

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 31 of 2023
& I.A. No. 207 of 2023

[Arising out of order dated 03.01.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench, Bench-III in CP (IB) No. 415/(ND)/2020]

IN THE MATTER OF:

Om Prakash
S/o Shri Hriday Narayan Mandal,
R/o Flat No. C-206,
Designers Park,
Sector-62, Noida,
Uttar Pradesh - 201301

...Appellant

Versus

Wipro Enterprises Pvt. Ltd.
C-Block, CCLG Division,
Doddakannelli, Sarjapur Road,
Bangalore – 560035

...Respondent No.1

NTPC BHEL Power Project Private Limited,
Block No.3rd, 6th, 7th and 8th Floor,
C.G.O. Complex, Lodhi Road,
New Delhi – 110 003
Through Mr. Varun Sethi IRP

...Respondent No.2

Present:

For Appellant: **Mr. Ramji Srinivasan, Sr. Advocate with Ms. Shruti Pandey, Mr. Vaibhav Dabas, Mr. Ashim, Advocates.**

For Respondents: **Ms. Anjali Sharma and Mr. Deepak Bashta, Advocates for R-1.**
Mr. Vishal Ganda, Mr. Rahul Narula, Advocates for IRP/R-2.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 03.01.2023 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench-III) in CP (IB) No. 415/(ND)/2020. By the Impugned Order, the Adjudicating Authority admitted the application filed under Section 9 of the IBC filed by the Operational Creditor and initiated Corporate Insolvency Resolution Process (**‘CIRP’** in short) against the NTPC BHEL Power Projects Ltd. - Corporate Debtor with immediate effect. Aggrieved by this impugned order, the present appeal has been preferred by the ex-director of the Corporate Debtor.

2. Stating the factual background of the present matter, the Learned Senior Counsel for the Appellant submitted that the Corporate Debtor had entered into a contract with Wipro Enterprises Pvt. Ltd - Operational Creditor for supply of material for water system, EPT and CW treatment system which is hereinafter referred to as the Project. The date of completion of the project was 09.06.2012 with purchase order issued on 10.08.2011 for a total value of Rs.7.86 cr. It has been further submitted that the Operational Creditor/Respondent No.1 had sought several extensions of time and in spite of time extensions having been allowed at regular intervals, the Operational Creditor failed to adhere to the timelines both in respect of supply of delivery as also commissioning of the project. It was further contended that the ground of non-payment raised by the Operational Creditor as an alibi to withhold the supply of balance material and resultant delay in the commissioning of the whole project lacks credulity.

3. Due to the inefficiency and lackadaisical approval of the Operational Creditor, the Corporate Debtor was compelled to request BHEL to complete the project and supply the materials against the risk and costs of the Corporate Debtor. It was also pointed out that since BHEL was executing the balance work at risk and cost of the Corporate Debtor and some material was still under procurement stage by BHEL, confirmation of the risk and cost amount had to be carried out before releasing further payments to the Operational Creditor. It is further submitted that on 06.07.2019 a communication to this effect was sent to the Operational Creditor. Disputing the claims of dues raised by the Operational Creditor, it was mentioned that the above letter had clearly stated after making all adjustments no amount was payable to the Operational Creditor. Moreover, the Corporate Debtor was entitled to recover the liquidated damages (**'LD'** in short) in terms of the General Conditions of Contract (**'GCC'** in short).

4. It was emphasized that this communication of 06.07.2019 disputing the operational debt was issued before Section 8 demand notice of 16.09.2019. It was also asserted that the Corporate Debtor in their reply of 07.11.2019 to the Section 8 notice had postulated the reasons why the Corporate Debtor was not liable to pay the outstanding dues claimed by the Operational Creditor. It was therefore contended that the parties were clearly at dispute with respect to supply of materials and failure of completion of work order on time by the Operational Creditor which fall in the nature of pre-existing disputes.

