from NHIDCL. Subsequently, at the request of the Corporate Debtor through a letter dated 07.09.2021, the Operational Creditor, on 09.09.2021, formally notified the Corporate Debtor in writing regarding the extension of the deadline granted by NHIDCL for completing the target work at the project site, extending it until 04.05.2022. Despite this extension, as stated by the Operational Creditor in the application that the Corporate Debtor regrettably failed to meet the work plan and complete the project within the extended timeframe. Copies of letter dated 07.09.2021 and 09.09.2021 has been annexed as **Exhibit-G** with the Application.



12. The Corporate Debtor resumed the work at the project site on 15.09.2019 but due to inadequate procurement of resources/ manpower/equipments at the site, other than those availed from the Operational Creditor, the progress of work got delayed as stated in the application.

13. It is also contended that all the R.A Bills raised by the Corporate Debtor were timely paid by the Operational Creditor as and when the payment was credited in the escrow account by the NHIDCL. However, the Corporate Debtor failed to make timely payment of all the rental charges/ expenses incurred on account of procurement of resources/labour/inventories and machineries to the Operational Creditor.

14. The Operational Creditor vide letters dated 07.07.2020 and 20.03.2020 requested Corporate Debtor to clear its dues or make all the statutory payments towards road tax, permit etc. which later on may be adjusted from the outstanding dues of Corporate Debtor of Rs. 5.98 crores as on March, 2020. Copies of letters dated 07.07.2020 and 20.03.2020 has been annexed as **Exhibit H** with the Application.



15. As specified in the Minutes of Meeting dated 04.02.2021 and 11.08.2020, Mr. Sanjay Kumar, partner of Corporate Debtor was allowed to make for repayment of the due amount in installment to Operational Creditor subject to certain terms and conditions. However, the Corporate Debtor failed to meet the requirements of the said minutes of meetings. Copies of Minutes of Meeting (MOM) dated 04.02.2021 and 11.08.2020 has been annexed as **Exhibit I** with the Application.

16. Due to dissatisfactory performance, failure to meet the financial progress and abandonment of work at Project Site on 27.12.2021, NHIDCL again terminated the contract on 08.04.2022 with the Operational Creditor. The Operational Creditor again requested to the Corporate Debtor to pay the hire and rental charges of resources obtained from the operational charges such as deployment of staff and workers, usage of camps & shed, usage of store materials, purchase of shuttering & staging material as per the terms of the sub-contract agreement.

17. In order to resolve the matter of outstanding payments due for the Corporate Debtor, as stated in the application, the parties met in a meeting held on 20.05.2022, and as emphasized by the Operational Creditor that at the request of the Corporate Debtor in



this meeting, the Operational Creditor waived the rent charges of four months due to CAA movements, COVID-19 Pandemic and refunded credit of Risk & Cost maintenance (towards Highway Maintenance work) withheld by NHIDCL from GDCL, which was to be borne by Corporate Debtor as it was back to back applicable on Corporate Debtor as per the sub contract agreement dated 20.08.2019, thereby allowing substantial relief in the amount of outstanding liability payable by Corporate Debtor, while arriving at the cleared admitted/acknowledged dues of Rs. 7,55,76,839 recoverable from the Corporate Debtor.

18. It is further contended by the Operational Creditor that Corporate Debtor acknowledged its outstanding liability of Rs. 7,55,76,839 in the meeting held on 20.05.2022 and signed Minutes of Meeting dated 20.05.2022 (MOM) wherein Corporate Debtor assured to make the payment of the due amount. Copies of Minutes of Meeting (MOM) dated 20.05.2022 has been annexed as **Exhibit J** with the Application. Due to failure to make the repayment of the outstanding amount as acknowledge by the Corporate Debtor in the MOM dated 20.05.2022, Operational Creditor issued demand notice dated 15.07.2022 calling for to make repayment of the outstanding amount along with interest @



18%p.a. from 15.07.2022 till the date of receipt of demand amount of Rs. 7,76,64,143 as on 15.07.2022. Copy of demand notice dated 15.07.2022 has been annexed as **Exhibit K** with the Application.

19. It is also contended by the Operational Creditor that in response to the said demand notice, the Corporate Debtor issued notice of dispute dated 21.07.2022 through its advocate raising false and frivolous allegations which is not regarding the dues as stated in the MOM dated 20.05.2022. The Operational Creditor through advocate replied to the said notice of dispute vide letter dated 30.07.2022. Copies of letters dated 21.07.2022 and 30.7.2022 has been annexed as **Exhibit L** with the Application.

