

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

CP (IB) NO.35/ALD/2020

In the matter of

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Section 13, 14 and 33 and other applicable provisions of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of:

Kreate Energy (I) Pvt. Ltd.

(Formerly known as M/s Mittal Processors Pvt. Ltd.)
Represented by its Authorized Representative

Sh. Azhar Hussain
Corporate Office

Having its Registered Office at:

1002-1004, Antriksh Bhawan,
22 K.G. Marg, New Delhi-110001

Also, at

Unit 46-50, 2nd Floor,
Ansal Plaza, Sector- 1
Vaishali, Ghaziabad- 201010

.....OPERATIONAL CREDITOR/PETITIONER COMPANY

Versus

1. M/s Meenakshi Ferro Ingots Pvt. Ltd.

368 Civil Lines, Jhansi, Jhansi UP

.....CORPORATE DEBTOR/RESPONDENT COMPANY

**2. Union of India, Ministry of Corporate Affairs through the
Secretary, New Delhi**

... PROFORMA RESPONDENT

Order pronounced on 12th December, 2023

Coram:

Mr. Praveen Gupta. : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Ujjawal Satsangi, Adv. : For the Operational Creditor

Sh. Tarun Agarwal, Adv. : For the Corporate Debtor

ORDER

1. The instant application is filed on 17.12.2019 by Kreate Energy (I) Pvt. Ltd. (hereinafter referred as Applicant/Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "I & B Code, 2016") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "the Rules") against M/S Meenakshi Ferro Ingots Pvt. Ltd. The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') in respect of M/s Meenakshi

Ferro Ingots Pvt. Ltd. (hereinafter referred as the Respondent/Corporate Debtor) due to default in payment of total outstanding amount of Rs.36,02,275/- (Rupees Thirty Six Lakhs Two Thousand Two Hundred and Seventy Five only) inclusive of interest.

2. 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 that:-

i. The Petitioner Company operates in power trading and holds an interstate trading license under the Electricity Act, 2003, granted by the Central Electricity Regulatory Commission (CERC). This license authorizes the company to engage in power trading. The Corporate Debtor, Ferro Ingots Pvt. Ltd., is a Private Limited Company involved in the manufacturing of basic iron and steel.

ii. In December 2015, the Corporate Debtor approached the Petitioner Company for electricity supply, considering the Petitioner's involvement in power trading. Consequently, a Power Purchase Agreement (PPA) was signed on 22.12.2015, spanning twenty-four

months. Thereafter, on 25.01.2016, 18.03.2016, and 14.06.2016, the parties mutually agreed to amend/substitute new clause in PPA dated 22.12.2015 by way of corrigendum on respective dates as mentioned above, amending existing clause 1, 4 and 10 revising the terms for sale of electricity power and tariff.

- iii. As stated in the application, the Petitioner Company fulfilled its electricity supply obligations as per the Corporate Debtor's schedule and invoiced the Respondent based on the agreed contractual terms. Subsequently, the Petitioner Company learned that principal amount of Rs. 28,58,949/- is outstanding, as per the revised statement of accounts since February 2017, which is admittedly payable by the Corporate Debtor for the power supplied during the contractual period of twenty-four months from the execution date of the PPA dated 22.12.2015 between the Operational Creditor and the Corporate Debtor.
- iv. The Petitioner Company further submits that all invoices were initially sent to the Corporate Debtor in accordance with the PPA terms. Despite several

attempts by the Petitioner's officials to meet and discuss outstanding payments, meetings were repeatedly postponed by the Corporate Debtor's representative. On 29.11.2017, the Petitioner's officials briefed the Corporate Debtor's representative, Mr. Utsav Aggarwal about the situation, providing photocopies of revised statements and a letter dated 24.10.2017, urging for prompt payment.