5. It was further contended that the Section 9 application was not maintainable being defective. The total amount of debt claimed in the demand notice was Rs.87,01,843/- which was not in sync with the Section 9 application

where the total amount of debt and default is shown as Rs.1,84,80,706/-. On this ground alone, it was asserted that the impugned order was liable to be set aside. Assailing the impugned order, it was submitted that the Adjudicating Authority failed to appreciate that the IBC is not a debt recovery forum as it does not envisage penalizing solvent companies for non-payment of disputed dues. In support of their contention, the Learned Counsel for the Appellant relied on the judgment of the Hon'ble Supreme Court in ***M/s S.S. Engineers v. Hindustan Petroleum Corporation Ltd. 2022 SCC Online SC 1385.***

6. Refuting the submissions made by the Learned Senior Counsel for the Appellant, it was stated by the Learned Counsel for the Respondent No.1 that the Operational Creditor having performed its obligations under the contract, 36 invoices and 27 Material Receipt Certificates (MRC) were submitted. It was claimed that the execution of contract was delayed for reasons attributable to the Corporate Debtor since it failed to perform crucial reciprocal promises and obligations namely the timely release of funds for supplies made and works executed. Moreover, the Operational Creditor had sent 29 emails from 02.06.2018 to 08.01.2019 seeking payment of its outstanding dues. As against gross billing of Rs.7.63 cr the Corporate Debtor had released payment of Rs.5.78 cr. Further, in various minutes of the meeting including the meeting held on 28.09.2015, it was clearly recorded that the Operational Creditor had requested the Corporate Debtor to release the outstanding payment to expedite the work.

7. Moreover, the Corporate Debtor had on more than one occasion admitted and acknowledged their liability in writing. The Corporate Debtor in their email dated 14.11.2017 had clearly admitted that an amount of Rs.98 lakh was outstanding. This was followed by another email dated 09.01.2019 wherein an

amount of Rs.87,01,843/- has been admitted by the Corporate Debtor as liability as per their own reconciliation statement. More importantly, these communications did not make any mention that the outstanding dues were to be subjected to adjustment after finalizing the risk and cost amount or after deduction of LD. Hence, it was pointed out that the defence of risk and cost action and LD was an afterthought.

8. It has been further stated that after the Corporate Debtor failed to release Rs.87 lakh payable by it, the Operational Creditor had issued a detailed communication on 12.02.2019 on the long pending outstanding payments from M/s NBPPL towards APGCL Namrup Project of Rs 1.84 cr. Subsequently on 13.06.2019 another letter bearing the subject 'Notice for Outstanding Payment' was issued. It is the issue of these two letters which precipitated the Corporate Debtor to issue a communication on 06.07.2019 alleging that the work was being completed on risk and cost by BHEL. The reply of the Corporate Debtor to the Section 8 demand notice on similar lines is untenable and tantamounted to a sham defence.

9. It was also submitted that the Corporate Debtor has failed to submit any document to show that it followed the procedure outlined in the contract with respect to risk and cost action. It was stated that Clause 34.1 of Special conditions of Contract ('**SCC**' in short) regarding deductions from Contract Price stipulated that all such claims were to be billed to the Operational Creditor regularly as and when they fell due along with vouchers and explanations. However, no such process was followed and hence this defence was specious and a moonshine.

10. We have duly considered the arguments and submissions advanced by the Learned Counsel for the parties and perused the records carefully.

11. Briefly recapitulating the statutory provisions of IBC as contained in Sections 8 and 9 of the IBC, we notice that Section 8 requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. From a plain reading of the above provision, it is clear that with regard to an Operational Creditor, the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 16.09.2019 and notice of dispute was raised by the Corporate Debtor on 07.11.2019 but beyond the prescribed period of ten days.

12. We notice that the Adjudicating Authority has returned the finding that the Corporate Debtor having failed to reply within 10 days, the Operational Creditor has successfully proved that Corporate Debtor has not complied with Section 8(2)(a) of the IBC. We however like to make it clear that it is now settled law as laid down by this Tribunal in Company Appeal (AT) (Ins.) No.958 of 2020 that even if reply notice is not submitted within ten days, it does not preclude the Corporate Debtor from raising the issue of pre-existing disputes by bringing relevant material before the Adjudicating Authority. Hence it has been erroneous on the part of the Adjudicating Authority to overlook the disputes raised in the notice for dispute by holding that an undisputed debt was acknowledged by the Corporate

Debtor simply on the basis of an email dated 09.01.2019 sent by the Corporate Debtor.