20. On failure to receive the aforesaid outstanding amount, the Operational Creditor proceeded with filing of this application under section 9 of the Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor before this Tribunal.

21. The Corporate Debtor has raised few preliminary objections in its reply filed vide dairy no. 984 dated 17.03.2023 wherein it is stated that the Petitioner is not an Operational Creditor as there is no Constitution of Operational debt and there is pre-existing dispute prior to the filing petition under section 9 of the IBC, 2016.



The preliminary objections raised by the Corporate Debtor are stated as under: -

- i. It is submitted by the Corporate Debtor that the amount claimed by the Operational Creditor does not qualify the criteria of operational debt as defined under Section 5(12) of the IBC, 2016. The Operational Creditor has not supplied any goods or services to the Corporate Debtor for which no contract was executed between the parties. The only contract referred is sub-contract agreement dated 20.08.2019 which was executed between both the parties for performance of the contract entered into by the Operational Creditor with NHIDCL. The Corporate Debtor is only a sub-contract for fulfilling the obligation undertaken by the Operational Creditor under the main contract with NHIDCL. Therefore, it is also submitted by the Corporate Debtor that vide letter dated 11.03.2020, the Corporate Debtor raised the issue of unpaid government levy's and road taxes on account of which , the Sivasagar district RTO Authorities seized the vehicles through a vigilance squad team due to this project work got delayed



by 15 days. Copy of letter dated 11.03.2020 has been annexed as **Annexure-R5** with the Reply.

- ii. It has been further submitted by the Corporate Debtor that maintenance of the highway under reference from 490.800 km to 516.00 km was responsibility of the Operational Creditor since February 2018 as per contract dated 09.11.2017 executed between NHIDCL and Operational Creditor. The maintenance of work of the said highway would have been completed 18 months prior to the execution of the sub-contract agreement dated 20.08.2019. Thus, the expenses amounting to Rs. 1,10,73,672/- incurred on account of maintenance of the said highway cannot be deducted from the amount payable to the Corporate Debtor. The corporate raised this issue vide letter dated 11.05.2021 and requested to release the aforesaid withheld amount for smooth functioning of the project work. Copy of letter dated 11.05.2021 has been annexed as **Annexure-R6** with the Reply.
- iii. It is further submitted that the as per the direction of the Hon'ble High Court of Calcutta, machinery and equipments were seized on account non-fulfillment of



obligation by the Operational Creditor towards NHIDCL prior to 20.08.2019. This prolonged the execution of the project work. By the end of 31.05.2021, project was only 39% completed due to lockdown of COVID-19 Pandemic and CAA Protests.

- iv. The Corporate Debtor in its reply stated that delay in the execution of project work is due to the non-shifting of electric poles as clearly informed by the Assam Power Distribution Limited to NHIDCL. The Corporate Debtor has further stated as under:-

“.....

o) The extension of time for completion of the project was granted till 04.05.2022 on the basis of many reasons inter alia, the delay in handing over of site/ ROW free from encumbrances. Out of the encumbrances, most prominent was shifting of utilities, i.e., electric lines and poles, cables, pipe lines, etc, from the site. The electric poles and lines from ROW have been lingering on viz a viz the Corporate Debtor's work program, which resulted in less progress in work. It was noticed by the Corporate Debtor that the performance of utility shifting contract given by GDCL to M/s Shri Power Tech Allied Pvt Ltd was not satisfactory and as they had not deployed their staff and resources on work. The non-shifting of electric lines and poles from working zones of ROW, directly affected the work in progress and thereby



*caused severe financial loss to the Corporate Debtor. Further, the risk of safety of lives of the staffs of the Corporate Debtor, resources, lives of the local people and their movable and immovable property were also affected due to non-shifting of utilities from ROW. Moreover, after noticing the resources working under LT and HT Lines, Assam Power Distribution Corporation Ltd warned NHIDCL vide their letter dated 29.01.2021 not to work at such a dangerous zone without shifting of electric poles and lines where the overhead clearance under HT/LT was very less than the acceptable limit because such less overhead clearance invites accidents and loss of life. Even under such circumstances, Corporate Debtor was forced to work. In view of the above, since GDCL has been dealing and monitoring the progress of the Contractor of utility shifting directly, Corporate Debtor had sent a letter of dispute dated 11.09.2021 strongly protesting the aforementioned illegal acts and also demanding from GDCL to make proper arrangements to start and expedite the shifting of electric poles and lines, however GDCL had miserably failed to comply with the said genuine concern of the Corporate Debtor. Copy of the Letter dated 11.09.2021 issued by Corporate Debtor to GDCL is annexed hereto and marked as **ANNEXURE R-7**.*

....”

