



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

CP (IB) No. 108/9/JPR/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

Saudi Basic Industries Corporation (SABIC)

... Applicant/Operational Creditor

Versus

Prayag Polytech Pvt. Ltd.

... Respondent/Corporate Debtor

MEMO OF PARTIES

Saudi Basic Industries Corporation (SABIC)

PO Box 59090

Riyadh 11525

Saudi Arabia

... Applicant/Operational Creditor

VERSUS

Prayag Polytech Pvt. Ltd.

C-587, Phase-1, Industrial Area,

Bhiwadi Alwar, Rajasthan 301019

(CIN U28994RJ1982PTC012328)

... Respondent/Corporate Debtor

For the Operational Creditor

: Jaideep Singh, Adv.

Kanupriya Singh, Adv.

For the Corporate Debtor

: Virender Ganda, Sr. Adv.

Amodini Raina, Adv.

Bhaskar, Adv.

Ayandeb Mitra, Adv.

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Order Pronounced On: 22.02.2023

Per: Shri Prasanta Kumar Mohanty, Technical Member

1. The Application has been filed by the Applicant/Operational Creditor, i.e. M/s Saudi Basic Industries Corporation (SABIC), Riyadh under Section 9 of the Insolvency and Bankruptcy Code 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 seeking initiation of Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor, namely, M/s Prayag Polytech Pvt. Ltd.
2. The Applicant/Operational Creditor namely, **SABIC** is having its Registered Office in Al Qordoba Districtat P.O Box 5101 postal code 11422. Mr. Alok Kumar Basera, having address at 10th Floor, Ambience Corporate Tower II, Ambience Island, Gurugram-122001 is the Power of Attorney Holder of the Applicant. The address of correspondence for the Applicant is at C/o Mr. Jaideep Singh, Durana House, 538, Hanuman Nagar, Extension, Vishwamitra Mary, Sirsi Road, Jaipur 302021.
3. The Respondent/ Corporate Debtor, namely M/s Prayag Polytech Pvt. Ltd, was incorporated on 16.08.1982 with CIN- U28994RJ1982PTC012328. The Registered Office of the Corporate Debtor is situated C-587, Phase-1, Industrial Area, Bhiwadi, Alwar, Rajasthan 301019. The Nominal Share Capital of the company is Rs. 15,00,00,000/- (Rupees Fifteen Crore only)

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and the paid-up share capital is also Rs. 7,94,93,700/- (Rupees Seven Crore Ninety-Four Lakhs Ninety-Three Thousand Seven Hundred only).

4. It is submitted by the Applicant that;

4.1 The Applicant / Operational Creditor and Corporate Debtor entered into a Sale Order Reference No. 02/5522 for purchase of 519.75 metric tons of certain goods (more particularly described in the Sale Order) subject to certain terms and conditions of Sale. Delivery CIF PIPAVA PORT

4.2 As per the Sale Order, the payment for the purchase price of the goods had to be made within 90 days from the B/L date. The goods were delivered on time to the Corporate Debtor and the Corporate Debtor duly accepted the same.

4.3 There has been no dispute of any nature regarding the quality and/or quantity of these goods. The Applicant/Operational Creditor raised an Invoice No. 200157677 dated 06.06.2017 upon the Corporate Debtor for an amount of USD 403,920. The due date under the said Invoice was 04.09.2017. The Corporate Debtor on being repeatedly requested by the Applicant/Operational Creditor made part payment for an amount of USD 276,580 to the Applicant/Operational Creditor.

4.4 The Applicant/Operational Creditor sent several emails to the Corporate Debtor requesting the Corporate Debtor to clear all

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outstanding dues. However, the Corporate Debtor failed and neglected to make payment of the balance outstanding amount.

4.5 Therefore, the Corporate Debtor is liable to pay the balance outstanding amount of USD 127,340 along with interest at 12% p.a. till the payment and/or realization.

5. On the other hand, the Respondent/Corporate Debtor submits that:

5.1 The Present Application under Section 9 filed by the Applicant is devoid of any substance and merits and hence it is not maintainable and the same is liable to be dismissed with exemplary costs.

5.2 There is no claim within the meaning of Section 3(6) of the Code:

I. The Applicant had deliberately adduced an incomplete sales contract. However, the Applicant has very cleverly omitted to attach such integral part of the Sales Contract. The nature of the transaction is referred to as an open account as the invoices against the supply of goods are routed through bank. The conclusion of such transaction entirely hinges upon the communication of acceptance of goods to the seller's bank i.e. the beneficiary bank through a swift message. The Respondent however has not communicated such acceptance because the goods supplied by the Applicant suffered from grave infirmities owing to which the Respondent incurred substantial losses, as the said goods were not within the specified range of the Melting

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Floor Index leading to an inadequate blending of the colouring pigment, which is added to the product manufactured by the Respondent. The said defect resulted in failure of the plastic granules to generate the desired effect. Further the said defect/deficiency was beyond the scope of detection for want of an in-house testing facility.

In sum and substance therefore the transaction to which the invoice pertains has not matured into a 'claim' within the meaning of Section 3(6) of the Code.