- v. Subsequent attempts to contact Corporate Debtor's officials about the outstanding payment were met with unresponsive and disconnected calls. To recover the outstanding amount, the Petitioner Company sent multiple letters, dated 06.09.2017, 24.10.2017, 30.11.2017, 29.01.2018, 12.02.2018, and 15.03.2018. Despite assurances, the Corporate Debtor failed to fulfill its commitment to release the outstanding payment.
- vi. The Petitioner Company dispatched a Legal Demand Notice on 02.07.2018 to the registered office address of the Corporate Debtor via Speed Post, seeking payment for pending dues related to Invoices and late payment

surcharge as per the power purchase agreement. As a final measure, a statutory demand notice was sent on 01.01.2019 under Section 8 of the Insolvency and Bankruptcy Code, 2016, and was duly served to the Corporate Debtor.

vii. As further stated in the application, the Corporate Debtor responded on 25.01.2019, raising a vague objection without specifying reasons for non-payment. Despite the Petitioner's efforts, till the date of filing of present application, an outstanding amount of INR 36,02,275/- (comprising principal and interest) remains unpaid by the Corporate Debtor.

3. The Respondent/Corporate Debtor has submitted its reply stating that the present Insolvency and Bankruptcy petition has been filed by Kreate Energy (I) Pvt. Ltd., falsely representing itself as an Operational Creditor of the Respondent in question. The following contentions have been raised in the reply of the Respondent pleading for the dismissal of this petition:

i. The current Section 9 petition under the Insolvency and Bankruptcy Code (IBC), 2016 was initiated by the

Operational Creditor alleging that the Corporate Debtor could not pay outstanding dues amounting to 36,02,275/-. This sum apparently originated from a Power Purchase Agreement (PPA) dated 22.12.2015 between the Petitioner and the Respondent Company.

- ii. According to clause 4 of the PPA, the Petitioner agreed to sell 2 MW of power to the Respondent, with clause 4(a) specifying a fixed tariff of 3.95 per unit, inclusive of transmission charges, as outlined in clause 4(b).
- iii. Moreover, the previously mentioned rate did not cover cross subsidy surcharge, wheeling charges, MSEDCL application charges, MSEDCL operating charges, SLDC scheduling and operating charges, SLDC application fees, and renewable purchase obligation imposed by MERC/SLDC/MSETCL/Discom. Upon examination, it is evident that the agreed tariff included transmission charges according to clause 4(a), and the Respondent Company had no obligation to bear separate transmission charges.
- iv. Furthermore, the Respondent Company was obligated to bear SLDC scheduling and operating charges, fixed

at 90,000/- per month, as indicated in item no. 6 in the chart appended with clause 4(c) in the PPA.

- v. To elucidate the electricity supply mechanism, it has been explained that out of a total electrical load of around 7 MW, 5 MW (approximately) is serviced by Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) and the petitioner company supplied 2 MW. The petitioner company being a trading licensee, pools its electrical power into a common grid from where, it is transmitted to its destination through the electrical infrastructure developed and maintained by MSEDCL. MSEDCL while raising its bills also includes the cost of transmission charges for transmission of electrical power sent through its network. In support of its above claim, the Corporate Debtor attached such bill raised by MSEDCL evidencing the levy of transmission charges, showing that MSEDCL levied an amount of 4,94,570.10/- on the Corporate Debtor/Respondent Company towards transmission charges. The respondent company paid this charge to MSEDCL to settle the corresponding invoices. Thus, according to the

Respondent/Corporate Debtor, the entire amount of transmission charges was deposited by the respondent company with MSEDCL.

- vi. It has been further pointed out by the Respondent/Corporate Debtor in the reply that according to the PPA dated 22.12.2015, the responsibility for paying transmission charges lay with the petitioner company, and the same had been included in the agreed tariff. Therefore, the respondent company adjusted the transmission charges paid by it to MSEDCL against the bills issued by the petitioner company. The respondent company in its reply categorically states that it cleared the transmission charges levied by MSEDCL in its bills, and thereafter adjusted the corresponding amount of transmission charges that was to be borne by the petitioner company under the PPA dated 22.12.2015. It's emphasized that the tariff rate mutually accepted by both parties included transmission charges.
- vii. As the respondent directly paid the transmission charges to MSEDCL, the corresponding amount was

adjusted against the invoices raised by the petitioner company. The respondent company has provided attached copies of various correspondences detailing the adjustment of transmission charges in response to the dispute that arose between the parties. In an email dated 20.12.2016, the respondent company urged the petitioner to designate a representative for finalizing the invoices. A copy of this email has been attached as ANNEXURE NO. C.A. 2 with the reply.