- v. It is submitted by the Corporate Debtor that Operational Creditor has illegally withheld an amount of Rs.



8,03,211,777/- which was required to clear all the outstanding dues and payment of sub-contractors vendors. The Corporate Debtor vide letter dated 20.11.2021 requested release of the said amount for clearing the outstanding due as the CAA protest and COVID-19 pandemic has created a devastated situation which was creating obstacle in completion of the project work. Copy of the Letter dated 20.11.2021 issued by Corporate Debtor to GDCL is annexed as **ANNEXURE R-7** with the Reply.

- vi. It is also submitted by the Corporate Debtor in its reply that the Operational Creditor introduced additional equipment at the project site beyond the initially agreed-upon quantity during the meeting held on 19.11.2021 and started demanding idling charges. The contention raised by the Corporate Debtor regarding the said issue is stated under:-

“....

q) That on 19.11.2021, a meeting was convened between GDCL and Corporate Debtor and in the said meeting, considering the financial perspective, it was agreed by GDCL to deploy only 12 dumpers and 2 excavators as per



*plan for the requirement of earth at site. However, in total disregard of the said agreement, GDCL had deployed only 5 excavators, 20 dumpers, one back hoe excavator and other machinery. Further, GDCL had demanded for idling charges from the Corporate Debtor, despite the fact that there is no provision to pay any idling charges in the Sub-Contracting Agreement between GDCL and the Corporate Debtor. Further, GDCL had got the execution of work stopped at site and in plant area, which resulted the Corporate Debtor incurring a colossal loss fiscally as well as loss of peak working season. Corporate Debtor had always been willing to carry on the work, but when GDCL have got the execution of works of Corporate Debtor and functions of all machinery stopped, it was not possible to spread and compact the soil in the embankment and sub-grade on proper moisture content without equipment. As such, the work had to be stopped. Vide letter dated 22.12.2021, Corporate Debtor raised dispute against all those illegal activities and also demanded from GDCL to address such concerns, however GDCL had ignored the same. Copy of the letter dated 22.12.2021 issued by Corporate Debtor addressed to GDCL is annexed hereto and marked as **ANNEXURE R-9**.*

...”

- vii. It is further submitted in the reply that the Corporate Debtor vide letter dated 27.12.2021 requested to release a sum of Rs. 12,72,41,939/- which was not paid till date, as



41.50% of the project work was completed by 27.12.2021. Copy of the Letter dated 27.12.2021 issued by the Corporate Debtor to the Operational Creditor is annexed as **ANNEXURE R-7** with the Reply.

- viii. Furthermore, it is stated that a Tripartite Agreement was executed involving Jalan Infrastructure Limited (JIL), the Operational Creditor, and the Corporate Debtor. The primary purpose of this agreement was to inject funds into the project. However, the agreement was subsequently terminated due to what the Corporate Debtor alleges as baseless concerns raised by JIL. In his view, the termination occurred without JIL fulfilling its obligations in accordance with the agreement's terms and conditions.
- ix. The Corporate Debtor claims that the Operational Creditor wrongly applied an additional 2% TDS (Tax Deducted at Source), on top of the 2% TDS already deducted by NHIDCL. The Corporate Debtor has also argued in his reply that this extra deduction is not legally valid. As a result, they have been requesting a refund of Rs. 3,24,82,632/-, which has not been reimbursed so far.



- x. On July 15, 2022, the Corporate Debtor issued a Final Bill, amounting to Rs. 19,05,41,478/- (Nineteen Crores Five Lakhs Forty-One Thousand Four Hundred Seventy-Eight rupees only), to Operational Creditor. This bill was accompanied by a covering letter of the same date. The Corporate Debtor explicitly indicated in the letter that this Final Bill solely pertained to the work carried out by the Corporate Debtor. It was also stated that the Corporate Debtor retained the right to make separate demands for other outstanding claims payable by Operational Creditor.
- xi. The Operational Creditor received the Final Bill and its covering letter through mail on the very same day, i.e., 15.07.2022. Corporate debtor contends that Operational Creditor sent a baseless Demand Notice dated 15.07.2022, under Section 8 of the Insolvency and Bankruptcy Code, 2016. This notice contained unfounded accusations and omitted crucial details, seemingly as a retaliatory measure. Copy of Final Bill along with covering letter dated 15.07.2022 issued by the Corporate debtor has been annexed as **Annexure R-11(Colly)** with the Reply.