- II. The invoices are immediately raised upon the expiry of the shipment schedule which is specified in the Sales Contract. The shipment schedule expires in April 2017 as per the annexed Sales Contract and the annexed invoice is dated 06.06.2017. The delayed shipment amounts to breach of a material obligation under the Sales Contract. Further, the goods to be supplied to the Respondent were only partially delivered and this can be evidenced from the fact that the quantity/units of the goods to be supplied to the Respondent as per the Sales Contract are not equivalent to the quantity/unit of goods against which the corresponding invoices were raised under the Sales Contract. The partial delivery was inadequate to fulfil the set requirements

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of the Respondent and thereby the Respondent was constrained to reject the goods supplied by the Applicant.

It is for the aforesaid reason that the Respondent did not communicate its acceptance of the goods supplied by the Applicant and as already pointed out and established above the transaction to which the invoice pertains has not matched into a claim within the meaning of Section 3(6) of the Code.

- 5.3 *The Applicant has failed to establish 'default' within the meaning of Section 3(12) of the Code:* The Applicant has relied upon several letters of acknowledgment to buttress their alleged claim.
- 5.4 The Respondent had reported severe quality issues as to the polymer supplied by the Applicant including the non-specified range of the melting flow index and the imperfect matrix that was conveyed by the Respondent to the Applicant vide its email dated 06.04.2019. Subsequently, the Respondent received the demand notice dated 03.04.2019, which was received by the Respondent on 06.04.2019 after sending the email dated 06.04.2019 which essentially demonstrates the existence of dispute between the parties. The said demand notice was duly replied by the Respondent on 19.04.2019, reiterating the dispute raised vide email dated 06.04.2019.
- 5.5 The goods supplied by the Applicant suffered from grave infirmities owing to which the Respondent incurred substantial losses as the said

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goods were not within the specified range of the Melting Flow Index leading to an inadequate blending of the colouring pigment which is added to the product manufactured by the Respondent. The said defect resulted in failure of the plastic granules to generate the desired effect. It is further pertinent to note that the said defect/ deficiency was beyond the scope of detection for want of an in-house testing facility. However, as and when the Respondent was apprised of the said defect from its customers, the Respondent had duly intimated the Applicant on call.

5.6 The Respondent suffered consequential losses from the sale of the deficient goods, manufactured using the defective raw material supplied by the Applicant and the same was reported by the customers of the Respondent.

5.7 The Applicant has arbitrarily claimed an interest of 12% without any basis. There is not even a remote mention of the interest either in the invoices or in the Sales Contract.

5.8 Hence, it is prayed that the present petition under sec. 9 be dismissed with exemplary costs.

6. Further, the Respondent/Corporate Debtor has filed an Interim Application bearing *IA(IBC)No. 139/JPR/2022* under Section 65 and Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016, seeking directions of this

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Hon'ble Tribunal for dismissal of the present Insolvency Petition on the additional facts and circumstances provided and hold the Petitioner liable for malicious prosecution. The Respondent in its IA submits that:

- 6.1 The Respondent/Applicant was recently apprised of the fact without prejudice that the amount claimed by the Petitioner/Non- Applicant in the Insolvency Petition was covered under the insurance policy availed by the Petitioner/Non-Applicant by Atradius Collections and accordingly the payments under claim have already been paid by Atradius to the Petitioner/Non-Applicant.
- 6.2 Since, the Petitioner/Non-Applicant has already received the payment against the purported invoices from Atradius on which the entire case of the Petitioner/Non-Applicant is based on, the Petitioner/Non-Applicant has no right to claim any outstanding dues and the cause of action, if any in favour of the Petitioner/Non-Applicant does not survive. In any case, Atradius cannot step into the shoes of the Petitioner in the present matter.
- 6.3 In light of the above fact, Atradius (through the Petitioner/Non-Applicant) has actually approached this Hon'ble Tribunal, even though it has not come on the forefront, by way of this Insolvency Petition for the purpose of recovery and not with an aim of initiating Corporate Insolvency Resolution Process. Accordingly, the

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Respondent is seeking malicious prosecution vide this Application against the Petitioner.

6.4 The Petitioner/Non-Applicant has deliberately not made any mention of Atradius in the Insolvency Petition filed by them and has concealed the aforementioned fact from this Hon'ble Tribunal.

6.5 A perusal of Section 65 of the Code makes it abundantly clear that Hon'ble Tribunal is empowered to dismiss this Insolvency Petition with maximum permitted penalty, on account of the malicious intent of the Financial Creditor herein, the Petitioner/Non-Applicant for having initiated this proceeding with active concealment and omitting material facts with the intent of misguiding this Hon'ble Tribunal and extort money from the Corporate Debtor, herein the Respondent/Applicant.

6.6 In view of the same, the Petitioner/Non-Applicant has no right to claim any liability from the Respondent/Applicant since the Petitioner/Non-Applicant has already received all the dues.