- viii. The above mentioned email is referred in the reply to make it clear that the respondent company clearly pointed out that the petitioner company was not taking steps to resolve the billing dispute. Furthermore, the respondent company also pointed out that it clearly objected to the excessively high invoices issued by the petitioner company. This contradicts the petitioner's assertion that the invoices were accepted by the respondent without any objection or protest.
- ix. Subsequently, on 01.03.2017, the respondent company once again requested the petitioner to depute a representative for resolving the dispute. In the email

dated 01.03.2017, the respondent clearly conveyed that the invoices presented by the petitioner were unacceptable. A copy of this email has been attached as ANNEXURE NO. C.A. 3 with the reply.

- x. The respondent in its reply pointed out that the email dated 01.03.2017 was sent in response to the petitioner company's email threatening the invocation of a bank guarantee on the same date. In this prompt reply, the respondent company clearly stated that bills raised were excessive and unacceptable. They requested the petitioner company to send a representative to address the dispute. Subsequently, on 11.04.2017, the petitioner company appointed Mr. Sachin Yeskar to visit the respondent company's office for negotiation and issue resolution
- xi. Following this, Mr. Sachin Yeskar visited the respondent company's office on 19.04.2017 and compiled a comprehensive statement of account, which was mutually reconciled by both parties. It is explicitly stated that Mr. Sachin Yeskar acted as a representative

of the petitioner company in preparing this statement of account.

- xii. The statement "payment received from Minakshi Ferro" clearly indicates that Mr. Sachin Yeskar himself prepared the reconciled statement of account. A copy of this statement, verified and finalized by Mr. Sachin Yeskar, has been attached as ANNEXURE NO. C.A. 6 with the reply.
- xiii. Upon examining the aforementioned statement of account, it is apparent that the respondent company diligently settled the invoices as they were raised by the petitioner company. By the end of November 2016, the total amount of bills/invoices issued by the petitioner amounted to 4,63,93,404.53/-. This sum was in accordance with the mutually agreed tariff, which inherently included the transmission charges.
- xiv. Against the aforesaid amount of 4,63,93,404.53/-, the respondent company admitted to have made payments totalling 4,39,71,838/-. Additionally, the statement of accounts reveals that the respondent company directly paid transmission charges amounting to

34,90,507.30/- to MSEDCL, and this sum was subsequently adjusted against the invoices issued by the petitioner company.

- xv. Following this adjustment of transmission charges, it was discovered that the respondent paid an amount of 10,68,940.77/- in excess. This surplus amount was then offset against the 9,39,500/- paid for MSEDCL application fees.
- xvi. Respondent Company has also specifically pointed out in its reply that according to clause 4(b), the respondent company was responsible for paying MSEDCL application charges. However, the petitioner made this payment, and consequently, this amount was adjusted against the 10,68,940.77/- that the petitioner company was liable to pay to the respondent.
- xvii. Following the adjustment of all amounts, a net liability of 1,29,440.77 was indicated in the statement of accounts against the petitioner company. The statement, prepared by Mr. Sachin Yeskar, clearly indicates that the petitioner was obligated to reimburse the respondent company with the sum of 1,29,440.77/-

xviii. After the reconciliation of accounts, the statement was promptly forwarded to key individuals at the petitioner company, including Mr. Yogesh, Mr. Ujjwal Goel, Mr. Rahul Jain, Mr. Rajeev Mestry, and Mr. Sachin Yeskar. The accompanying email explicitly outlined the respondent's claim for a refund of excess charges amounting to 1,29,440.77/-. The final statement of account, prepared by Sachin Yeskar, was attached to this email.

xix. Importantly, it is explicitly stated that the petitioner company did not raise any objections to the final statement of account sent to them. Furthermore, they did not dispute their liability to refund the amount of 1,29,440.77/-.

xx. However, to circumvent the refund of the aforementioned amount, the petitioner company, on 21.04.2017, sent an email justifying its claim of 28,61,683/-. In this email, the petitioner company, for the first time, asserted that the mutually agreed tariff between the parties included transmission charges. Consequently, the petitioner claimed that the

transmission charges paid by the respondent company to MSEDCL could not be adjusted against the invoices it had raised.

xxi. The respondent asserts that the email dated 21.04.2017 is merely a concoction. The respondent drew attention of this tribunal to various clauses in the PPA dated 22.12.2015, as well as the Corrigendum Agreements dated 25.01.2016, 18.03.2016, and 14.06.2016. None of these agreements excluded transmission charges from the agreed rate of tariff.

