

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH at AHMEDABAD
COURT 1**

CP(IB) 296 of 2018

**Coram: Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER (JUDICIAL)
Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER (TECHNICAL)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF INDORE BENCH OF
THE NATIONAL COMPANY LAW TRIBUNAL ON 29.05.2020**

Name of the Company: Phalashri Estates (P) Ltd
V/s
Orion Constactors Pvt Ltd

Section: 9 of Insolvency and Bankruptcy Code.

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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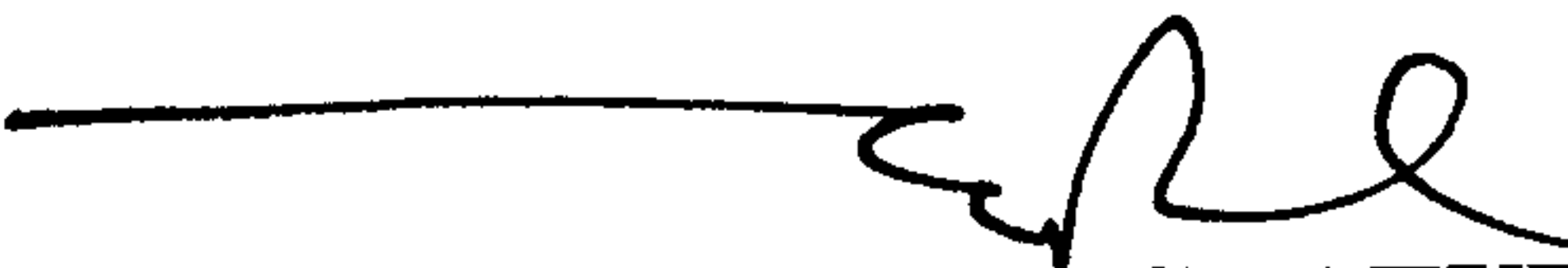
ORDER

The case is taken up through video conferencing.

The case is fixed for pronouncement of order today.

The order is pronounced in open Court as order in detail is recorded vide separate sheet.


(PRASANTA KUMAR MOHANTY)
MEMBER (TECHNICAL)


(HARIHAR PRAKASH CHATURVEDI)
MEMBER (JUDICIAL)

Dated this the 29th of May, 2020

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
INDORE BENCH at AHMEDABAD**

C.P. (I.B.) No. 296/9/NCLT/AHM/2018

**Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (Judicial)
Hon'ble Mr. Prasanta Kumar Mohanty, Member (Technical)**

In the matter of:

M/s. Phalashri Estates (P) Ltd,
'Kaustubh,'
141, Phadnis Colony,
A.B. Road,
Indore - 452001,
Madhya Pradesh.

.....Petitioner/Operational Creditor

Versus

M/s. Orion Contractors Pvt. Ltd,
301, Krishna Tower,
2/1, New Palasia,
Indore - 452001,
Madhya Pradesh.

.....Respondent/ Corporate Debtor

Appearance:

Mr. Vivek Dalal, Advocate, for the Petitioner.
Mr. Aniket A. Naik, Advocate, for the Respondent.

Order delivered on 28th May, 2020.

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ORDER

[Per: Shri Harihar Prakash Chaturvedi, Member (Judicial)]

1. The present I.B. Petition is preferred by M/s. Phalashri Estates (P) Ltd. being an Operational-Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy Rules, 2016 (herein after referred to as a "Code") seeking for initiation of Corporate Insolvency Resolution Process ("CIRP" in Short) in respect of the Corporate-Debtor-Company namely, M/s. Orion Contractors Pvt. Ltd.
2. The present Petitioner, M/s. Phalashri Estates (P) Ltd. has filed the petition through its Director, Mr. Chandrashekhar Phadnis. The Petitioner Company is stated to be incorporated under the Companies Act, 1956 and has been engaged in building construction business. The Petitioner/Operational Creditor is having its registered address at: 'Kaustubh,' 141, Phadnis Colony, A.B. Road, Indore - 452001, Madhya Pradesh, India.
3. It is stated that the Respondent/Corporate Debtor Company, namely M/s. Orion Contractors Pvt. Ltd. was incorporated on 19.03.1999 with the CIN: U45203MP1999PTC013407 and appears to be engaged in the building construction business.