13. Now coming to Section 9 of IBC, sub-section (1) thereof provides that if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, he may file an Application under Section 9(1) of the Code. It remains an undisputed fact that the Operational Creditor did not receive any payment from the Corporate Debtor and chose to file an application under Section 9 of IBC. However, Section 9(5)(ii) envisages that if a notice of dispute is received by the Operational Creditor or there is a record of dispute in the Information Utility, the application is liable to be rejected by the Adjudicating Authority.

14. Given this background of relevant statutory construct of IBC, we now proceed to see from the facts of the present case whether there was a debt which had become due and payable and also whether any notice of existence of dispute had been raised and, if so, whether there was sufficient material on record to validate their genuineness or whether it appears to have been made falsely with the perspective of evading the liability to pay any outstanding debt.

15. It is the contention of Respondent No. 1 that the Corporate Debtor having clearly acknowledged their liability to clear outstanding debt which was above the threshold limit and not having paid the same, there is clear evidence of debt and default and hence a fit case for admission of Section 9 application.

16. In support of their contention, it has been submitted that in a meeting held on 07.02.2017, the Corporate Debtor had certified their satisfaction with the project work and agreed to release Rs.1 cr to the Operational Creditor before

10.02.2017 as placed at Ann R-4 of Reply Affidavit. This also showed that material supply had been accepted by the Corporate Debtor without demur. Later, the Corporate Debtor in their email dated 14.11.2017 had clearly admitted that an amount of Rs.98 lakh was outstanding which was followed by another email dated 09.01.2019 wherein an amount of Rs.87,01,843/- has been admitted by the Corporate Debtor as per their own reconciliation statement. While admitting these liabilities, no conditionalities of risk and costs adjustment or LD deduction were made out and therefore it has been contended by the Learned Counsel for Respondent No.1 that this defence was created as an afterthought.

17. It is also submitted that requests for expeditious payments were made by the Operational Creditor during meetings held on 28.09.2015 and 04.10.2016 and even by way of communications issued on 04.05.2018 and 14.02.2019 but to no avail. Hence the Demand Notice under Section 8 was issued on 16.09.2019 demanding the admitted sum of Rs.87,01,843/- being the amount in default. It was further added that even in the notice of dispute on 07.11.2019, an amount of Rs.5,39,414/- has been admitted as a liability which was also above the prescribed threshold.

18. Rivalling the above arguments advanced by the Learned Counsel for the Respondent No. 1, it is the case of the Appellant that in their reply to the demand notice dated 07.11.2019, they had disputed the liability to pay the amount claimed by the Operational Creditor. To find out as to whether the dispute raised by the Corporate Debtor is a moonshine dispute unsupported by any evidence, we need to look into the nature of allegations made in the Reply Notice and whether these allegations are built on a past foundation preceding the issue of the demand notice.

19. We notice that the reply notice listed out the need to make several adjustments on the debt claimed by the Operational Creditor occasioned by liquidated damages of Rs.68 lakh, sales tax due of Rs.4.82 lakh, Rs.95,539/- for short supply of material, Rs.84.83 lakhs for risk and cost account and Rs 2.37 lakhs being retention amount for non-submission of MRCs. After making these adjustments, the balance payable worked out to be Rs. 5.39 lakhs but it was clearly qualified in the reply notice that even this amount was not payable on account of need to conduct final debit on account of risk and cost from BHEL which was still under finalization. The reply notice clearly stated that after adjustment of all these amounts, the Corporate Debtor would not be liable to pay any amount to the Operational Creditor and it was contended by the Learned Senior Counsel for the Appellant that instead the Operational Creditor was liable to make payments to the Corporate Debtor.

20. It was further averred by the Learned Senior Counsel for the Appellant that the reply notice also makes mention of delayed supplies by the Operational Creditor and delay in commissioning of the project which necessitated allowing BHEL to execute the balance work on risk and cost basis. We also find that ample material has been placed on record evidencing repeated requests of time extensions sought by Operational Creditor. Adverting attention to an email dated 31.08.2015 at page 154 of APB, it was submitted that the Operational Creditor was granted time extension up to 31.10.2015 for supplies and till 31.12.2015 for supervision. In another email on 18.09.2015 addressed to the Corporate Debtor by the Operational Creditor, time extension was sought and commitment was given to close the supplies by 15.01.2016 as at page156 of APB. Yet again, on an email request from Operational Creditor dated 22.09.2015, time extension for

supervision was allowed till 29.02.2016 as at page157 of APB. While allowing these extensions, a caveat had been placed that the Corporate Debtor reserved its right to levy liquidated damages at a later date in terms of clause 14.2.1 of the GCC.