xii. The Corporate Debtor vide letter dated 03.08.2022 through advocate responded to the letter dated 30.07.2022 issued by the Operational Creditor in reply to the notice of dispute. The Corporate Debtor has denied all the allegations raised by the Operational Creditor regarding payment of the outstanding amount through the said letter. The Corporate Debtor has denied that the MOM dated 20.05.2022 and 04.02.2021 wherein it is alleged by the Operational Creditor that Corporate Debtor has admitted its liability and acknowledged an amount of Rs. 7,55,76,839. The Corporate Debtor has neither signed nor admitted any liability as mentioned in the aforesaid MOM. There is pre-existing dispute which was brought into the notice of the Operational Creditor vide several communications dated 11.03.2020, 07.02.2020 and 11.05.2021. It is further stated that machineries, plants and vehicles provided by the Operational Creditor were already carrying statutory dues which Corporate Debtor paid. Moreover, such assets were seized by the authorities under the direction of the Hon'ble High Court of Kolkata due to nonpayment of dues by the Operational Creditor,



which led to the delay in execution of the Project. The Operational Creditor failed to provide the sufficient resources and manpower to execute the project as per terms of the contract. The termination of the contract by the NHIDCL is only attributable to the conduct of the Operational Creditor, who violated the terms of the sub-contract agreement.

- xiii. It is stated that Corporate Debtor has already initiated the arbitration proceedings as per the condition stated in clause F (2) of the Sub-Contract agreement and clause 19.2 of the Tripartite Agreement and in terms of the Section 21 of the Arbitration and Conciliation Act, 1996. A notice dated 20.7.2022 of the Arbitration proceeding was sent to the Operational Creditor. Copy of notice dated 20.07.2022 has been annexed as **Annexure R-16** with the Reply.
- xiv. The Corporate Debtor also filed civil petition before the Hon'ble High Court of Kolkata under Section 9 of the Arbitration and Conciliation Act, 1996 titled as "Kapasi Infracon LLP vs Gannon Dunkerley & Co. Ltd & Anr-AP/582/2022. The Hon'ble High Court of Calcutta vide its



order dated 22.09.2022 disposed of the petition and held that since the matter is pending before the Arbitral Tribunal no further order is required to be passed on the merits of the case. Copy of the civil petition –AP/582/2022 and order dated 22.09.2022 are annexed as **Annexure R-17 and R-18** with the Reply. The relevant portion of the order dated 22.09.2022 is mentioned herein below: -

“....

- i. *The Court: Heard counsel appearing on behalf of the petitioner and both the respondents. It appears that an arbitration has already commenced between the respondent no.1 and the respondent no.2 before a three member Arbitral Tribunal. Parties agree that the issues involved in the tripartite agreement between the three parties are similar in nature and may also be referred to the same Tribunal for adjudication.*
- ii. *In view of the above fact, the disputes between the petitioner and the two respondents that arise out of the tripartite agreement are also referred to the same Arbitral Tribunal comprising of Mr. Jayanta Kumar Mitra, Senior Advocate, Mr. Utpal Bose, Senior Advocate and Mr. Tilak Bose, Senior Advocate.*
- iii. *In light of the fact that the matter is being referred to arbitration, no further order needs to be passed*



in the Section 9 application bearing No.AP/582/2022.

iv. Accordingly, AP/582/2022 is disposed of.

v. I make it clear that I have not gone into the merits of the case and all points are kept open before the Arbitral Tribunal.”

xv. It is also stated in the reply that the Corporate Debtor is in financially sound position and there is no inability whatsoever to discharge any debt. Thus, CIRP cannot be initiated against the **Corporate Debtor**.

22. The Operational Creditor vide dairy no. 1995 dated 28.07.2023, filed its rejoinder wherein it has denied all the allegations mentioned from para 01 to 13 and stated that Corporate Debtor admitted and acknowledged in the meeting held on 20.5.2022 and jointly signed minutes of meeting dated 20.05.2022. It is also stressed by the Operational Creditor that the Corporate Debtor is not in a financially sound position to pay any of its liabilities.

23. As further emphasized by the Operational Creditor that the Corporate Debtor employed mostly those resources comprising of labour, machinery, vehicles and other equipments for execution of the project work, which were owned by the Operational Creditor



and the Corporate Debtor was liable to pay rent charges for the purpose of utilization of these resources. Such rent and lease charges which are due and payable by the Corporate Debtor constituting the Operational Debt but so far not paid. Therefore, allegation of Corporate Debtor that there exist no relationship of Operational Creditor and Corporate Debtor between the Applicant M/S GANNON DUNKERLEY & CO. LTD and the Respondent M/S KAPASI INFRACON LLP and hence, there is no Operational Debt, is hereby denied.