6.7 Therefore, it is amply clear that since the Petitioner/Non-Applicant has already received the payment claimed under the purported invoice, the Insolvency Petition filed by the Petitioner/Non-Applicant does not stand.

6.8 Hence, the Respondent/Applicant respectfully prays that the Hon'ble Tribunal may be pleased to dismiss the Insolvency Petition of the

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Petitioner/Non-Applicant with maximum permissible penalty and hold the Petitioner/Non-Applicant liable for malicious prosecution under Section 65 of the Insolvency and Bankruptcy Code, 2016.

7. The Applicant/Operational Creditor vide its Affidavit in Reply to the Interim Application filed by the Corporate Debtor under Section 65 of the Code, submits that:

7.1 The Operational Creditor had entered into an insurance policy dated 01.01.2018 being the Policy No. 601846 with Tawuniya for the period of 24 months valid up to 31st December, 2019. Under the said Policy, Tawuniya (being the insurer) covers the losses incurred by the Operational Creditor in case of non-payment/default by the Applicant. Copy of Insurance Policy No. 601846 has been annexed.

- 7.2 The relevant clauses of the Policy are as follows:

“Clause No. (00500.00) Protracted default:

For the purpose of this policy, the Covered Cause of Loss Protracted Default shall mean the failure of a Buyer to pay the receivable within the waiting period specified in the Policy schedule.

If the Schedule of Countries specifies a longer waiting period for the country of the Buyer, this shall be the applicable waiting period.

The waiting period commences on the original due date of payment of the receivable. For this Covered Cause of Loss, the Date of Loss shall be the date on which the applicable waiting period expires.

Loss prevention and debt collection: clause No. (20100.00)

Action to minimise loss

In all your dealings with the Buyers, you must use due care and diligence as if you are uninsured. You must take all practicable measures to effect payment of the amount owing

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from the Buyer and to prevent and minimise the loss. This includes, without limitation, ensuring that all rights against contract goods, Buyers and third parties are properly preserved and exercised. You must also take all steps that we may require in connection with a potential or actual loss- either before or after indemnification- including the institution of legal proceedings.

Claims: clause No. (63375.00)

Allocations of Payments

All amounts received by you, by any person acting on your behalf or by us before the Date of Loss shall for the purpose of the policy be allowed to all receivables due from the same Buyer in chronological order of due dates.

All amounts received by you, by any person acting on your behalf or by us after the Date of Loss shall first be allocated to any costs incurred by us in relation to the same Buyer, until we are fully indemnified for such costs and thereafter divided between you and us in the proportion in which the loss is borne by each of us. You must notify us immediately of the receipt of such amounts.

Clause No. (21310.00) Amounts Held in trust

All amounts received by you or by any person acting on your behalf after the Date of Loss should immediately be remitted to us. Until this remittance is made, you hold such amounts in trust for us."

- 7.3 The Applicant has defaulted in payment under the invoices issued upon them. Thereafter, the Operational Creditor submitted their claim to Tawuniya providing the relevant information along with the invoices raised upon the Applicant. Upon assessing the claims, Tawuniya found out that the claim of the Operational Creditor is valid and the Applicant has failed to make the payment. Thus, Tawuniya made full and final payment for an amount of USD 127,340 to the Operational Creditor and issued a claim offer letter dated 23.10.2018.

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The said offer letter was duly accepted by the Operational Creditor. In the said letter, **it was categorically mentioned that all the monies received from the Applicant are to be held in trust for Tawuniya** and must be paid to Tawuniya as soon as practical.

7.4 In light of the above-mentioned terms and conditions of the Policy, it was an obligation of the Operational Creditor to initiate legal proceedings against the Applicant to recover the outstanding debt even after the indemnification of the Operational Creditor. Further, there was no letter of subrogation executed between Tawuniya and the Operational Creditor. Thus, the Operational Creditor is entitled to file the present petition and the present application is erroneous and frivolous filed with an intent to delay the insolvency proceedings. The right to sue continues with the Operational Creditor, in law and contractually.

7.5 The Operational Creditor's claim for an amount of USD 127,640 qualifies to be as a debt under section 3(11) of the Code. Thus, the present application taken out by the Applicant is not maintainable and holds no merits in fact and law.

7.6 It was an obligation of the Operational Creditor to initiate legal proceedings against the Applicant in case of default even after the indemnification. The Operational Creditor denies that all the communication with respect to the non-payment of the invoices were

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sent by "Atradius" to the Applicant as alleged or at all. The Operational Creditor denies that it had engaged Tawuniya for the purposes of Finance management of the Operational Creditor as alleged or at all. The corporate debtor was well aware about the email dated 09.04.2019. However, the Corporate Debtor had remained silent about the said email till date, and has now taken out the present application at a belated stage to delay the present proceedings.

- 7.7 The Operational Creditor states that the invoices were raised by them and not by Atradius. The Applicant vide their several emails as annexed to the Petition has admitted their liability towards the Operational Creditor. The Operational Creditor denies that they have no right to claim any outstanding dues or cause of action against the Applicant as alleged or at all.
- 7.8 The Operational Creditor states that there was no letter of subrogation executed with Atradius or with Tawuniya. Under the Policy, it is categorically mentioned that it is an obligation of the Operational Creditor to initiate appropriate legal proceedings against the Applicant even after the indemnification of the Operational Creditor. Thus, Tawuniya cannot approach this Hon'ble Tribunal directly or as an attorney of the Operational Creditor.