4. As stated, the Corporate-Debtor-Company is having nominal share capital of Rs.50,00,000/- (Rupees Fifty Lakh) and the paid-up share capital of the company is Rs.50,00,000/- (Rupees Fifty Lakh). The registered office of the Corporate Debtor Company is situated at: 301, Krishna Tower, 2/1, New Palasia, Indore, Madhya Pradesh - 462001, India.

5. The Petitioner submits that, the Respondent/Corporate Debtor was allotted a work contract by the **Narmada Hydroelectric Development Corporation ("NDHC")**, which is stated to be the joint venture of **NPHC and the Government of Madhya Pradesh** vide letter dated **03.12.2007** for the construction of "WBM Road (Phase-II) and Construction of WBM (Final coast) and asphaltting of internal roads Phase-I & II and approach road for resettlement site Tonki of OSP." The project is stated to have a value of Rs.49,41,344/- (rupees Forty-Nine Lakh Forty-One Thousand Three Hundred Forty-Four only).

6. The Petitioner also contends that the Respondent was allotted various work contracts as per the details mentioned below:

a) Work contract by NHDC Limited vide letter dated 22.01.2010 for construction of "WBM Road (Phase-II) and Construction of WBM (Final coast) and asphaltting on approach roads for resettlement site Phefriya and Siwar

under ISP” for a total value of **Rs.55,95,025/-** (Rupees Fifty Five Lakhs Ninety Five Thousand Twenty Five Only).

b) Work contract by NHDC Limited vide letter dated 21.05.2008 for construction of “*WBM road and asphaltting of approach road to karoli to resettlement site Tonki of OSP*” for a total value of **Rs.44,82,358/-** (Rupees Forty Four Lakh Eighty-Two Thousand Three Hundred Fifty-Eight Only).

c) Work contract by NHDC vide letter dated 07.03.2008 for construction of “*WBM road and asphaltting of approach road from village Hantia to resettlement site Indhawadi of OSP*” for a total value of **Rs.97,13,204/-** (Rupees Ninety-Seven Lakhs Thirteen Thousand Two Hundred Four only).

d) Work contract vide letter dated 17.09.2008 for upgradation, asphaltting and construction of C.D. on Anjaniga to Dhamangaon road for a total value of **Rs.40,75,000/-** (Rupees Forty Lakh Seventy-Five Thousand only).

e) Work contract for work of IRQP in KM 103 to 105 & 125 to 134 of Indore-Ahmedabad NH 59 (under PBFF) as per NIT 11/2/2008-09 dated 17.09.2008 for a total value of **Rs.4,27,80,465/-** (Rupees Four Crore Twenty-Seven Lakh Eighty Thousand Four Hundred Sixty-Five only).

7. It is submitted that the Respondent/**Corporate Debtor had sublet all the work contract** executed in its favour of the Petitioner/Operational Creditor, from the Competent

Authority as mentioned in above paragraphs in favour of the Petitioner/Operational Creditor and has entered into valid agreement in favour of the Petitioner, wherein, **the Petitioner had executed and done the execution of the work contract on behalf of the Respondent/Corporate Debtor.** It is submitted that the entire work contracts have been successfully executed by the Petitioner and against which, the **Respondent had received full and final payments from the Government and its Competent Authorities.**

8. It is submitted that, as per the agreements entered between the Petitioner and the Respondent, the Respondent is in obligation to pay to the Operational Debts for work contract after a one per cent deduction of profit, in addition to statutory deduction of Income Tax (TDC) as per the entered agreement.
9. It is stated that the Respondent/Corporate Debtor has paid a part payment for the work contracts as mentioned in above paragraphs and there is an outstanding operational debt of **Rs.21,00,678/- (Rupees Twenty One Lakh Six Hundred Seventy-Eight only).** The Petitioner has annexed copies of the ledger account along with the present petition as Annexure A/3.

