

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

**CP (IB) No.95/ALD/2020**

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

**IN THE MATTER OF:**

**M/s. SSP Private Limited**

13, Milestone, Mathura Road,  
Faridabad - 121003 (HR)

**...Applicant/Operational Creditor**

*Versus*

**M/s. Triveni Engineering & Industries LTD.**

8<sup>th</sup> Floor Express Trade Towers,  
15-16, Sector 16A,  
Noida-201301, Uttar Pradesh

**...Respondent/Corporate Debtor**

**Order pronounced on: 30<sup>th</sup> January, 2024**

**CORAM:**

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

**Appearances:-**

Sh. Rajendra Beniwal alongwith : For the Operational Creditor  
Sh. Utkarsh Srivastava, Advs.

Sh. Diptiman Singh alongwith : For the Corporate Debtor  
Sh. Shubham Agarwal, Advs.

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## ORDER

1. The instant application was filed on 24.02.2020 by M/s SSP Private Limited (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**"). The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as '**CIRP**') in respect of M/s Triveni Engineering & Industries Private Limited (hereinafter referred as '**Respondent-Corporate Debtor**') due to default in payment of total outstanding amount of Rs. 80,79,435 (Rupees Eighty Lakhs Seventy Nine Thousand Four Hundred Thirty Five Only) with the date of default mentioned in the application as 11.8.2016.

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

3. As stated in the Application, the Operational Creditor was formed in the year 2004 under the provisions of the Companies Act, 1956 having CIN- U29219HR1985PTC021129. It is a process

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engineering company which offers an extensive range of projects, equipment and innovative process solutions based on advance technology.

4. The Corporate Debtor is a company incorporated on 27.07.1932 having CIN: L15421UP1932PLC022174 engaged in sugar manufacturing and engineering business, covering power transmission, water and waste treatment solutions, and defense sector. As stated by the Applicant-Operational in the Application, the Respondent-Corporate Debtor made a presentation before the Operational Creditor on design, erection and commissioning of Multi Effect Evaporator (MEE) at their plant of Alco Chemical Division situated in Village and post- Bhikki -Bilapur, Distt- Muzaffarnagar, Uttar Pradesh.

5. Thereafter, on making an offer on 10.11.2015 by the Operational Creditor to the Corporate Debtor, a Letter of Intent ("LOI") cum order confirmation was issued on 19.11.2015 by the Corporate Debtor to the Operational Creditor, outlining the terms for the supply, erection, and commissioning of a Multi Effect Evaporator with TVR for Biomethanated Spent wash after RO Plant of 6 Effect (hereinafter refereed as "**the Machine**"). The terms of

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the said LOI included inter-alia following payment terms and conditions:

*“..... Payment Schedule*

*(a) 10% advance against submission of Advance Bank Guarantee.*

*(b) 10% against receipt of complete Layout, Civil Structural Drawings and submission of un-priced P.O for major items.*

*(c) 60% against exchange of dispatch document/SSP shall submit Proforma Invoice 7 days in advance.*

*(d) 10% shall be released against submission of Performance Bank Guarantee on completion of supplies Limi PBG shall be valid for 14 months of supply.*

*(e) 10% shall be released after successful commissioning within 45 days. ....”*

6. As stated in the Application, the Operational Creditor has effectively completed the erection and commissioning of the plant. It is also mentioned in the Application that the Operational Creditor successfully installed the project on 02.05.2016 and both the parties signed the Joint Erection Completion Report on the same day. As per the details provided in the Application, the Corporate Debtor has made partial payments in response to the invoices submitted by the Operational Creditor but it has failed to pay the remaining amount of Rs.49,87,643/- and total outstanding dues as on 20.01.2020 has been shown at Rs.

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80,79,434/- in Part IV of the Application, which comprises of Principal sum of Rs. 49,87,643/- and interest of Rs. 30,91,792/- and further charging of interest at the rate of 18% p.a. till actual payment or realization as mentioned in the Application.