24. Further, it is stated by the Operational Creditor that the allegation of withholding of amount paid in the Escrow account is also denied on the ground that R.A Bills were approved by the NHIDCL itself and payments gets credited in the escrow account itself, which automatically gets credited in the respective bank account of the parties. As per Clause 6 of the sub contract agreement, the Corporate Debtor was allowed the alternatives for utility shifting or to engage new one for smooth functioning of work. However, the Corporate Debtor never used this alternative.

25. The target of 79% of completion of work by the Corporate Debtor remained unfulfilled as on 27.12.2021 and only 43% of the said work was completed. The unpaid amount of Rs. 3,24,82,632



as claimed by the Corporate Debtor due to additional deduction of TDS is also denied by the Operational Creditor. The Operational Creditor vide reference no. GDCL/KOL/JORT/15.07.2022/PMG/0002 dated 15.07.2022 communicated to the Corporate Debtor regarding the final GST Bill. In the communication, it was highlighted that the final GST bill issued was deemed unacceptable due to the absence of work measurement certification by the Authority Engineer/NHIDCL. Copy of letter dated 15.07.2022 of the Operational Creditor has been annexed as **Exhibit O** with the Rejoinder.

26. The Operational Creditor in its rejoinder, has also placed reliance on the case laws, **Consolidated Construction Consortium Limited V Htro Energy Solutions Pvt Ltd (2022)7 SCC 164** and **Jaipur Trade Expocentre Pvt Ltd Vs Metro Jet Airways Training Pvt Ltd (2022 SCC Online 263)** and made the followings submissions :-

“....

1. The claim of the Operational Creditor is well governed by the definition of 'claim' u/s 3(6), 'operational creditor' u/s 5(20), 'operational debt' u/s 5(21), 'debt' u/s 3(11), 'default' u/s 3(12) and 'transaction' u/s 3(33) and words



and expressions used but not defined in this Code' u/s 3(37) of the IBC.

2. The Code of 2016 is absolutely clear that when goods have been supplied or services rendered as defined under Section 5(21) of the IBC by Operational Creditor and the Corporate Debtor fails to make payment against availing such goods or services due to its financial incapability, such debt is treated as "operational debt" and proceedings under Section 9 of the IBC may be initiated by the Operational Creditor against such Corporate Debtor on commission of default owing to its financial inability. Reliance is placed on Consolidated Construction Consortium Limited V Htro Energy Solutions Pvt Ltd (2022)7 SCC 164.

3. The Corporate Debtor in its reply affidavit has contended that there is no goods or services availed or supplied by Operational Creditor to the Corporate Debtor. Such contention is absolutely untenable in view of the Five Bench judgment of Hon'ble NCLAT in Jaipur Trade Expocentre Pvt Ltd Vs Metro Jet Airways Training Pvt Ltd (2022 SCC Online 263) (enclosed) (Para 12, 13, 16, 17, 18, 19,20,22,25,27,28 and 42). The Hon'ble NCLAT has vividly discussed the definitions of 'operational debt', 'Operational Creditor, 'transaction' as provided in Section 5(20), 5(21) and 5(33) of the Code of 2016. Further the larger bench held that when a statute does not contain a definition of a particular expression employed in it, it becomes the duty of the Court to expound the meaning of



the undefined expression in accordance with law with the well-established rules of statutory interpretation. It was stated in Para 20 of the said judgment that "The above condition stipulates that Licensee shall pay all government taxes including but not limited to Service Tax, VAT, GST, Excise etc., over and above License Fee. The Agreement itself thus support payment of GST. The payment of GST is contemplated only for 'goods' and 'services' and the Clause 4 of the Agreement clearly indicates that when Licensee is to be taxed for GST, it being taxed for 'services'. The definition of 'services' given under the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "2017 Act") in Section 2(102) is to the following effect:"

The Hon'ble larger bench in Para 28 of its judgment then referred to and took cognizance of the observations of the Hon'ble Supreme Court in Mobilox Innovations Private Limited v. Kirusa Software Private Limited as reported in (2018) 1 SCC 353, referring to the recommendation of Bankruptcy Law Reforms Committee Report as contained in paragraph 5.2.1 of its report dated November, 2015, thereby confirming and approving the view that payment of lease/license/rent for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code.