10. It is submitted that, the Respondent/Corporate Debtor, in lieu of such said debt of **Rs.21,00,678/-** gave a cheque of **Rs.17,90,000/-** (Rupees Seventeen Lakh Ninety Thousand only) as a part payment vide YES Bank at Mahatma Gandhi Road Branch, Indore, bearing cheque no.315034 dated 29.08.2017. It is submitted that the said cheque was deposited on 15.11.2017 but got dishonoured/not cleared, stating the reason of insufficient funds or "exceeds arrangements". A copy of said cheque has been place at page no.51 of the present petition.

11. Pursuant to such, the Petitioner/ Operational Creditor sent a demand notice in the prescribed Form under Rule-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Respondent, which is declared in affidavit dated 08.02.2018.

12. In reply to the petition, filed by the Petitioner/Operational Creditor, the Respondent/Corporate Debtor, Mr. Dipak Soni, one of the Directors was authorised to appear and act vide company's Board Resolution dated 20.08.2018 and to file its objections on 15.11.2018. A copy of said resolution has been annexed with the objection/ reply as Annexure R/1.

13. It is contended that there exists a pre-existing dispute between the parties and no dues payable to the applicant as well as no default has been committed by the Respondent that might attract any Insolvency Proceedings.
14. It is averred that the Petitioner deliberately suppressed certain facts and did not disclose the details of particulars of the claimed amount which is due vide individual agreements and thereby the petition is liable to be rejected as being defective.
15. It is stated in the reply that the proper demand notice, under Section 8 of the Code along with annexures was not served to the Respondent. However, the Respondent sent a reply of the same on 02.01.2018, which was suppressed by the Petitioner in the present petition.
16. It is averred that the Petitioner did not correctly mention about the amount of default by calculating as amount + 10% (extra) as mentioned in its work contract letter.
17. It is contended that the Petitioner undertook the work of "Construction of WBM (final coast) and asphaltting on approach roads for resettlement site Phefriya Kalan and Siwar under ISP" as awarded vide letter dated 22.01.2010 and sublet that work vide contract letter dated 26.02.2010 was left incomplete by the Petitioner, which breaches the

Clause-2 of the contract and the Petitioner did not fulfilled the responsibilities under the said contract terms. The said incomplete work was later on completed by the Respondent on his own cost.

18. It is stated that the on part completion of the concerned work the Petitioner was paid **Rs.44,95,440/-** out of **Rs.55,95,025/-** which was the total value of that contract. **The payment to the Petitioner is stated to be evident from the ledger of running accounts as maintained by the Respondent, a copy of which is annexed as Annexure R/3.**

19. It is also stated that the part work which was done by the Petitioner was also defective against which some additional cost was incurred by the Respondent amounting to the tune of Rs.12,84,937/- and cost for transport of the material Rs.1,30,771/- which were claimed to be borne by the Respondent/Corporate Debtor itself. The leftover work was done by the Respondent which also claimed to be amounted to Rs.10,26,000/-.

20. The Respondent also contended that against the completion of the said work, he received payments of **Rs.10,05,067/-** as the rest of amount was already paid to the Petitioner, leaving the additional cost recoverable from the applicant to

the quantum of **Rs.14,36,641/-**. Therefore, the Petitioner's claim for an amount of **Rs.21,00,678/-** was in dispute due to violation of sub-letting agreement arising from non-execution of complete work and the amount to be recovered from the Petitioner itself.

21. It is also contended by the Respondent that in respect to the work contract letter dated 17.09.2008, the security amount had not been released by the concerned department amounting to Rs.7,45,264/- which is included in the total claimed amount of Rs.21,00,678/-, which, as per the terms of contract was payable only in case of receipt of the amount.

22. With regard to the **dishonouring the cheque of the Respondent, it is averred by him that the Petitioner (director) approached the Respondent and falsely claimed that the final bill amount of contract shall be released by the concerned department (i.e. PWD, Khandwa) within 4-5 days and shall get credited in Respondent's account and thus, requested to issue an advance cheque for an amount of Rs.17,90,000/-, which was given by the Respondent, by considering long and healthy professional relations. However, the said cheque got dishonoured on account of such false claims of the Petitioner.**

23. Thus, the Respondent has raised a pre-existing dispute which was claimed to exist at the time of serving the demand notice to the Respondent and to be resolved with further investigation.