7. As stated in the Application, the Corporate Debtor vide letter dated 28.02.2017 requested the Operational Creditor to verify the outstanding balance recorded in the books of the Operational Creditor. In response, the Operational Creditor confirmed a debit balance amounting to Rs.50,22,426/-. Subsequently, on 09.05.2017, the Corporate Debtor sent an email requesting the Operational Creditor to extend the Performance Bank Guarantee in their favor. The Operational Creditor has provided a Performance Bank Guarantee for the period covering the execution of the agreement i.e. from 17.06.2016 till 30.05.2017.

8. It has been categorically stated in the Application that the Corporate Debtor did not invoke the Bank Guarantee as there was no default in the performance on the part of the Operational Creditor. It is also emphasized that giving of Performance Bank Guarantee proves the bonafide of the Operational Creditor and it

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also proves the fact that the Operational Creditor has fulfilled its all obligations.

9. It is also pointed out in the Application that both the parties have executed Joint Commissioning Report dated 07.10.2017 and thereafter, the Operational Creditor sent emails requesting for payment of outstanding amounts but the Corporate Debtor neither disputed its liability towards the outstanding operational debt nor any payment was made. Therefore, a Demand Notice was issued to the Corporate Debtor demanding a sum of Rs. 76,06,156/ including interest. On issuing of Demand Notice, reply filed by the Corporate Debtor raised certain frivolous allegation in the opinion of the Operational Creditor as stated by it in the Application. Thereafter, the Operational Creditor failing to realize its outstanding dues filed the present Application u/s 9 of the I&B Code, 2016 seeking initiation of CIRP against the Corporate Debtor.

**REPLY/COUNTER AFFIDAVIT ON BEHALF OF CORPORATE DEBTOR**

10. The Corporate debtor has filed Counter Affidavit on 04.04.2022 wherein it has denied all the allegations raised by the

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Operational Creditor in the Applications and has made followings submission in support of its claim.

i. After giving details of various projects executed by the Corporate Debtor and vast business being carried out not only in India but even in many foreign countries in the field of sugar manufacturing and engineering business, covering power transmission, water and waste treatment solutions, and defense sector, it has been submitted in respect of the present case that the Corporate Debtor engaged the Operational Creditor by issuing a Letter of Intent (LOI) dated 07.09.2015 in favor of the Operational Creditor for the work of designing, supplying, erecting, and commissioning the Multiple Effect Evaporation system to achieve the production and performance parameters by designing and installing plant and machinery with Multi Effect Evaporation with Thermal Vapor Recompression (TVR) for Bio-Methaned Spent wash treatment after the RO Plant. The design targets a treatment capacity of 1000 m<sup>3</sup>/day over a 20-hour operational period in their Alco Distillery. The system is designed to concentrate 52500 Kg/h (50000 LP, Sp. Gravity- 1.05) from an initial total solids content of 10% to obtain 17500 kg/h concentrate at a final concentration of

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30% Total Solids, with the water evaporation capacity of the evaporator set at 35000 kg/h.

ii. As further submitted by the Corporate Debtor, the scope of work in the present case includes the following: -

*a. Degasification system consisting of all accessories including DSI system Flash vessels, Flash vessel pump vacuum pump and cooling tower.*

*b. Evaporation system with 6 Nos. effects including Calandria, instrumentation pre-heating system, MCC panels, PLC and SCADA operating system and CIP system.*

*c. Design and drawing of steel structural complete with bill of materials.*

*d. Load data for civil Foundation.*

*e. Erection of above equipment including MCC*

*f. Erection, Commissioning, Performance trials and operation of above equipment with g. training to TEIL manufacturing team post trial and during season*

*h. Achieving guaranteed performance parameters.*

iii. The terms of payment specified in the Letter of Intent cum Order of Confirmation are as follows:-

*a. 10% advance against submission of advance Bank Guarantee;*

*b. 10% against receipt of complete layout Civil Structural Drawings and submission of un-priced P.O. for major items 60% against exchange of dispatch documents/ SSP shall submit Proforma Invoice of 7 days in advance.*