In this case, the Corporate Debtor had likewise used for business purpose goods/materials/equipments/machinery/labour/staff and other ancillary services



(Exhibit E and Annexure to the MOM dated 20.05.2023- Exhibit J) of the Operational Creditor in term of Clause E3, E4, E5, E6, E7, E9, A5 & A6 of the agreement (Exhibit C) and thus claim of the Operational Creditor on account of unpaid dues mentioned in MOM dated 20.05.2023 is operational debt within the meaning of Section 5(21) of the Code of 2016.”

Findings and Conclusion

27. We have heard the Counsel for the parties and perused the materials available on record.

28. The issues for consideration before this Tribunal is whether the goods and services availed by the Corporate Debtor from the Operational Creditor for sum of money as per the sub-contract agreement, will constitute Operational Debt or not and whether the Operational Debt was disputed by the Corporate Debtor and there is pre-existing dispute between the parties.

29. The sub-contract agreement executed between both the parties allows the Corporate Debtor to procure material for completion of project work from the Operational Creditor as per the terms and conditions stated in the said agreement. Based on this, Corporate Debtor availed vehicles, machineries equipment's and other resources from the Corporate Debtor for this purpose on



rental charges basis. The Operational Creditor vide letter dated 07.02.2020 and 20.03.2020 requested the Corporate Debtor to release the payment of road and other vehicles tax as against the machineries/vehicles deployed at Jhanji-Demow Project .

30. It is pertinent here to mention that as per Section 5(20) and 5(21) of the IBC,2016, the operational debt deals with the scope of transaction and operational debt which has been well explained in the judgement relied upon by the Applicant i.e. **Consolidated Construction Consortium Limited (Supra)** and **Jaipur Trade Expocentre Pvt Ltd (Supra)**. Therefore, the rental charges claimed by the Operational Creditor is well within the meaning of Operational Debt as specified under section 5(21) of the IBC,2016 and therefore, we hold that the debt of Rs.7,76.64,143/- as mentioned in Part IV of the application is an Operational Debt.

31. The next issue for consideration is whether the Operational Debt was disputed by the Corporate Debtor and there is pre-existing dispute between the parties. The Operational Creditor served demand notice u/s 8 of IBC, 2016 to the Operational Creditor on 15.07.2022 and Corporate Debtor replied to the said demand notice via notice of dispute dated 21.07.2022. It is pertinent to note here that before responding to demand notice,



the Corporate Debtor served a notice to the Operational Creditor on 20.07.2022 through its advocate under section 21 of the Arbitration and Conciliation Act,1996 and clause F(2) of the Sub-Contract Agreement dated 20.08.2019 executed between Operational Creditor and Corporate Debtor. In the said notice, it is stated that due to seizure of plant, machinery, vehicles and equipment's in pursuance of the directions passed by the Hon'ble High Court of Calcutta, the work could not be completed in time and It is also stated that delay in the completion of project work is on account of CAA protest and lockdown of COVID-19 Pandemic so, by the end of 27.12.2021 only 41.50% of the project work got completed. To infuse cash flow in the project, a tripartite agreement was formed between Jalan Infrastructure Limited (JIL), Operational Creditor and Corporate Debtor. However, this agreement was terminated by the JIL without performing the contract after raising of frivolous dispute. In the meanwhile, on account of disputes between the Applicant/Operational Creditor and NHIDCL, on 8th April, 2022, NHIDCL terminated the contract itself. It is also alleged in the said notice that the JIL was also putting hindrance in execution of work and removal of the plant and equipment of the Corporate Debtor leading to further losses



and at the same time, the Applicant/Operational Creditor has collected higher charges for machinery during the periods where no work could be carried out due to hindrance such as CAA protest, COVID induces lockdown. Therefore, in this notice, the Corporate Debtor demanded that GDCL and JIL are also liable to compensate the Corporate Debtor for the loss of profit suffered by it.

32. Before serving of above notice under Section 21 of the Arbitration and Conciliation Act, 1996, it has been found that the Corporate Debtor has also sent various letters dated 11.03.2020, 11.05.2021, 20.11.2021 and 22.12.2021 regarding road maintenance and payment of statutory taxes and rental charges of plant, machinery and equipment. The clarification aligns with the details outlined in the subcontract agreement dated 20.8.2019 and the comprehensive scope matrix provided in Annexure A. Clause (A) of the sub-contract agreement delineates the stipulated terms, conditions of the contract, and associated responsibilities. The relevant sub-clauses of the agreement are enumerated below:-

“.....