xxii. It is categorically stated that transmission charges remained an integral part of the agreed rate of tariff. There is no evidence to suggest that the parties ever agreed to exclude transmission charges from the tariff rate. Therefore, the petitioner's claim in the email dated 21.04.2017 did not warrant any response.

xxiii. Interestingly, in the same email dated 21.04.2017, the petitioner acknowledged its liability to refund 1,29,440.77/-. Notably, this liability originated from the payment of transmission charges by the respondent company on behalf of the petitioner. By admitting this

liability, the petitioner implicitly recognized that the responsibility for paying transmission charges indeed rested with them.

xxiv. It is evident that the petitioner company explicitly acknowledged the accuracy of the statement of account prepared by Mr. Sachin Yeskar, affirming that the liability to pay transmission charges rested with them. Therefore, it is clear that the respondent company is entitled to receive the amount of 1,29,447.77/- from the petitioner company.

xxv. However, throughout the entire petition, the petitioner company has concealed crucial communications between the parties, indicating malicious conduct. Consequently, the present petition under Section 9 of the IBC is deemed to be dismissed with exemplary costs, as there is no outstanding amount is owed by the respondent company to the petitioner company.

xxvi. In response to the petitioner's notice dated 02.07.2018, the respondent company, on 06.08.2018, explicitly requested the petitioner to refund the excess payment of 1.29 lakhs.

xxvii. The respondent in his averments, has also requested to direct the Tribunal's attention to clause 6(b) of the PPA dated 22.12.2015, which obligated the respondent to provide a bank guarantee for securing payment to the petitioner. In compliance with this clause, the respondent duly furnished the required bank guarantee. However, the petitioner company, in a clear admission of its liability to refund, consciously allowed the mentioned bank guarantee to expire without seeking its renewal. This deliberate action by the petitioner, letting the bank guarantee lapse, indicates their acknowledgment of their own liability towards the respondent company.

4. The Operational Creditor filed a rejoinder countering all the contentions raised in the reply filed by the Corporate Debtor and made the following averments:
 - i. The petitioner has accused the Corporate Debtor of lacking transparency before the Tribunal, engaging in deception by withholding the truth. Specifically, the practice of directly imposing transmission charges on

the Corporate Debtor by MSEDCL only commenced from April 2016.

- ii. It is acknowledged that prior to April 2016, MSEDCL levied only wheeling charges, operating charges, etc., without including transmission charges. Additionally, until May 2016, the responsibility of charging transmission fees lay with the Western Regional Load Dispatch Centre ("WRLDC") from the Operational Creditor.
- iii. It is acknowledged that until April 2016, the recovery of transmission charges from the Operational Creditor was in accordance with the terms and conditions outlined in the Power Purchase Agreement dated 22.12.2015.
- iv. For April and May 2016, both MSEDCL and WRLDC collected double the transmission charges. The Operational Creditor notified the Corporate Debtor via an email dated 08.07.2016, stating that due to MSEDCL directly imposing transmission charges, the revised tariff would be 3.42 per unit (excluding 29 paise for transmission charges), compared to the earlier agreed tariff of Rs. 3.77.

- v. The Corporate Debtor, in its letter dated 14.06.2016, made amendments without expressing any discomfort or protest. The current disputes raised by the Corporate Debtor are baseless attempts to avoid the rightful claims of the Operational Creditor. Copies of the relevant documents are attached as Annexure P
- vi. Subsequently, in an email dated 21.04.2017, the operational creditor explicitly communicated to the corporate debtor that based on MSEDCL directly imposing transmission charges, the tariff would be reduced post-May 2016. The email specified a reduction to 6 paisa per unit from July 16 onwards, as mutually agreed, with reference to a prior email dated 08.07.2016. The operational creditor requested payment of Rs. 28,61,883/- for transmission charges spanning from June 16 to November 2016, calculated as Rs. 29,91,324/- minus Rs. 1,29,440.77, as detailed in the attached reconciliation sheet.
- vii. The corporate debtor did not raise any objections or disputes in response to the aforementioned email from the operational creditor. Consequently, it is evident that

the defenses presented by the corporate debtor in its counter affidavit are merely pretenses, aimed at evading the legitimate obligation to settle the outstanding amount rightfully owed

viii. In conclusion, the party at the receiving end, the Respondent, acting as a buyer, has the option to either request an overall tariff reduction later or claim a refund of excess charges paid, as stipulated in the Power Purchase Agreement (PPA). However, seeking both advantages would be unjust enrichment and a violation of the PPA. It's worth noting that the Respondent already benefited from the non-levy of transmission charges. Therefore, it is evident that the Corporate Debtor is unable to pay its debts and is deliberately delaying debt payments through dubious defenses, thereby, justifying the initiation of the Corporate Insolvency Resolution Process against it.