21. Advancing further points of substantiation, it was submitted that apart from the above email correspondences, in a meeting held on 28.09.2015 between the Corporate Debtor and Operational Creditor with respect to reconciliation of materials supplied for the project, it had been recorded that Operational Creditor had failed in timely execution of tank fabrication. The Operational Creditor had also agreed during the meeting to provide the complete master list of the project as placed at page 158 of APB. In a subsequent meeting held on 04.10.2016, the Operational Creditor had again sought time extension to complete the tank fabrication work as at page161 of APB. However, delay in the execution of the projects persisted. The Corporate Debtor sent emails on 13.12.2017 and 04.05.2018 for supply of certain specific materials as per scope of work for work completion at Namrup site as at pages 165-166 of APB. Another email of balance material was sent to the Operational Creditor on 02.02.2019 which preceded the Section 8 notice as placed at page 168 of APB. It may be helpful to reproduce the said communication as: -

“From VIRENDRA SINGH virendra@nbppl.in

Sent: Saturday, February 2, 2019 12.08.58 PM

*To: Adesh Butala (WF01 – WIN – Water);
abhijit.bhandarkar@wipro.com*

Cc: ‘Giridhar’; ‘Anant Narayan Goyal’; ‘Ravichandran BARATHAN ARIYUR’; ‘Ashok Gupta’; jayesh.chavan1@wipro.com; harish.bc4@wipro.com; prabhakar.jangam@wipro.com, ‘KRISHNA NAIK K’; rashesh.parekh@wipro.com; jha.nbppl@gmail.com; ‘pdev’; ‘Saroj Kumar Das-Genl Manager-PSER’; ‘M.Sai Phanindra Kumar’

Subject: Supply and supervision contract of Water system at NBPPL Namrup site

Dear Sir,

This is to inform you that you are yet to complete the supply of balance materials for water system at namrup site. This has resulted in non completion of the water system and the plant cannot be put to production despite us paying you huge amount of money against the supply. Commissioning of the balance system like CBC, GT, STG etc. cannot be completed/operated without the availability of DM plant. Due to this, our cashflow has been seriously affected which has a cascading effect on overall commissioning and cash turnover of our work. Therefore nonpayment from our side cannot be used as an alibi for withholding the balance supply and thereby delaying the whole project.

Therefore, you are once again requested to resume the supplies and supervision work so that we can generate cash flow and will be able to pay you also, else your inaction will be treated as the violation of the contract and suitable measures under the contract will be taken against M/s Wipro Water.”

(Emphasis supplied)

22. We notice that the Corporate Debtor had clearly apprised therein that huge payments having been done, the Operational Creditor cannot use the ability of non-payment for withholding balance supply. This clearly shows signs of dispute between the two parties over non-payment and delay in supply and project execution.

23. Due to continued delay in completion of the contract and failure to deliver the materials, the Operational Creditor was eventually informed on 29.05.2019 that because of the delay on the part of the Operational Creditor, BHEL would be executing the balance work at the risk and costs of the Corporate Debtor and that

the same would be recoverable from the Operational Creditor. The said communication appearing at page 169 of APB is extracted below: -

*“From: Ashok Gupta<ashokgupta@nbppl.in.
Sent: 29 May 2019 16:04
To: Sonu Garg (WFO1 – WIN - Water)
Cc:ravi@nbppl.in; ravi.nbppl@gmail.com; virendra@nbppl.in;
Goyal.A.N; nrpp.pmg; Sajan Kumar (WFO1 – WIN – Water); Nagendra
Gupta (WFO1 – WIN – Water); jha.nbppl@gmail.com; Pramod
Vishwakarma (WFO1 - WIN – Water)*

Subject: Re: NBPPL – Namrup – Supply and supervision control of Water system at NBPPL Namrup site (OLD PROJECT)

Dear Madam,

Due to delay in supply of balance items from M/s Wipro, BHEL project was getting delayed, hence BHEL is executing the balance work on risk & cost to NBPPL, the same shall be passed on to you as per order terms & conditions.