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7.9 The Operational Creditor denies that they have deliberately not made any mention of Tawuniya in the Insolvency Petition as alleged or at all.

7.10 In view of the aforesaid circumstances, the Operational Creditor humbly submits before this Hon'ble Tribunal be pleased to dismiss the present Interim Application with cost.

8. In accordance with our last order dated 07.11.2022, the Applicant further submits that:

8.1 The Applicant and the Respondent entered into a Sale Order Reference No. 02/5522 for purchase of 519 Metric Tons of (24.75 MT LLDPE SABIC R50035, 49.50 MT LDPE SABIC HP 4024WN, LDPE SABIC HP20023 & LLDPE M500026), (the goods) on the terms and conditions as more particularly set out therein.

8.2 The good was delivered on time to Respondent and there has been no dispute of any nature regarding the quality and/or quantity of the goods/product.

8.3 Thereafter, the Applicant raised an Invoice No. 200157677 dated 06.06.2017 upon the Respondent for an amount of USD 403,920 (Invoice). The due date under the said Invoice was 04.09.2017. Vide an email dated 24.08.2017, the Applicant informed the Respondent that the said Invoice would be outstanding on 03.09.2017. Vide an email dated 11.09.2017, the Applicant provided details of various

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outstanding invoices including the present Invoices for payment and requested to provide a letter with a schedule of payments.

8.4 The Applicant/Operational Creditor sent following emails to the Corporate Debtor requesting the Corporate Debtor to clear all outstanding dues:

- i. Vide an email dated 15.09.2017, the Applicant once again requested the Respondent to update on the status of payment. In response to the said email, vide an email dated 15.09.2017 the Respondent replied stating that they were expecting extension of their bank limits that month and further ensured that they would pay dues under all the outstanding invoices.
- ii. Vide an email 20.09.2017 and email dated 21.09.2017, the Applicant once again sent reminder email to the Respondent for the payment. In response to the said emails, vide an email dated 21.09.2017 the Respondent informed that they were doing their best to pay the dues.
- iii. Vide an email dated 26.09.2017, the Applicant reminded the Respondent by referring to the email dated 15.09.2017 wherein, they assured that they would clear all the outstanding payments by September 2017 and requested him to provide schedule of payments. In the said email, it was categorically informed that in case of non-payment, the Applicant would

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lodge a claim with Tawuniya-Insurance Company. Vide an email dated 30.09.2017, the Respondent replied to the above email stating that they had made payment against one of the unpaid invoices and they would provide with a copy of swift remittance and further ensured that they would pay 100% dues.

- iv. Vide reminders emails dated 04.10.2017, 24.10.2017 and 20.11.2017, the Applicant once again requested the Respondent to make the payment under the outstanding Invoices.
- v. Thereafter, the Respondent issued a letter dated 28.11.2017 to the Applicant to acknowledge the outstanding payable amount. In the said letter, **it is stated that Respondent owes an amount of USD 981,351 to SABIC Asia Pacific Pte Limited and an amount of USD 537,570 to Applicant Creditor till date. SABIC Asia Pacific Pte Limited is one of the entities of the SABIC Group.**
- vi. Vide an email dated 04.12.2017, the Applicant requested the Respondent to clear all the outstanding payments due to SABIC Asia Pacific Pte Limited and the Applicant. In response to the said email, the Respondent informed that they were committed to pay the dues as soon as possible.

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- vii. Vide an email dated 08.12.2017, the Applicant once again requested the Respondent to make the payment under the outstanding Invoices.
- viii. Subsequently, the Respondent issued a letter dated 26.03.2018 to the Applicant to acknowledge the outstanding payable amount. In the said letter, it is stated that the Respondent owes an amount of USD 516,780 to SABIC Asia Pacific Pte Limited and **an amount of USD 289, 980 to the Applicant till that date.**
- ix. Vide an email dated 01.05.2018, the Applicant informed the Respondent that they owed an amount of USD 516,780 to SABIC Asia Pacific Pte Limited and an amount of USD 246,740 to the Applicant till date.
- x. Vide an email dated 02.05.2018, the Applicant requested the Respondent to clear all the outstanding payments. In response to the said email dated 02.05.2018, the Respondent informed that they would pay the dues as soon as their enhanced limits are released.
- xi. Vide an email dated 15.05.2018, 21.05.2018 and 11.06.2018, the Applicant requested the Respondent to clear all the outstanding payment. However, the Respondent/Corporate Debtor failed to make the outstanding payment.

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8.5 **The Respondent had made a part-payment to Applicant for an amount of USD 276,580 out of USD 403,920. Hence, total outstanding amount toward Respondent was USD 127,340 till 1st August 2018.** The Applicant requested on several occasion to pay the said outstanding amount to the Respondent. However, the Respondent failed to make the balance payment.