ix. Setting aside the aforementioned considerations, the Operational Creditor asserts that even if, hypothetically, an amount of Rs. 1,29,440.77 is deemed payable by the Operational Creditor to the Corporate Debtor,

established legal precedent allows initiation of the Corporate Insolvency Resolution Process based on the outstanding balance which is Rs. 36,02,275 minus the alleged amount of Rs. 1,29,440.77.

- x. Notably, the **Hon'ble NCLAT**, in the case of **Pedersen Consultants India Pvt. Ltd. Vs. Nitesh Estates Limited (Company Appeal (AT) (Insolvency) No. 720 of 2018)**, clarified that a claim, even if disputed, constitutes a right to payment. Therefore, the Corporate Debtor's attempt to oppose the insolvency petition on the grounds of a counterclaim is legally flawed, as per the explicit findings of the Hon'ble Supreme Court and the Hon'ble NCLAT.

5. A written submission has also been filed by the respondent in this case on 14.11.2023 vide diary no. 2911 submitting interalia as under:-

- i. The respondent reiterated that the bone of contention between both the parties is the amount of transmission charges. According to the corporate debtor, the petitioner's claimed amount of Rs. 28,58,949/- was set off against transmission charges paid to MSEDCL. The

disagreement revolves around whether the revised tariff covered these transmission charges. Clause 14 of the PPA from 25.12.2015 stipulates that any amendment requires a supplementary agreement, and since no such agreement was executed amending clause 4(13), the petitioner's tariff still encompassed transmission charges. Consequently, the corporate debtor had the right to adjust the directly paid transmission charges from the petitioner's invoices.

- ii. It is also evident from Annexure CA- 6 in the Reply by the respondent that the parties have reconciled the accounts on 19.04.2017. Examining Annexure No. CA- 6 on Page 30 reveals that transmission charges totaling Rs.34,90,507.30 paid between April 2016 and November 2016 were offset against the petitioner's bills. Post-adjustment, an outstanding amount of Rs. 1,29,440.77 was identified against the petitioner. The petitioner, in an email dated 24.07.2017 (Page 32 of the counter affidavit), acknowledged its liability for Rs. 1,29,440.77. This figure was determined after appropriating Rs. 34,90,507.30 for transmission

charges against the petitioner's bills. The email dated 21.04.2017 indicates that the parties reconciled accounts on 19.04.2017, finding Rs. 1,29,440.77 due from the petitioner. On 21.04.2017, the petitioner admitted the withholding liability of Rs. 1,29,440.77. However, the petitioner overlooked that this amount itself constituted a full and final adjustment of its raised invoices. Hence, the demand of Rs. 28,61,883/- for transmission charges from June-November 2016 was unwarranted, especially given its admission of liability for Rs. 1,29,440.77.

- iii. Analyzing the aforementioned details, it's evident that the disputes existed before the statutory notice. The petitioner acknowledges a liability of Rs. 1,29,440.77 to the corporate debtor. Notably, clause 4(b) of the PPA from 25.12.2015 wasn't amended as per the procedure outlined in clause 14. The email dated 08.07.2016 (Page 12 of the rejoinder affidavit) appears to be a unilateral action by the petitioner, lacking evidence of the corporate debtor's agreement to exclude transmission charges from the proposed tariff. Without a

supplementary agreement reflecting the corporate debtor's consent, the original clause 4(b) remains in force.