24. The respondent has submitted a copy of its ledger account of 'security deposit' between the period of 01.04.2017 to 31.03.2018 on 15th November, 2018, which mentioned that Rs.21,68,178=58 paisa were in credit in the ledger.

25. In response to such contentions of the Respondent/ Corporate Debtor, the Petitioner has further clarified some of the contentions vide his written submissions filed on 12.01.2019 which are given below:

a) As contended that the Petitioner has clubbed all the contracts, which are separate from one another. **The same is replied as these contracts are serially listed. However, the account statements submitted by the Respondent also does not contain any break-up.**

b) It is contended that the Petitioner did not mention a reply dated 02.01.2018. **It is replied that no proof of service was submitted and contrarily no reply received for the submitted affidavit by the Petitioner.**

- c) It is contended that the Petitioner relied on its own account statement and the same was not annexed to the Demand Notice. **It is replied that there is no mention of annexures in the demand notice.**
- d) It is contended that the work was not completed by the Petitioner, which was later on completed by the Respondent himself after incurring heavy costs. The same is **replied that there is no communication received by the Petitioner on account of incomplete work.**
- e) It is contended that work was completed by the Respondent and an amount of Rs.14,36,641/- was incurred and a debit note of Rs.14,36,641/- was raised on **31.12.2017**. Which is replied that - **no debit note has ever been served on the Petitioner by giving details of amounts incurred and the debit note was not submitted in the proceedings before this tribunal. The said amount was debited on 31.12.2017, i.e. two days after the receipt of demand notice.**
- f) It is contended that letter from PWD (Khandwa Division) have not been annexed in support of incomplete work. The same was replied that - **In order to show that the work was incomplete, the Respondent at page 32 of their objections dated 13.11.2018 attached a letter dated 22.10.2013**

pertaining to a different contract not allotted to the Petitioner. The contract sublet is No.43, while the letter pertains to a contract 126/2012-13.

26. We considered the above given facts and circumstances of the present case for the purpose of admissibility of the present I.B. Petition or otherwise. We heard the rival submissions made before us by the Learned Counsel for both the parties and perused the material available on record. By perusing of the contents of the I.B. Petition, it is undisputed position in the present matter that the Respondent / Corporate Debtor has issued a cheque of **Yes Bank, bearing no.315034 dated 29.08.2017 amounting to Rs.17,90,000/- in favour of the present petitioner** towards the work done/ performed by the Petitioner.

27. As per the record, the said cheque got dishonoured / remained un-cleared due to insufficient funds and for exceeds arrangements. The Petitioner has enclosed a copy of the dishonoured cheque. The fact of this cheque as issued by the Corporate Debtor has not been disputed or denied by the Corporate Debtor but it only made attempt to explain that the Petitioner falsely represented to the Respondent that the final bill amount was going to be released by the concerned government department (P.W.D. Khandwa) and such amount would get credited soon in the

Respondent's account. Therefore, on such expectation, Petitioner managed to obtain a cheque of Rs.17,90,000/- from the Respondent/Corporate Debtor, the same was issued by considering long and healthy professional relationship with the Petitioner. The Corporate Debtor further made an attempt to explain that such cheque got dishonoured due to such false claim made by the Petitioner. However, it is evident that no such contention was ever made or such plea is taken by the Respondent, prior to issue of Demand Notice. In-fact, the Respondent, in its reply to the recall notice dated 02.01.2018 was issued (by the Petitioner) to it (Respondent), chose to remain silent about such alleged false claim. It while replying to the above through its Advocate has merely wondered about what action was to be taken against dishonour of such cheque. Thus, in above referred reply, the Corporate Debtor did not even whisper about its false representation made by the Petitioner with Respondent even Respondent in its reply made such allegation that the Petitioner managed to obtain such cheque with malafied intention by some force or false representation. He did not dispute issuance of cheque, nor did it make any written protest / letter with the Petitioner. Hence, such contention of the Corporate Debtor does not carry merits being an afterthought plea. Moreover, as per the material available on record, the Corporate Debtor in page-08 of its reply has conceded with such fact that such