*c. 10% shall be released against submission of Performance Bank Guarantee on completion of supplies.*

*d. PBG shall be valid for 14 months of supply.*

*e. 10% shall be released after successful trial and commissioning within 45 days*

iv. Respondent-Corporate Debtor further contends that the Letter of Intent cum Order Confirmation explicitly outlines provisions for Late Delivery Penalty (LDC) in the case of delayed supply or completion, set at 1% per week, capped at a maximum of 5% of the order value. Consequently, a delay of five weeks would trigger a 5% penalty. However, the delay by the Operational

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Creditor (SSP) extends beyond this period. As per the mutually agreed terms between the Operational Creditor and the Corporate Debtor, the final installment payments were contingent upon the successful trial and commissioning, with a stipulated timeframe of 45 days. The original delivery schedule required all equipment to be supplied by 15.03.2016, with erection, commissioning, and successful trials to be completed by 25.04.2016.

v. It is further contended by the Corporate Debtor in the reply that the Operational Creditor failed to meet these deadlines, resulting in a default in the timely supply of goods and the successful erection and commissioning of all equipment by the specified date i.e. 25.04.2016.

vi. It has also been stated in the reply that the Corporate Debtor has been continuously highlighting the poor performance of the MEE, highlighting design flaws/shortcomings, excessive steam consumption, and issues with poor brix to both the Operational Creditor/SSP.

vii. It is further stated in the reply that the Corporate Debtor vide an email dated 02.01.2017 requested the Operational Creditor to

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personally investigate and promptly address the concerns related to the performance of the Multiple Effect Evaporation (MEE) system. Copy of the email dated 02.01.2017 has been annexed as **Annexure- C.A. - 3** with the Counter Affidavit/Reply. Thereafter, vide another email dated 31.01.2017, the Corporate Debtor informed the Operational Creditor regarding the fuel wastage (15.12.2016 to 31.01.2017) due to excess steam consumption in MEE about 1876 Kg /hr. which resulted into total steam loss of 2026080 Kgs in 45 days. This led to an additional cost for the company, amounting to Rs 1.1 per kilogram of steam, totaling approximately 22.28 lakhs. Despite incurring this additional expense, the Corporate Debtor was unable to achieve the targeted brix of 30% from the Multiple Effect Evaporation (MEE). Instead, the attained output brix fell short, reaching only around 16% as against the desired brix of 30%. Copy of email dated 31.01.2017 has been annexed as **Annexure C.A-4** with the Counter Affidavit/Reply.

viii. Corporate Debtor also contends that vide another email dated 01.02.2017, it informed the Operational Creditor that MEE is not performing as per the agreed design due to its faulty design which

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is evident from the steam consumption was 7500 kg @33 m<sup>3</sup>/hr. feed rate, which was very high. MEE was running maximum up to 33 m<sup>3</sup>/hr. feed flow against the design flow of 50 m<sup>3</sup>/hr. This is leading to additional fuel loss which is a direct loss to the Corporate Debtor. Because of the fault in MEE, Membrane India was not able to commission their plant. Copy of the email dated 01.02.2017 has been annexed as **Annexure- C.A. - 5** with the Counter affidavit.

ix. Further it is pointed out that the GM (D) of the Corporate Debtor vide another email dated 02.02.2017 informed to the Operational Creditor about the plant not being commissioned for a long time causing huge loss to the Corporate Debtor on fuel consumption on daily basis due to ineffective working of MEE. The Corporate Debtor also made a request to complete the plant at the earliest. Copy of the email dated 02.02.2017 has been annexed as **Annexure- C.A. - 6** with the Counter Affidavit/Reply. Corporate Debtor vide another email dated 15.02.2017 requested the Operational Creditor to analyses the MEE performance and do the needful as the top management of the Corporate Debtor was seriously concerned due to ineffective working of the plant. Copy

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of the email dated 15.02.2017 has been annexed as **Annexure-C.A.-7** to the Counter Affidavit/Reply.