8.6 The Applicant/ Operational Creditor issued to the Respondent a Demand Notice dated 03.04.2019, in Form 3 under Section 8 of the Code. After receipt of the Demand Notice, on 05.04.2019, the Respondent responded to the Demand Notice, vide a reply email dated 06.04.2019 and a letter dated 19.04.2019. Vide the said Reply, the Respondent denied the liability to pay the outstanding amount and alleged for the first time that the goods supplied by the Applicant were not in accordance with the specification and on account of quality issue, they have suffered losses. The Respondent made baseless allegations against the Applicant with regards to the quality of goods and disputed the acknowledgement of debt. It is an afterthought and an attempt to wriggle out of its legitimate liability. There were no quality issues with any product supplied by Applicant. The Respondent has not provided any proof such as independent survey report to show that the goods were not as per the specification. Furthermore, the Reply does not refer to existence of any dispute and

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record of pendency of suit or arbitration proceeding filed before receipt of the said demand notice.

8.7 The Applicant filed the present application on 08.05.2019. The Respondent filed the Reply to the application on 05.09.2019. In the said Reply, the Respondent raised the objections on the claim of the Applicant inter alia on the grounds that the Applicant had enclosed incomplete sale contract, defective goods were supplied and the Respondent disputed the acknowledgment of debt etc. Thereafter, the matter was listed for the hearing on several dates.

8.8 In order to delay the hearing of the present application, on April 04, 2022, the Respondent filed Interim Application No. 139/JPR/2022 under Section 65 (5) of the Code for seeking direction from the Hon'ble Tribunal for dismissal of the present application- CP (IB) No. 108 of 2019

8.9 The said IA 139 of 2022 was filed inter alia on the ground that the Applicant has received money from the Insurance Company. Therefore, the Applicant has no right to claim any outstanding dues and the cause of action against the Respondent. The Applicant filed reply to the said IA, it was categorically mentioned in the said reply that due to the non-payment, the Insurance Company has made a full and final payment for an amount of USD 127,340 to the Applicant. As per the policy dated 01.01.2018, all the monies received from the

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buyer are to be held in trust for the Insurance Company and must be paid to the Insurance Company as soon as practical. Under the policy, it was an obligation of the Applicant to initiate appropriate legal proceedings against the Respondent for the default in payment.

8.10 The Senior Counsel for the Respondent has further submitted that:

- I. The present Company Application is proxy litigation filed by the Applicant on behalf of the Insurance Company and thus the Petitioner does not have any locus standi to file the present CA.
- II. The Applicant had not disclosed the facts that they have received the payment from Insurance Company and thus has no right to claim any dues.
- III. The Respondent has not received the delivery of the goods.
- IV. The Applicant is claiming different amount i.e. USD 127,340 as opposed to the invoice amount of USD 403,920.
- V. The Applicant has filed the present proceedings which amounts to the recovery of monies and the same is against the object of Insolvency and Bankruptcy Code, 2016.

8.11 In response to the above contentions, it is stated that:

- I. No facts have been concealed by the Applicant. Vide emails dated 30.09.2017 and 26.09.2017 the Respondent was informed that if the pending dues were not cleared then the Applicant would lodge its claim with insurance company.

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- II. Admittedly, the Respondent has duly received the goods and never raised any objections/protest. To the contrary, the Respondent had admitted in paragraph 5 at Page 3 & 4 of the Reply to CA that the Applicant had supplied goods to them.
- III. With respect to difference in amounts, the Applicant has already mentioned that out of the invoice amount i.e. USD 403,920, part payment of USD 276,580 was received by the Applicant. Thus, the outstanding amount is USD 127,340.
- IV. Due to the default in the payment, the Applicant has sent the demand notice under section 8 of the Code. Since, the Respondent failed to raise any dispute, the Applicant has rightly filed the present CA.

ORDER

9. Considering the materials made available by the Operational Creditor/Petitioner and the Corporate Debtor/Respondent, arguments of learned Senior counsels of the Petitioner and Respondent and the facts mentioned hereinabove, this Adjudicating Authority has found that:

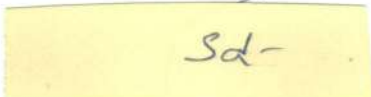
- 9.1 The Applicant/Operational Creditor and Corporate Debtor/Respondent entered into a Sale Order Reference No. 02/5522 for purchase of 519 Metric Tons of (24.75 MT LLDPE SABIC R50035, 49.50 MT LDPE SABIC HP 4024WN, LDPE SABIC HP20023 & LLDPE M500026).