cheque was issued at the request of the Petitioner for settling the account and in expectation of some payment from the PWD Department towards payment of final bill. However, as per the Respondent, such could not be materialised but the Corporate Debtor did not enclose any document as proof of written communication about a protest letter to recall such issued cheque or by giving some instruction to the Bank to not to deposit such cheque with the Bank. It is a matter of record that the said cheque was properly presented before the Bank but it got dishonoured by the Bank due to insufficient funds/ exceeds arrangement and not for any other reason. Thus, such alleged act on the part of the respondents attracts penal provision of the Section 138 of the Negotiable Instruments Act. Hence, such contention of Corporate Debtor is without proof and substance. Hence, it is not acceptable being an afterthought plea. It is a matter of record that the Petitioner duly performed his part of contract /agreement and was getting regular payments time to time from the Corporate Debtor. So, this may be the position in respect of present cheque also, which got dishonoured by the Bank for want of sufficient funds. That shows that the Corporate Debtor has admitted its debt liability to the extent of amount mentioned in the cheque, i.e. **Rs.17,90,000/-** and which undisputedly is above rupees one Lakh to make eligible the Petitioner to trigger the Corporate Insolvency Resolution

Process ("CIRP") in respect of the Corporate Debtor. As the above stated cheque was issued on 29.08.2017 and presented before the concerned branch of the Bank on 15.11.2017, while the present petition is found to be filed on 09.02.2018, hence, it is filed well within the limitation.

28. The legal position in respect of the Operational Creditor has been well settled by the Hon'ble Supreme Court in the matter of ***M/s. Innoventive Industries Ltd. Vs. ICICI Bank and Another, (Civil Appeal Nos.8337-38 of 2017, decided on August 31, 2017)***, wherein, their Lordships have held that when a debt is established and the petition is found complete, then the Adjudicating Authority is expected to admit the petition. Moreover, the defence of the Corporate Debtor in respect of pre-existing dispute should not be a **moon shine defence**. As per the decision of the Hon'ble Supreme Court in the matter of *Mobilox Innovations Ltd. Vs. Kirusha Softwares Pvt. Ltd.* The relevant portion of the Supreme Court decision is being reproduced herein below:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an Instalment amount. For the meaning of "debt," we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which denies "claim" to mean a right to

payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate Insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. **The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it**

is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

29. By following the above stated judicial precedents in the present matter we find in the present matter that the Respondent himself has admitted in its reply that the above stated cheque was issued on the request of the Applicant **for settling of amount of contract and in order to maintain good relationship with the Petitioner.** This means that the Corporate Debtor has admitted its liability for making payment of debt towards settlement of its contract has it voluntarily and bonafiedly issued such cheque in the favour of the Petitioner. The Respondent did not produce in writing any protest letter issued immediately thereafter as an attempt to stop the payment. Therefore, such plea taken by the Respondent appears to be an after-thought plea and devoid of merits. Hence, the default is well established.

30. For the aforesaid reasons, the present I.B. Petition is found complete to initiate CIRP in respect of the Corporate Debtor. Therefore, the present I.B. Petition deserves admission. Hence, it is hereby admitted with following observations/ Directions.

31. In the present matter, the Petitioner/Corporate-Debtor has not suggested name of any Insolvency Professional. Hence, the same to be appointed by this Adjudicating Authority.

32. Hence, this Adjudicating Authority hereby appoints **(MP) Mr. Rahul Anand**, having Insolvency Professional Registration No. **IBBI/IPA-003/IP-N000166/2018-2019/11955**, Email **rahulpnb@hotmail.com**, as an **Interim-Resolution-Professional**. The Interim-Resolution-Professional is further directed to make public announcement of moratorium in respect of Corporate-Debtor-Company soon after receipt of an authenticated copy of this order and to act further as per the order/direction issued by this Adjudicating-Authority and to follow the provisions Section 13 and 14 and relevant provisions of the Insolvency and Bankruptcy Code.