x. The Corporate Debtor vide emails dated 05.04.2017 and 07.04.2017 informed the Operational Creditor about deficiencies in the plant's performance stating that plant was operating at 70% capacity with a lower percentage of solid output (18-20%). The lower percentage of solids led to increased evaporated water and condensate quantity, creating a critical situation. The existing control processing unit (CPU) was unable to handle this situation effectively. The Corporate Debtor urgently requested to conduct an inspection and take immediate measures to be to rectify these issues, ensuring that the plant could operate at its rated capacity and meet efficiency parameters. Copy of the emails dated 05.04.2017 and 07.04.2017 has been annexed as **Annexure- C.A.-8** to this affidavit.

xi. The Corporate Debtor in its reply by giving the details of above communications made with the Operational Creditor about the unsatisfactory performance of the plant erected by the Operational Creditor , emphasized that despite making repeated efforts and maintaining continuous communication with the Operational

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Creditor, the situation persisted without any improvement in the performance of the MEE and then to its utter surprise, on 23.08.2017, officials of the Operational Creditor abruptly left the site without providing any prior notice or information about their departure. In this regard, the Corporate Debtor informed the Operational Creditor vide an email dated 04.09.2017 that the commissioning team had departed from the site without completing the commissioning process and handing over the Multiple Effect Evaporation (MEE) system to the operating team of the Corporate Debtor. The Corporate Debtor further conveyed that during the period from December 2016 to September 2017, the plant operated at the risk and cost of the Operational Creditor. During this time frame, the Corporate Debtor incurred substantial steam losses due to the Operational Creditor's failure to provide any effective remedy to mitigate steam loss. Moreover the Operational Creditor's team left the site without updating the Corporate Debtor's operating team about any improvements in the MEE's performance. Copy of the email dated 04.09.2017 has been annexed as **Annexure- C.A.-9** with the Counter Affidavit/Reply.

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xii. The Corporate Debtor further stated in the reply that it conducted a performance trial from 23.09.2017 to 26.09.2017 of the MEE in plant using RO reject. In this regard, further communication with the Operational Creditor was made vide email dated 26.09.2017 and 29.09.2017 respectively informing *inter alia* that they had failed to meet the design performance specified in the Purchase Order (PO) terms, a comparison between the design parameters and the actual parameters achieved during the trial, providing a clear overview of the disparities to the Operational Creditor and highlighting the problems related to the degasification system provided and very high steam consumption in MEE. Copies of the email dated 26.09.2017 and 29.09.2017 have been annexed as **Annexure- C.A.- 10** and **Annexure-C.A.- 11 respectively** with the Counter Affidavit/Reply.

xiii. Respondent-Corporate Debtor also contends that despite numerous requests from the Corporate Debtor, the Operational Creditor refused to provide the technical details of the MEE. The Corporate Debtor vide email dated 23.11.2018 categorically informed that withholding of technical details by the Operational Creditor had left them unable to release the payment. Copy of the

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email dated 23.11.2018 has been annexed as **Annexure- C.A.-12** with the Counter Affidavit/Reply. In the Joint Inspection Report dated 07.05.2016, it is specifically mentioned that the plant is not running satisfactorily and the output provided are not meeting the standard as per PO. Copy of the Joint Inspection Report has been annexed as **Annexure C-A-13** with the Counter Affidavit/Reply.

xiv. As per the terms of payment, the Corporate Debtor was liable to make the payment towards last instalment within 45 days from successful trial and commissioning. As per the Corporate Debtor as explained in the written submission, the plant was never commissioned as per the given specifications in the Purchase Order. From para 39 to para 41 of its reply, the Corporate Debtor explained in details various design defects in MEE plant not giving the desired outputs, therefore causing operating losses to the corporate Debtor . It is mentioned in para 42 of the reply that the Corporate Debtor suffered the loss of approx. Rs. 11.5 crores (Rs. 22.28 lacs due to higher steam consumption and Rs. 11.3 crores due to production loss). It is also contended by the Corporate Debtor that due to unprofessional attitude of the Operational Creditor and defective working of project, Corporate Debtor