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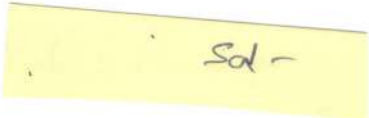
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- 9.2 The Applicant/Operational Creditor raised an Invoice No. 200157677 dated 06.06.2017 upon the Respondent for an amount of USD 403,920. The due date under the said Invoice was 04.09.2017. The Applicant vide various emails requested the Corporate Debtor to clear all outstanding dues.
- 9.3 The Respondent had made a part-payment to Applicant for an amount of USD 276,580 out of USD 403,920. Hence, total outstanding amount against the respondent was USD 127,340 till 01.08.2018. The Applicant ,on several occasions, requested the respondent to pay the said outstanding amount but the Respondent failed to make the balance payment.
- 9.4 The Applicant/ Operational Creditor issued Demand Notice dated 3rd April, 2019, calling upon the Corporate Debtor to make payment of an outstanding amount of USD 127,340 along with interest at 12% p.a thereon.
- 9.5 On the other hand, after the receipt of the Demand Notice dated 03.04.2019, on 05.04.2019, the Corporate Debtor vide a reply email dated 06.04.2019 denied the liability to pay the outstanding amount alleging that the goods supplied by the Operational Creditor were not in accordance with the specification and quality issue which had resulted into losses for the CD. The Corporate Debtor also sent a



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letter dated 19.04.2019 to the OC raising doubts about the quality of goods supplied by the Applicant/ Operational Creditor.

10. At this stage it is essential to bring certain correspondences made between the OC and the CD so as to have the clarity relating to the unpaid dues, dispute and acknowledgement of the debts. This is an import transaction and materials have been supplied to the CD from a foreign country.

- 10.1 Vide an email dated 24.08.2017, the Applicant informed the Respondent that the said Invoice would be outstanding on 03.09.2017. The said Email is reproduced below for reference:

*“Dear Sir,
One more payment of USD 403,920. due on 03.09.2017 in
SABIC Riyadh accounts.
Best Regards”*

- 10.2 Vide an email dated 11.09.2017, the Applicant provided details of various outstanding invoices including the present Invoices for payment and requested to provide a letter with a schedule of payments. The said Email is reproduced below for reference:

*“Dear Sir,
Please find below the details of outstanding payments.....accounts.*

<i>PAYMENT DUE DATE</i>	<i>AMOUNT IN USD</i>
<i>05.07.2017</i>	<i>136,620.00</i>
<i>22.07.2017</i>	<i>66,330.00</i>
<i>22.07.2017</i>	<i>67,320.00</i>
<i>18.08.2017</i>	<i>31,432.50</i>
<i>03.09.2017</i>	<i>403,920.00</i>
<i>21.08.2017</i>	<i>131,670.00</i>
<i>03.09.2017</i>	<i>253,444.00</i>
<i>08.09.2017</i>	<i>92,812.50</i>
<i>10.09.2017</i>	<i>208,656.00</i>

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08.10.2017	136,620.00
TOTAL	1,528,825.00

Request please arrange a letter stating the planned schedule for making payments..."

- 10.3 Vide an email dated 15.09.2017, the Applicant once again requested the Respondent to update on the status of payment. In response to the said email, vide an email dated 15.09.2017 the Respondent replied stating that they are expecting extension of their bank limits that month and further ensured that they would pay dues under all the outstanding invoices. The said Emails are reproduced below for reference:

*"Dear Sir,
Request please confirm the status of balance payments asap.
Best regards
Tarun Sharma"*

Reply by CD:

*"Dear Sir
We have visited your office and explained the situation in details.
We confirmed that moment we have our bank extension limits, we will pay the entire dues.
We are expecting it to happen within this month and we will pay the entire due invoices.
Please support us.
Thanks
Milan Agarwal"*

- 10.4 Vide an email 20.09.2017 and dated 21.09.2017, the Applicant once again sent reminder emails to the Respondent for the payment. In response to the said emails, vide an email dated 21.09.2017 the

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Respondent informed that they were doing their best to pay the dues.

The said Emails are reproduced below for reference:

“Dear Sir,

*Please find below the due payment details. Request please arrange to make payments due for the month of **July and August** asap, otherwise SABIC will file the claims with Insurance company.*

PAYMENT DUE DATE	AMOUNT IN USD
22.07.2017	66,330.00
22.07.2017	67,320.00
18.08.2017	31,432.50
21.08.2017	131,670.00
03.09.2017	403,920.00
03.09.2017	253,444.00
08.09.2017	92,812.50
10.09.2017	208,656.00
08.10.2017	136,620.00
TOTAL	1,392,205.00”

Reply by Corporate Debtor:

“Dear Sir

Rest assured, we are doing our best to pay the dues.