- iv. Moreover, a reconciliation attempt on 19.04.2017 conveyed the adjustment of transmission charges to the petitioner. In these circumstances, it's evident that the corporate debtor's defense is well-founded and not contrived, making it unsuitable for triggering Section 9 of the IBC. The dispute is genuinely pre-existing and not artificially created for this petition.
- v. In the light of pre-existing dispute, the respondent avers that this petition is liable to be dismissed. The respondent has relied upon the judgements of **Kay Bouvet Engineering Ltd vs Overseas Infrastructure Alliance (India) Private Limited (2021) 10 SCC 483**, **Sabarmati Gas Limited vs. Shah Alloys Limited (2023) 3 SCC 229** and **Rajratan Babulal Agarwal v. Solartex India Pvt. Ltd. & Anr. (2023) 1 SCC 115** for supporting its contention.
- vi. In its last averment, the Corporate Debtor has pointed out that the petitioner has not disclosed the date of

default in either part IV of the petition or in the statutory demand notice. However, from an email dated 21.04.2017 which has been appended as Annexure CA-7, it is evidenced that the claimed dues are related to the period June-November 2016. The current petition was filed on 17.12.2019, surpassing the three-year limit from the alleged due date. Therefore, the petition is susceptible to dismissal on grounds of limitation. The CD has placed reliance on a recent decision of **NCLT, Allahabad**, reported in: **(2023) ibclaw.in 411 NCLT: Dinesh Kumar Goel vs M/s Shanti Refrigeration Industries Pvt. Ltd** for supporting his contention.

FINDINGS AND ORDERS:-

- 6.** We have considered above submissions made before us and also heard the Ld. Counsels of Petitioner as well as the Respondent.
- 7.** As per part IV, it has been averred in the application filed under Section 9 of the Code that the total amount of the debt owed to the Operational Creditor by the Corporate Debtor is Rs. 36,02,275/- and the amount claimed to be in default is Rs.28,58,940/- There is, however, no date of default

mentioned in part IV of the application. As per the demand notice dated 1st January, 2019 issued by the Operational Creditor placed at Annexure A in Form 3 at relevant page 37, the amount of default alleged is Rs. 28,58,949/-. However, there is no date of default mentioned in the notice issued under Section 8 also. In reply to the Section 8 notice, the Corporate Debtor vide its communication dated 25th January, 2019 stated that the vital material facts have been suppressed while issuing the said notice and the same is thus abuse of process of the statutory provisions which has also been stated in the reply that a notice was earlier issued through the petitioner's advocate on 2nd July, 2018 to which a reply dated 6th August, 2018 was already sent through the Advocate of the Corporate Debtor. There is no mention of this letter sent by petitioner through its Advocate and the reply sent by the Corporate Debtor through its Advocate in the aforesaid demand notice dated 1st January, 2019 allegedly issued in Form No. 3 under Section 8 of the Code. In his reply dated 25th January, 2019, the Corporate Debtor had further mentioned that the alleged amount of Rs. 28,58,949/- is not liable to be paid. On the contrary, the Operational Creditor is

liable to pay the excess amount of Rs. 1,29,443/- The said demand raised earlier on 6th August, 2018 was thus disputed by the Corporate Debtor and therefore, an amount of Rs. 1,29,497/- was required to be paid by the Operational Creditor to the Corporate Debtor. Vide this communication dated 25th January, 2019, the Corporate Debtor again asked the Operational Creditor to refund the excess amount of Rs. 1,29,497/- together with interest.

- 8.** As regards to the date of default, it is evident that the applicant seems to have deliberately kept silent on giving the date of default either in the application under part IV or while issuing notice under Section 8 of the Code . Even as per the invoices which have been relied upon by the Operational Creditor, the due date mentioned therein, would make the application beyond the period of limitation. As per the communication dated 1st December, 2016 sent by the Operational Creditor to the Corporate Debtor, an amount has been shown to be due for the period from 16th November, 2016 to 30th November, 2016 by specifically mentioning that the payment be made by the due date i.e. 8th December, 2016. The invoice/ sale of power bill has been attached at page 184

of the application, wherein the bill date has been mentioned at 1st December, 2016 and the due date is shown as 8th December, 2016. Thus, if the due date as admitted by the Operational Creditor is taken as 8th December, 2016 with respect to the said invoice, the filing of the application on 17.12.2019 is clearly barred by limitation as being beyond the prescribed period of three years. Further a final supply of power bill has been sent which is dated 27th March, 2017 attached at page 187 the due date has been shown to the 4th October, 2016 and the amount is for Rs. 49,060/-. It would thus further be evident that this final bill seems to be relating for the leftover amount for which the due date was already 4th October, 2016. The present matter has been filed on 17th December, 2019 which would make the application out of limitation.