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suffered huge loss which is solely attributable to the Operational Creditor. Therefore, the Corporate Debtor withheld the payment towards last instalment.

xv. In terms of the purchase order, the Corporate Debtor requested the Operational Creditor to extend the performance guarantee by one year beyond 20.05.2017. However, the Operational Creditor extended the performance guarantee only for six months, expiring on 30.11.2017. Despite the Corporate Debtor's subsequent request for an additional six-month extension due to persistently subpar performance parameters compared to the designed and committed specifications, the Operational Creditor declined to extend the performance guarantee. Consequently, the Corporate Debtor withheld 10% of the payment, as stipulated in the purchase order terms, as a retention towards the performance guarantee. Copy of the emails by Corporate Debtor asking for extension of Performance Bank Guarantee are annexed as **Annexure- C.A. - 16** with the Counter Affidavit.

xvi. As stated in para 43 of the reply that due to continuous failure of MEE, the Corporate Debtor had placed the retrofit of MEE by the order dated 15.06.2018 to M/s Vapco Engineers. Copy of

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the issuance of LOI cum order by the Corporate Debtor to M/s Vapco Engineers dated 15.08.2018 has been enclosed as **Annexure C.A.-15** with the Counter Affidavit/Reply. It is also mentioned that the M/s Vapco (MEE supplier) & M/s Avant Garde have also highlighted the shortcomings in the MEE in their letters. Copy of the letters by M/s Vapco & M/s Avant Garde has been annexed as **Annexure- C.A.- 17** with the Counter Affidavit/Reply.

xvii. The Corporate Debtor in its reply has also raised the point about the present Application being barred by limitation pointing out that as per the schedule of payment final payment was required to be made after successful trial and commissioning of the plant. The plant was not commissioned completely. The part payment was made to the operational creditor on 10.08.2016. The present applicant under section 9 has been filed on 24.02.2020 which is beyond the period of limitation expired on 09.8.2019. Therefore, the said application is barred by limitation and is liable to be dismissed.

xviii. The Corporate Debtor has also showed that it is a reputed and a solvent company and earning profits. In supports of its claim, the financial statement for the year ending on 31<sup>st</sup> March

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2021 has also been attached in **Annexure -C.A.-18** with the Counter Affidavit/Reply showing that the Corporate Debtor has earned income of Rs. 273 crore post tax and total assets of the company, current as well as non-current are Rs.3457.49 crore and for that financial year, the company has paid interim dividend of 125% and final dividend of 175%. Thus, the Corporate Debtor after presenting all the relevant facts showed that the outstanding debts shown in the application is not paid not because of any financial difficulties faced by it in payment of lawful genuine demand of the Operational Creditor but due to pre-existing disputes with the Operational Creditor in view of the poor quality of work done in manufacturing of plant resulting into it not being getting successfully commissioned due to which it also suffered huge operational losses. It is also argued that in the light of test of “existence of a dispute” settled by the Hon’ble Apex Court, it is clear that without going into the merits of the disputes, the Corporate Debtor in the present case has raised a plausible contention requiring further investigation which is not patently feeble legal argument or an assertion of facts unsupported by evidence. The defense set up by the Corporate Debtor is not spurious, mere bluster, plainly frivolous or vexatious and a dispute

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does truly exist in fact between parties, which may ultimately succeed. It is also emphasized that from the facts of the instant case, it would appear that despite the claim of the Operational Creditor has been *bonafidely* disputed by the Corporate Debtor, the Operational Creditor has initiated the instant proceeding only with a malicious intent to put pressure on the Corporate Debtor to settle the *bonafide* disputed claim. Therefore, as contended by the Corporate Debtor, in view of facts and circumstances of the case as explained by it in the reply , there is existence of pre-existing dispute as regards the outstanding debts shown in the application filed u/s 9, therefore the present application may be dismissed *in limine* .

### **REJOINDER ON BEHALF OF THE OPERATIONAL CREDITOR**

11. The Operational Creditor has filed rejoinder on 13.12.2022 in response to the averments made by the Corporate Debtor in his Rejoinder and has made following submissions: -

i. Operational creditor contends that officials of the Applicant Company left the site after completion of all the works the Corporate Debtor itself acknowledged the completion of the works before the Operational Creditor's departure from the Project Site.