Milan Aggarwal”

- 10.5 Vide an email dated 26.09.2017, the Applicant reminded the Respondent by referring to the email dated 15.09.2017 wherein, they assured that they would clear all the outstanding payments by September 2017 and requested him to provide schedule of payments. In the said email, it was categorically informed that in case of non-payment, the Applicant would lodge a claim with Insurance Company. Vide an email dated 30.09.2017, the Respondent replied to the above email stating that they had made payment against one of

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the unpaid invoices and they would provide with a copy of swift remittance and further ensured that they would pay 100% dues. The said Emails are reproduced below for reference:

*“Dear Sir,
September end is near and you have promised in your below mail dated 15.09.2017 that you will clear all the due invoices within this month.
SABIC Riyadh and Singapore offices are continuously asking us on daily basis on the status of due payments
Request please provide us the schedule of payments asap otherwise SABIC will lodge their claim with insurance company.
This is for your information.
Best regards..”*

Reply by Corporate Debtor:

*“Dear Sir
We have already paid one invoice and we will be able to give you swift copy on 3rd or 4th.
Our bank limits enhancement has been delayed by 2 weeks, so please keep patience and support.
Rest assured you will get your 100% dues.
Milan Aggarwal”*

10.6 Vide reminders emails dated 04.10.2017, 24.10.2017 and 20.11.2017, the Applicant once again requested the Respondent to make the payment under the outstanding Invoices. The said Emails are reproduced below for reference:

Email dated 04.10.2017:

*“Dear Sir,
We are still awaiting the swift copy of payment.
Best regards”*

Email dated 24.10.2017:

*“Dear Sir,
Request please confirm when will your bank clear the dues as we have to update to our Singapore office.*

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Best regards”

Email dated 20.11.2017:

“Dear Sir,

We are trying to contact you since morning, regarding due payments.

As informed by you in last meeting and telephonic discussion later on you have informed us that you will make some payments in the month of November 2017.

So we are awaiting the copies of payment asap.

“ Best regards”

- 10.7 The Corporate Debtor issued a letter dated 28.11.2017 to Applicant/ Operational Creditor to acknowledge the outstanding payable amount which is reproduced below:

“Dear Sir,

ACKNOWLEDGMENT OF OUTSTANDING PAYABLE AMOUNT

We note that as of the date of this letter, our outstanding amount owing to SABIC Asia Pacific Pte. Ltd. (SAPPL) for purchase of SABIC petrochemicals currently stands at US \$ 981,351.00.

&

To SABIC, KSA for purchase of SABIC petrochemicals currently stands at US \$ 537,570.00 which total to US \$ 1,518,922.00.

We acknowledge the amount of US \$ 1,518,921.00 outstanding and owing to SABIC as at the date of this letter, and that we agree not to raise any disputes to SABIC lawful claim for the amount.”

- 10.8 Vide an email dated 04.12.2017, the Applicant requested the Respondent to clear all the outstanding payments due to SABIC Asia Pacific Pte Limited and the Applicant. In response to the said email, the Respondent informed that they are committed to pay the dues as soon as possible. The said Email is reproduced below for reference:

“Dear Milan,

It was really nice of you and your team for the courtesy extended to SABIC's team during their visit to your plant on Nov 28th

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We also appreciate your efforts to begin to release the long overdue payment starting with the given swift copy of USD 31432.5 on Nov 30th

Looking forward for your continuous support to clear the total overdue payment to SABIC KSA & SABIC Singapore on priority basis

Thanks once again... ”

Reply by Corporate Debtor:

“Dear sir

We are committed to pay the dues asap. Thanks

Milan Aggarwal”

- 10.9 Vide an email dated 08.12.2017, the Applicant once again requested the Respondent to make the payment under the outstanding Invoices.

The said Email is reproduced below for reference:

“Dear Sir,

Hope you are releasing some over-due payments.

Request please share with the swift copies asap.

Best regards.. ”

- 10.10 Subsequently, Corporate Debtor issued a letter dated 26.03.2018 to Applicant/Operational Creditor to acknowledge the outstanding payable amount. Which is reproduced below

“Dear Sir,

***ACKNOWLEDGEMENT OF OUTSTANDING PAYABLE AMOUNT
(Balance Confirmation)***

We note as of the date of this letter, our outstanding amount owing to SABIC Asia Pacific Pte Ltd [SAPPL] for purchase of SABIC petrochemicals currently stands at USD 516780

&

To SABIC KSA for purchase of SABIC petrochemicals currently stands at USD 289980 which totals to USD 806760.

We acknowledge the amount of USD 806760 outstanding and owing to SABIC as at the date of this letter, and that we agree not to raise any disputes to SABIC lawful claim for the amount.

We are pleased to inform that our request for working capital enhancement has finally been approved by our group of bankers,



and awaiting for the disbursement. We also expect to get GST refund soon, and hope to clear all your dues by April 2018.....”

10.11 Vide an email dated 01.05.2018, the Applicant informed the Respondent that they owed an amount of USD 516,780 to SABIC Asia Pacific Pte Limited and an amount of USD 246,740 to the Applicant till date. He further requested to clear all the outstanding dues within that week. The said Email is reproduced below for reference:

“Dear Sir,

This is in reference to our continuous follow up with you and your team regarding to recover long outstanding due of USD 246,740 (KSA accounts) and USD 516,780 (Singapore accounts).

We appreciate your support for releasing the part payments during last six months.

As you now we have visited your plant couple of times and also follow up with you and Mr. Milan Aggarwal and our team from Singapore also visited your plant for overdue payments.

For last couple of meeting you and Mr. Milan Aggarwal has assured us to clear Principal amount by 31st March 2018 and then further requested us that you will clear the same by 30th April 2018.