As the BHEL is still executing balance Wipro supply, I have discussed with our site in-charge at NAMRUP site, you may please depute your representative at NAMRUP for the meeting with BHEL & NBPPL site incharge and action plan for supply of balance items, so that risk and cost can be minimized.

We are awaiting amount of risk and cost executed by BHEL as on today, till that we may not be in position to release any amount of M/s Wipro.

Regards,

Ashok Gupta”

(Emphasis supplied)

24. It was further contended that in their subsequent letter on 06.07.2019 it was categorically clarified that since the risk and cost value to be levied by BHEL on the Corporate Debtor was yet to be finalized, no amount was payable by the Corporate Debtor to the Operational Creditor as placed at page 173-174 of APB which is to the effect:-

*“Ref. No:- NBPPL/Project/Water system/PO-2071/19/00 date
06/07/2019*

To

*M/s Wipro Enterprises Pvt. Ltd
Plot No. A-38, TTC Industrial Area
Thane Belapur Road, Navi Mumbai – 400705*

Attention: Mr. Jintendra Mitangale, Manager-Legal

Subject: Our PO-2071 for Water system (DM Plant, ETP & CW treatment)

Ref: Your letter ref no. JWL/2194/Legal-01

Dear Sir,

This has reference to your aforesaid letter and subsequently your visit to Mannavaram on 27.06.2017. During the meeting, it was informed to you that the delay in supply of balance critical materials from your end has led to delays in completing supplies for the sub systems in your scope even as on date and further delaying the supervision of erection & commissioning of the system awarded to you. NBPPL had on several occasions reminded you on the balance supplies and the completion of commissioning. Even though it was agreed to complete in the year 2016 during the high-level review meeting conducted by BHEL, NBPPL and your representative, the balance supplies have not been completed and thus NBPPL had no other option but to accept the risk & cost operated by BHEL, our immediate customer on us. The same has been communicated to you on several occasions. Despite these communications, you have chosen to ignore and thus there was a breach of contract from your end. This has affected in delays in completion of the project.

Out of billing of Rs.7,63,36,750/- against the supplies made by you, NBPPL has already paid you Rs.5,78,56,44/- which 75-80% excluding LD and retentions against E1/E2 and discrepancy of documents etc.

During the meeting it was intimated to you that you may plan your visit for NMARUP site and have a detailed meeting with NBPPL & BHEL site in-charge, and you may submit your action plan for the completion of the water systems.

Please note that the matter is under dispute and dues claimed by you cannot be paid as our customer is completing the work on risk & cost to whose value cannot be assessed as on date. The total value of the work executed on risk and cost by BHEL is Rs.43.71 lakhs as on date (copy enclosed) plus 30% overhead and still some of the materials/requirement is under procurement stage by BHEL for completing the water system and the same shall be intimated to you on completion of E&C and PG test.

In view of above, since the risk & cost value is yet to get finalized, all payments can be finalized only after completion of commissioning of water system. As such nothing is payable as on date.

Therefore, NBPPL disputes your all claim.

With best regards

Ashok Gupta

Sr. DGM (Project)”

(Emphasis supplied)

25. It was therefore asserted by the Learned Senior Counsel for the Appellant that the above communications dated 29.05.2019 and 06.07.2019 clearly showed that there was allegation of delay by the Operational Creditor in completing supplies and in the erection and commissioning of water system besides need to make adjustments of LD and risk and costs of BHEL which clearly signifies pre-existing disputes. Moreover, the very fact that requests were made by Operational Creditor seeking waiver of liquidator damages in itself manifests dispute.