- 9.** In counter filed by the Corporate Debtor, a reference has also been made to the email dated 21st April, 2017 sent by the Operational Creditor, wherein an amount of Rs. 28,61,883/- for the transmission charges from “June, 2016 to November, 2016” period has been claimed by deducting an amount of Rs. 1,29,440/- as per the reconciliation sheet. The

reconciliation sheet has been attached at page No. 30 where the amount paid by the Corporate Debtor from February, 2016 onward has been reflected and an amount of Rs. 1,29,440/- has been determined to be an excess amount which is rather liable to be paid by the Operational Creditor to the Corporate Debtor. Therefore, an amount of Rs. 1,29,440/- is rather claimed by the Corporate Debtor to be paid by the Operational Creditor which was also mentioned by the Corporate Debtor in reply dated 25th January, 2019 sent by the Corporate Debtor in response to the Section 8 notice. In that reply, there was already a communication made on 6th August, 2018 wherein it was also stated that the excess amount of Rs. 1,29,443/- is liable to be paid. Thus, the dispute with respect to the outstanding amount has been existing much prior to the issuance of the demand notice under Section 8 on 1st January, 2019 and the excess amount to be paid by the Operational Creditor to the Corporate Debtor was already reflected in the communication dated 6th October, 2018 sent by the Corporate Debtor which is much prior to the issuance of the demand notice dated 1st January, 2019 issued under Section 8. Moreover, the email dated 21st

April, 2017 referred to by the Corporate Debtor in its counter at page 32 would further reflect that the alleged amount be claimed by the Operational Creditor is for the transmission charges from “June, 2016 to November, 2016” and therefore, even this alleged demand is only for the said period up to November, 2016 which again makes the application under Section 9 beyond the period of limitation.

10. After perusing the facts of the case as discussed in aforesaid paras, we are of the view that the existence of pre-existing dispute is patently visible in this case. The reliance is placed upon the judgment of the Hon'ble Supreme Court in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** wherein it was held that:

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section

8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.

...51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in

doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

54.We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

56. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability”.

(Emphasis Supplied)

In present case also, there is a dispute on payment of transmission charges whether it has to be paid by the petitioner to MSEDCL or by the Corporate Debtor. The

Corporate Debtor has contended that it was to be paid by the petitioner and since it has paid the transmission charges to the MSEDCL directly, it has adjusted this amount against the bill raised by the petitioner, and therefore after reconciliation with the representative of the petitioner an amount of Rs.1,29,440/- has been computed to be paid by the petitioner to the Corporate Debtor. However, the petitioner has disputed the above claim of the Corporate Debtor stating that the transmission charges was to be paid by the Corporate Debtor from June, 2016 to November, 2016 before the traffic was revised and accordingly, a demand of Rs. 28,58,940/- was raised by the petitioner to the Corporate Debtor, which has been denied by the Corporate Debtor as payable by it to the petitioner and the dispute in this regard has been raised much before issuance of notice under Section 8 by the petitioner. In the above cited decision, it has been clearly held that as regards the dispute, the court does not at the stage of proceeding under Section 9 of IBC is required to go into the merits of the dispute and so long as a dispute truly exist infact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject application. In the

present petition, we have clearly found that there is a dispute as regards the outstanding amount claimed to be paid by the Corporate Debtor which is mentioned in Part IV of the Application and such dispute between both parties is in existence even before the notice under Section 8 was issued therefore, we are of clear opinion that there is a pre-existing dispute in the present case as per the guidelines laid down by the Hon'ble Supreme Court in the case of **Mobilox Innovations Private Limited (Supra)**.

11. Considering our above findings, the present petition/application deserves to be dismissed as not being maintainable as per Section 9(5)(ii)(d) in view of there being pre-existing dispute as regards the amount claimed to be in default in Part IV of the petition and also due to the petition is filed beyond limitation period. Accordingly, the petition no. CP (IB) No.35/ALD/2020 is dismissed.

-Sd-

(Ashish Verma)
Member (Technical)

12th December, 2023

Aditi Kharbanda
(LRA)

CP (IB) NO.35/ALD/2020

-Sd-

(Praveen Gupta)
Member (Judicial)