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Mr. Lakhvinder Gaur, the Corporate Debtor's representative, expressed gratitude in a reply email dated 23.08.2017 to the Operational Creditor for their cooperation and support. Moreover, the Corporate Debtor's representative affirmed the satisfactory performance of the MEE plant at the input effluent quality (Refer to Annexure-A14 on Page No. 132 of the Application). Thus, the plea taken by the corporate debtor that official left the site on 23.08.2017 without any intimation is false.

ii. With respect to commissioning of the plant, the Operational Creditor contends that plant was successfully commissioned at the site of the Corporate Debtor. Moreover, the Corporate Debtor vide email dated 23.08.2017 (Kindly refer page 132 of the Petition) had acknowledged and confirmed that the plant commissioned by the Operational Creditor was performing well.

iii. Thereafter, the Commissioning Engineer from the Operational Creditor's team concluded their assignment at the Corporate Debtor's location on 26.09.2017, following the proper commissioning process and a performance product trial conducted from 23.09.2017 to 26.09.2017. Additionally, a Joint Commission Report was presented on 07.10.2017, documenting that the plant

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was operating satisfactorily, meeting the rated capacity as per purchase order. Subsequently, the plant was officially handed over to the Corporate Debtor for continuous operation. (Kindly refer Annexure – A/8 on Page No. 110-A of the Application).

iv. With regard to performance of the Plant, Operational Creditor contends that from the outset, the Corporate Debtor failed to provide the specified feed quality outlined in the Purchase Order conditions, in accordance with the plant requirement. Despite the Operational Creditor's efforts to persuade the Corporate Debtor to provide the correct feed quality, no initiative was demonstrated by the Corporate Debtor to address the TSS level in the feed product. On the contrary, following the successful commissioning of the plant, the Corporate Debtor sought assistance from the Operational Creditor on multiple occasions which was provided in good faith post commissioning of the plant.

v. With reference to the consumption of fuel, it is stated that desired steam for smooth functioning of the plant was not provided by the Operational Creditor. Instead of the anticipated 5624 kg/hr, the plant was utilizing only 5426 kg/hr of steam. In addition to this, instead of the expected 125 units of electrical power

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consumption, the plant recorded only 113 units. Consequently, the plea of additional fuel consumption causing losses to the Corporate Debtor is false.

vi. The Operational Creditor sent various e-mails dated 27.11.2018, 17.12.2018, 18.12.2018, 12.02.2019, 25.02.2019 and 28.02.2019 for releasing the outstanding payment and set up a meeting for discussion on clearance of invoices of the Operational Creditor. The Corporate Debtor did not respond to any of the aforesaid emails of the Operational Creditor. Moreover, the Corporate Debtor did not raise any pre-existing dispute before the issuance of demand notice dated 10.07.2019 and reply dated 22.7.2019 sent by the corporate debtor contains false averments.

12. The Operational Creditor in compliance of order dated 18.12.2022 passed by this tribunal filed written submissions wherein averments made in the Rejoinder has been reiterated and has been taken on record by this tribunal. The Corporate Debtor has also filed written submission in support of his averments which has been taken on record.

## **FINDINGS AND ORDER**

13. We have heard the arguments of Ld. Counsels of the Applicant/Operational Creditor as well as the Respondent/Corporate Debtor and perused all the submissions made by the both parties as discussed in foregoing paras.

14. The Applicant has been found to be aggrieved because of not receiving the full payments for the work done by it for the Corporate Debtor therefore, an application u/s 9 has been filed by it before this Tribunal mentioning the total amount of the operational debt in default in Part-IV of the application at Rs. 80,79,435/- from 11.08.2016 to 20.01.2020 which comprises of the principal outstanding amount of the bills raised by it coming to Rs. 49,87,643/- plus interest of Rs. 30,91,792. In Part-IV of the application, date of default has been mentioned as 10.08.2016. Before filing of this application, the Applicant/Operational Creditor had also issued and served a notice of demand u/s 8 of the I&B Code, 2016 dated 10.07.2019 in Form-3 mentioning the default amount of Rs. 76,06,156/-calculated from 11.08.2016 to 10.07.2019.