1) Execution of the PROJECT shall be carried out by VIL in all respects for the complete scope of work (as per



attached Scope Matrix, Annexure-A) within 31 December 2021 and shall indemnify GDCL in all respects of execution of the Contract entered by GDCL with NHIDCL. In consideration of subcontracting the PROJECT execution to VIL on Back to Back basis, VIL shall be responsible to GDCL for the execution, and successful and satisfactory performance of the Contract.

2) It shall be the responsibility of VIL to follow through the entire gamut of activities involved in execution of the PROJECT and not limited to project management, material procurement, labour and related tools & plants/machinery deployment for construction/ installation for successful completion of the PROJECT including operation and maintenance of the facilities during the defect liability as well as maintenance period of Four Years in accordance with the provision of the Contract between NHIDCL and GDCL.

.....

Except Income Tax, all other tax obligations as may be applicable on GDCL as Principal Contractor for the PROJECT as well as all tax obligations including income tax as may be / applicable on VIL as sub-contractor shall be borne by VIL.

5. All costs for execution of the project including maintenance and defect liability shall be Bentirely borne by VIL. GDCL shall not be responsible for any expenses whatsoever. VIL shall also bear the expenses since



inception towards all types of insurances as submitted by GDCL to NHIDCL as per contract conditions as well as the BG Commission charges towards all Bank Guarantees as submitted by GDCL to NHIDCL. Details of Insurances and BGs taken for the project are furnished in Annexure-1 (Insurance & BG).

.....

11) GDCL shall authorize a competent representative of VIL for day to day communication with Govt. / local authorities related to the project. However, any contractual communication/ correspondence with client or client's representative shall be done by GDCL only.

.....”

33. From the above stated clauses, it is clear the Corporate Debtor i.e. Kapasi Infracon LLP shall bear the expenses or charges of the all the statutory taxes and fees of the local and government authorities in relation to this project. Thus, the issue of State Road Transport Tax raised by the Corporate Debtor in the letter dated 11.03.2020 is not maintainable here in light of the aforesaid clauses of the sub-contract agreement enforced by both the parties. Further, it shall also be the responsibility of the Corporate Debtor to pay expenses for the maintenance of the highway, which is a subject matter of the sub-contract agreement *including operation and maintenance of the facilities during the defect liability*



as well as maintenance period of Four Years in accordance with the provision of the Contract between NHIDCL and GDCL.

34. The issue of expenditure incurred on maintenance on highway from 490.800km to 516.00 km of 18 months prior to the execution of sub-contract agreement dated 20.08.2019 of Rs. 1,10,73,672 as claimed by the Corporate Debtor vide letter dated 11.05.2021 is not sustainable keeping into consideration as clarified by the Operational Creditor in his letter dated 20.03.2020 the same could not be paid as due amount was not remitted by the Corporate Debtor and that the maintenance of existing Highway under reference is the sole responsibility of the Corporate Debtor. Again, in the letter dated 20.11.2021 TDS reimbursement, GST and Road Maintenance is claimed for payment to the sub-contractors and the vendors on account of failure to perform the contract due to *force majeure* i.e CAA protests and COVID-19 Pandemic. However, it has been clarified by the Operational Creditor that all the disputes were sorted out in the meeting held on 20.05.2022 and an amount of Rs. 7,55,76,839/- has been agreed upon by the Corporate Debtor to be paid to Operational Creditor and evidence in this regard is attached in **Exhibit “J” (Pg no. 112 and 113)** with the application .



35. It is also stated in the contract under clause (13) *Entire work shall be executed by VIL as per the specification and terms and conditions of original contract agreement between NHIDCL & GDCL on back to back basis and also as per the terms stipulated under this Agreement.* In this regard, it must be noted that the clauses of the Sub-Contract Agreement dated 20.8.2019 cannot be read in isolation. It has to be interpreted and read with Principal Contract Agreement Executed between NHIDCL and GDCL in terms of which Letter of Acceptance dated 09.11.2017 was issued by the NHIDCL to the GDCL.

36. It is significant to note that as per Section 8 of the IBC, 2016

“An Operational Creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt[#] or copy of an invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed.

(2) The Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the Operational Creditor—

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt—



(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the Corporate Debtor; or

(ii) by sending an attested copy of record that the Operational Creditor has encashed a cheque issued by the Corporate Debtor.

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an Operational Creditor to the Corporate Debtor demanding ²[payment] of the operational debt in respect of which the default has occurred.”