33. As per the provisions of Section 13 and 14 of the I.B. Code on the date of commencement of insolvency, this adjudicating authority declares moratorium for prohibiting all of the following, namely: -


- I.(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal arbitration panel or other authority.*
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein.*

- (c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- II. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- III. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

34. An authentic copy of this order to be communicated by the Petitioner as well as by this Registry to the Corporate-Debtor-Company, as well as to the Interim-Resolution-Professional and the Registrar of Companies at the earliest.

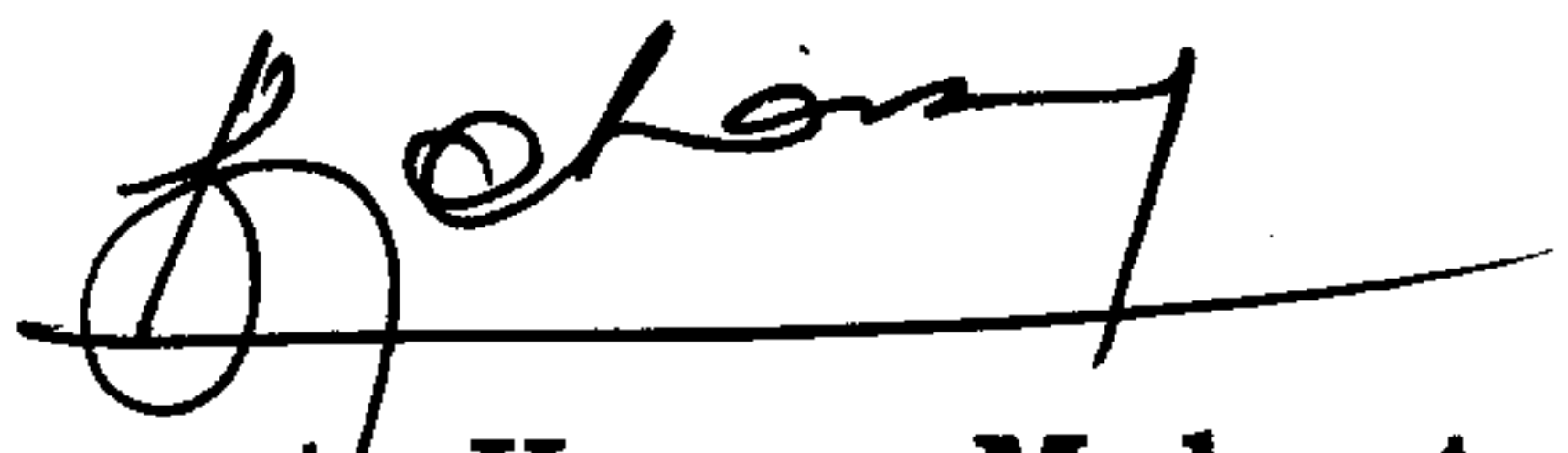
35. The present IB-Petition stands admitted.


(Harihar Prakash Chaturvedi)
Adjudicating Authority &
Member (Judicial)



[Per: Mr. Prasanta Kumar Mohanty, Member(T)]

1. The Corporate Debtor and the Petitioner entered into various contracts/agreements to undertake the job from 17.09.2008 and onwards. The work was completed as reported.
2. Thereafter, default started and the Cause of action was arising from 2008.
3. The Operational Creditor has not submitted any proof of debt acknowledgement from the Corporate Debtor from 2008 to 2017 till a cheque was reportedly issued in favour of Operational Creditor on 29.08.2017.
4. Hence, **continuity of liability is not there**. There is a gap of nine years between the cause of action and the cheque issued. **Hence, this application needs to be rejected on the ground of limitation.**
5. Reported cheque of Rs. 17,90,000/- was given to the Operational Creditor by the Corporate Debtor for the unpaid operational dues but **no proof was submitted by the Operational Creditor to this effect that this cheque was issued for that unpaid operational debt due to the Operational Creditor.**
6. Now, as per the judgment of Hon'ble NCLAT the balance sheet of earlier year is not to be taken into consideration as acknowledgement of debt. Hence, this **application needs to be rejected on the ground that the application time barred.**


**(Prasanta Kumar Mohanty),
Adjudicating Authority
Member (T)**

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