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15. The Ld. Counsel representing the Corporate Debtor has raised objections against the present petition inter alia on the grounds of preexisting dispute as well as the petition being time barred.

16. As regards to the pre-existing dispute, the Ld. Counsel representing the Operational Creditor stated that there is no pre-existing dispute in the present case, in view of the fact that the balance 10% was required to be paid on successful commissioning of the plant as in accordance with the contract for multiple effect evaporator certain parameters were required to be observed so as to maintain functionality of the plant. According to him, these parameters have been stipulated in the technical specification attached with the work contract particularly relating to the feed rate being 52,500 kilogram per hrs., feed PH value ranging from 7-7.5 etc. Therefore, the 10% payment was to be made on commissioning of the project upon meeting the aforesaid parameters. He relied upon the schedule of payment clause mentioned at Page 59 of the Contract the last payment required to be made being 10% to be released after successful trial and commissioning within 45 days. He also relied upon a Joint

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Commissioning Report jointly issued by both the parties dated 07.10.2017 (placed at Page No.48/49 with the counter reply filed on behalf of the Corporate Debtor) wherein there is a remark written by the Corporate Debtor that “The plant is (not) running satisfactorily with rated capacity as per PO norms”. According to him, the “not” word has been incorporated by the Corporate Debtor as not being originally typed in the proforma for certifying the commissioning jointly by both the parties.

17. Per contra, the Ld. Counsel representing the Corporate Debtor stated that there is a pre-existing dispute in the present matter. He also relied upon the payment terms as contained in the work order concerning the price schedule, terms and conditions stipulated at Page 86 of the Application filed under Section 9. As per the payment terms for supply, it is stipulated that the 10% payment is to be made within 45 days of successful commissioning. He raised through several mails to the Operational Creditor bringing about the fact of plant not being functional. He also referred to the Joint Commissioning Report, (attached at Page 48 of the Counter Affidavit).

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18. It is stated by him that the Joint Commissioning Report has prescribed a pre-printed format, which subscribed the sentence as “the plant is running satisfactorily with rated capacity as per PO norms and handed over to M/S Triveni Engineering & Industries Pvt. Ltd. for continuous operations”. The Ld. Counsel representing the Corporate Debtor stated that there was specific correction made in this pre-typed format by inserting the word not duly endorsed by the Corporate Debtor. Further, the term contained in this pre-typed format relating to the handed over for continuous operations were also striked out and duly endorsed by signatures. In this manner, after the amendment made the language of the joint commissioning report read as “the plant is not running satisfactorily with rated capacity as per PO norms”.

19. He also submitted that it was categorically written in hand in the lower part of the Joint Commissioning Report wherein it is mentioned that “plant is not running satisfactorily and the output provided are not meeting the standard as per PO terms. Therefore, according to him the Corporate Debtor has never certified that the commissioning was done satisfactorily. He also further relied on the Joint Erection Completion Report dated 07.05.2016 (annexed

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as Annexure A-8 (Colly) at page 109 of the Application) wherein the Corporate Debtor has specifically made “Ticks” under the column “not complete” with respect to “*Fabrication& Erection of Inter-connecting pipelines & Fittings as per P&I & Isometric/ 3D Drawing*”.

20. The Ld. Counsel representing the Corporate Debtor also stated that once the Joint Commissioning Report was signed in the manner as stated above where the Corporate Debtor has specifically stated that the plant is not running satisfactorily, there was no rebuttal made by the Operational Creditor nor any claim was raised by the Operational Creditor for over an year until when the Corporate Debtor himself sent e-mail for proper addressing the technical issues and also demanded the technical details from the Operational Creditor. It is also the case of the Corporate Debtor that due to the fact that the technical team of the Operational Creditor left the site on 23.08.2017 as per one of the e-mail sent by the Corporate Debtor on 04.09.2017, the Corporate Debtor had to get the remaining work done by engaging the third party agency on the risk and cost of the Operational Creditor. In this context, a work order dated 15.06.2018 regarding retrofitting of existing MEE was also issued by the Corporate Debtor to M/S Vapco Engineers,

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a copy of which has also been attached as **Annexure-CA-15** with the Counter Affidavit.