37. In the instant case, the demand notice was served to the Corporate Debtor on 15.07.2022 by the Operational Creditor, however, notice of initiation of arbitration proceedings was given on 20.7.2022 after serving of demand notice u/s 8 and hence, the same would not constitute the pre-existing dispute. It is also significant to consider that the Corporate Debtor in the meeting held on 20.05.2022 has agreed to pay the outstanding demand of Rs. 7,55,76,839 to the Operational Creditor after all the disputes between the parties were sorted out as it has already been discussed in this order. Therefore, we are of the view that there was no pre-existing dispute between the Corporate Debtor and Operational Creditor with reference to the supply of goods and services when notice u/s 8 was issued on 15.07.2022.



38. We find that the debt against the goods supplied with respect to the invoices raised by the Operational Creditor falls within the definition of Operational Debt u/s. 5(21) of the Insolvency and Bankruptcy Code, 2016. The Operational debt is defined u/s 5(21) of the Code to mean *“a claim in respect of provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”*.

39. Taking into account the provisions of Section 9 of the I & B Code, 2016, we find that the application made under sub-section (1) of Section 9 along with documents and fees as mentioned in its sub-section (2) is complete. The payment of the unpaid operational debt of Rs.7,76,64,143/- @ interest rate of 18% p.a. has not been made which is well above the threshold limit of Rs.1 crore. The date of default as per petition has been found to be 20.05.2022 and petition u/s 9 is filed on 06.08.2022, hence, petition is found to have been filed well within the limitation period. In terms of section 9(3) of I & B Code 2016, the Operational Creditor has provided a copy of invoice demanding payment and demand notice given to the corporate debtor for payment of goods supplied.



Therefore, after finding that all the conditions for admission of application under Section 9(5)(i) of the I & B Code 2016 against the Corporate Debtor, has been fulfilled and the Ld. Counsel of the Corporate Debtor has failed to demonstrate before us anything about there being any pre-existing dispute as regards the payment of the operational debt, we find this application fit for admitting under Section 9(5) of the I & B Code, 2016 for starting CIRP against the Corporate Debtor, Kapasi Infracon LLP.

40. The Operational Creditor has not proposed the name of the IRP in the present application. Hence, this adjudicated Authority appoints Mr. Anang Kumar Shandilya as the IRP in the present case, having Registration No. IBBI/IPA-002/IP-N00882/2019-2020/12826, R/o T9 1904 Exotica Dreamville, Sector 16C Greater Noida West (Noida Extension), Near Gaur City 2, Gautam Buddha Nagar, Uttar Pradesh, 201318. [Email: csanang@gmail.com](mailto:csanang@gmail.com) and Contact No. 91-9711914380. The verification of the said IRP has been carried out by Law Research Associate of this Tribunal, Ankita Sharma, and it is found that there is no proceeding pending against the proposed IRP. Upon verification from the website of IBBI, it is found that IRP holds valid authorization till 01 March 2024.



41. Accordingly, this application is admitted u/s 9(5) of I & B Code, 2016 under the following terms and conditions.

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor i.e. Kapasi Infracon LLP is hereby admitted.

ii) We hereby declare a moratorium u/s 14 and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) This Adjudicating Authority hereby appoints Mr. Anang Kumar Shandilya as IRP as discussed in para 40 above.

iv) The IRP shall cause a public announcement of the initiation of the Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016 shall be made immediately.

(v) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following: -

- a)** The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order



in any court of law, tribunal, arbitration panel or other authority; Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

- b)** Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- c)** The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

vi) The supply of essential goods or services rendered to the Corporate Debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vii) The provisions of sub-section (1) of Section 14 of I & B Code, 2016 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.



viii) The IRP shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of Constitution of the Committee.

ix) The Committee of the Creditors shall appoint a Resolution Professional as per section 22 of I & B Code, 2016. A monthly progress report shall be filled by the Resolution Professional providing the details of work done in respect of completing the CIRP within the time line as prescribed under the provision of section 12 of the I & B Code, 2016.

x) The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution process.

xi) However, at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the Corporate Debtor under Section 33,



the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

xii) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant in accordance with I & B Code, 2016 read with the relevant rules & regulation framed thereunder.

xiii) The Operational Creditor/Applicant is directed to deposit Rs.1,00,000/- (One Lakh Only) with the IRP appointed hereinabove within two weeks from this order. IRP can claim the preliminary expenses and fees subject to approval by the CoC and after the constitution of the CoC.

42. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the IRP and the jurisdictional Registrar of Companies by Speed Post as well as through email.

43. List the matter on 09.10.2023 for filing of the first progress report.

44. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



45. Ordered accordingly.

-Sd-

(Ashish Verma)
Member (Technical)

-Sd-

(Praveen Gupta)
Member (Judicial)