26. Challenging the impugned order, the Learned Senior Counsel for the Appellant mentioned that the Adjudicating Authority has failed to note that there was a pre-existing dispute qua the claim received from the Operational Creditor. We are inclined to agree that these disputes having been raised prior to the issue

of demand notice and the foundation of the disputes are adequately borne out from material placed on record before the Adjudicating Authority, the disputes were not illusory and hence the Section 9 application ought not to have been admitted. Reliance has also been placed on the decisions of this Tribunal in **“G4S Secure Solutions (India) Pvt. Ltd. Vs. Heavy Engineering Corporation Pvt. Ltd.” in Company Appeal (AT) (Ins.) No.331 of 2022, “Umesh Saraf vs. Tech India Engineers Pvt. Ltd.” (2020) SCC Online NCLAT 677 and “Vinod Mittal Vs. Rays Power Experts Pvt. Ltd. & Ors” 2019 SCC Online NCLAT 1278** where it has been held that if there is clear evidence of pre-existing dispute from exchange of emails/correspondences prior to issue of demand notice, such material must be considered before admitting a Section 9 application since the IBC is a beneficial legislation and not a mere a money recovery legislation.

27. It will be useful at this stage to reproduce the relevant excerpts of the impugned order as below:

“12. In view of the aforesaid email it is amply clear that the Corporate Debtor has admitted that it is liable to pay Rs 87,01,843. The instant application is filed on 03.01.2020, and therefore the threshold limit of Rs 1 lakh shall be applicable to it.

13. Though the Respondent had disputed the quantum of debt payable to the Operational Creditor, however, in our considered view this Adjudicating Authority is not a debt determining authority. The moment this Adjudicating Authority is satisfied that there is a debt subsisting of more than the threshold limit, it need not indulge itself in calculating the exact quantum of debt.

13. *In the light of the admission made by the Corporate Debtor of more than Rs.1 lakh, we are satisfied that there is existence of debt and default. In view of the above we are inclined to admit the Application.”*

28. The Adjudicating Authority in its Order while referring to the judgement of the Hon’ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. V. Kirusa Software Pvt. Ltd. 1 (2018) 1 SCC 353*** has further observed that the definition of ‘dispute’ must fit under the parameters as defined under the IBC but at the same time must also stand on a test as laid down in the recent judgment of the Hon’ble Apex Court in ***M/s S.S. Engineers v. Hindustan Petroleum Corporation Ltd. (supra)***. The common thread in both the judgments is that the CIRP can be triggered only if there is a default in the payment of an undisputed debt and all that the Adjudicating Authority has to see at this stage is whether there is a plausible contention which requires further investigation. We are of the considered view that Adjudicating Authority has referred to both these judgments but failed to correctly appreciate and apply the ratio in the facts of the present case.

29. Perusal of the impugned order makes it clear that the Adjudicating Authority simply relied on the email dated 09.01.2019 to come to the conclusion that there was debt and default and admitted the Section 9 petition. The satisfaction of the Adjudicating Authority is sans consideration of the reply to the demand notice and the voluminous exchange of correspondences which has taken place between the two parties relating to supplies, delay in completion of project, pendency of risk and cost account of BHEL and LD related issues. The tone and tenor of these protracted correspondences clearly manifest existence of dispute prior to the date of Section 8 demand notice on 16.09.2019. We also notice that

these disputes were raised much before the issue of the issue of Demand Notice. For such disputed operational debt, we are of the considered view that Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor.

30. Though there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt, but the contents of these emails/ letters/minutes of meetings ought to have been factorized to arrive at a finding whether the defence taken by the Corporate Debtor is moonshine defence unsupported by evidence. Surprisingly none of these emails and letters establishing the existence of pre-existing disputes between the parties have been taken into cognisance by the Adjudicating Authority. These being pertinent factors for consideration, to our mind the Adjudicating Authority has committed an error in side-stepping these aspects and admitting Section 9 application.

31. Where operational creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two parties which is, however, not so borne out given the facts of the present case.

32. For the foregoing reasons, we are of the considered opinion that the Adjudicating Authority committed serious error in admitting Section 9 application in the facts of the present case. We thus allow this appeal and set aside the impugned order initiating CIRP of the Corporate Debtor and all other orders issued pursuant to the impugned order. The Corporate Debtor is released from the rigours of CIRP and is allowed to function independently through its board of

directors with immediate effect. The Resolution Professional shall however be paid his fees/expenses by the Operational Creditor. It shall however be open for the Operational Creditor to seek alternative legal remedy for its dues, if any, before the appropriate legal forum as permissible in law. I.A. No. 207 is also disposed of in the above terms. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 04.05.2023

PKM