21. In view of aforesaid submissions, it is thus evident that there is a pre-existing dispute even much prior to the issuance of the Section 8 notice dated 10.07.2019 and such pre-existing dispute was raised independently by the Corporate Debtor on several previous occasions which largely remained unrebutted on the part of the Operational Creditor.

22. The Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Limited v. Kirusa Software Private Limited, Civil Appeal No. 9405 of 2017 dated 21.09.2017**, has held as extracted below, laying down the guiding principles for examining the conditions before admitting any application u/s 9 especially with respect to finding out whether any genuine and real pre-existing dispute is discernible in a particular case or not

*" 24. 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*

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*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. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a*

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notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso (Section 9(5)(ii)(a)). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b)), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c)). It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility (Section 9(5)(ii)(d)). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected (Section 9(5)(ii)(e)).

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

(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

***(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?***

***If any one of the aforesaid conditions is lacking, the application would have to be rejected.*** Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

XX  
XXXX

40. 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 Company Appeal (AT) (Ins.) No. 51 of 2023 8 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.***"

**(Emphasis Supplied)**

23. Viewed from the above guiding principles in the present case as discussed in paras 16-21 above, there is an existence of the pre-existing dispute which could not be controverted by the Operational Creditor with any credible evidence showing that the outstanding demand is undisputed and accepted by the Corporate Debtor and only its payment is being delayed , therefore we are of considered opinion that existence of such pre-existing dispute has disentitled the Operational Creditor for seeking any claim under Section 9 as per the mandate of the Code.

24. It is also worth to note that the Corporate Debtor is profit earning and dividend paying solvent company as it has been discussed in para 10(xviii) of this order and such solvent company cannot be subjected to CIRP for non-payment of a disputed demand. In this regard also, the Hon'ble Supreme Court in case of ***M/S S.S. ENGINEERS & ORS. Versus HINDUSTAN PETROLEUM CORPORATION LTD. (CIVIL APPEAL NO. 4583 OF 2022; July 15, 2022)*** has held as under:

*“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for nonpayment of disputed dues claimed by an operational creditor.*

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

**(Emphasis Supplied )**

Thus, the outstanding debt being disputed and the Corporate Debtor being a solvent company, the present Application is not maintainable.

25. As regards the second plea of the Corporate Debtor for the present application being time barred, it may be seen from the part IV of the Application that the date of default mentioned is 10<sup>th</sup> August, 2016 and the present petition has been filed on 24<sup>th</sup> February, 2020. An objection has been raised by the Ld. Counsel representing the Corporate Debtor that the present petition/application is time barred as the date of default mentioned is 10<sup>th</sup> August, 2016 and the petition has been filed after a period of three years.

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26. In the reply filed by the Corporate Debtor, it is averred that the Operational Creditor has failed to explain how the application is within limitation when seen from the point of view of the date of default as being 10<sup>th</sup> August, 2016 when the part payment was released.

There is no specific rebuttal in the rejoinder filed by the Operational Creditor to the averments/objections raised by the Ld. Counsel representing the Corporate Debtor in its reply as well as during the course of arguments. The present petition, therefore as well is also liable to be dismissed for being time barred.

27. Accordingly, the petition CP (IB) No.95/ALD/2020 filed by the Operational Creditor u/s 9 of the I & B Code, 2016 is hereby **dismissed on both grounds as there being pre-existing dispute as well as being time barred.**

-Sd-

**(Ashish Verma)**  
**Member (Technical)**

-Sd-

**(Praveen Gupta)**  
**Member (Judicial)**

**Date 30.01.2024**

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