As per recent discussion yesterday with you please note that we have a lot of pressure. from our Singapore / KSA office to get this principal overdue amount at the earliest.

We are looking forward your support to clear the over dues at the earliest within this week....”

10.12 Vide an email dated 02.05.2018, the Applicant requested the Respondent to clear all the outstanding payments. In response to the said email dated 02.05.2018, the Respondent informed that they would pay the dues as soon as their enhanced limits were released. The said Emails are reproduced below for reference:

“Dear Milan,

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We understand your concern shared by you regarding the delay in making payment especially post GST.

We also appreciate the support from you and your team in releasing the part payment. till date.

During our various discussion over phone and personal meetings with you and your team in last couple of months, we have explained our situation related to long pending overdue and now it is becoming really difficult to give any further valid reason to our management for delay in clearing your principal outstanding payment.

As confirmed, by you that your Banks have also approved the enhancement of your limit and you have also started getting refund of GST, so we will appreciate if you can clear the balance principal outstanding at the earliest.

Looking forward for your support

Thanks

R K Arora..”

Reply by Corporate Debtor:

“Dear sir

We shall pay as soon our enhanced limits are released.

Let's hope it happens asap/within may.

Milan Aggarwal”

10.13 Vide an email dated 15.05.2017, email dated 21.05.2018 and email dated 11.06.2018, the Applicant requested the Respondent to clear all the outstanding payment. The said Emails are reproduced below for reference:

Email dated 15.05.2018:

“Milan,

We are half way through in May 2018 also. Pl. support us in releasing the balance principal amount due to KSA & SAPPL. Looking forward for your support

Thanks

R K Arora”

Email 21.05.2018:

“Milan,

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Looking forward for your support to clear the balance principal outstanding payment due to SABIC KSA & SAPPL. Please help to clear it within May 2018

*Thanks
R K Arora."*

Email dated 11.06.2018:

*"Dear Milan,
Thanks for paying USD 40 K last week. Appreciate your support in clearing the balance principal overdue to SABIC KSA & SAPPL at the earliest within June 2018*

*Thanks
R K Arora."*

11. Having gone through the above E-mails/correspondences, **it is clear that the Corporate Debtor has repeatedly acknowledged its liability to the Operational Creditor from 15.09.2017 onwards, operational debt is unpaid and there is no dispute with regards to the quality of goods. The Corporate Debtor has made an attempt to raise certain dispute first time on 05.04.2019 after receipt of the Demand Notice issued by the Operational Creditor on 03.04.2019.**
12. Further, the Respondent/Corporate Debtor has filed an Interim Application bearing Interim Application No. 139/JPR/2022 under Section 65 and Section 60(5) of the Insolvency and Bankruptcy Code, 2016, seeking directions of this Hon'ble Tribunal for dismissal of the present Insolvency Petition on the facts that the amount claimed by the Petitioner was covered under the insurance policy availed by the Petitioner from the Tawuniya Collections and accordingly the payments under claim have already been paid by Tawuniya to the Petitioner. Since, the Petitioner has already

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received the payment against the invoices from Tawuniya on which the entire case of the Petitioner is based, the Petitioner has no right to claim any outstanding dues and the cause of action, if any, in favour of the Petitioner does not survive.

12.1 However, **the fact is that the Operational Creditor had bought an insurance policy. Under the said Policy, Tawuniya, being the insurer, covers the losses incurred by the Operational Creditor in case of non-payment/default by the Applicant.** Thus, the Tawuniya made full and final payment for an amount of USD 127,340 to the Operational Creditor **with a condition that all amounts received by the Operational Creditor or by any person acting on behalf of the Operational Creditor after the date of Loss should immediately be remitted to the Tawuniya. Until this remittance is made, Operational Creditor holds such amounts in trust for the Tawuniya.** As per the terms and conditions of the Policy, **it was an obligation of the Operational Creditor to initiate** legal proceedings against the Applicant to recover the outstanding debt even after the indemnification of the Operational Creditor.

12.2 Hence the contention of the Corporate Debtor that the Petitioner has no right to claim any outstanding dues from the Corporate Debtor is **having no merit at all as the Insurance taken by the Operational**

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Creditor paying insurance premium on its own to cover its probable loss/non receipt of payment of goods supplied to the buyer is totally a different and independent matter. Receipt of money from insurance company in trust does not confer any right to the CD not to pay the unpaid operational dues to the OC for the goods supplied. *The OC has right to initiate insolvency in case the CD does not pay the unpaid dues to the Applicant irrespective of the fact that whether insurance is there or not. Even if the insurance is taken but the amount received or to be received from the Insurance company by the Insured needs to keep that amount in trust for the Insurance Company.*

13. Hence, on perusal of the documents, records made available and submissions/arguments made by both the sides, the Adjudicating Authority is satisfied that:

- A. Existence of unpaid operational debt is above Rupees One lac (US Dollars- 127,340 i.e., approximately Rs 1,03,14,540.00@ Rs 81/- per one USD)
- B. Operational Debt is due and defaulted.
- C. Default occurred as per the terms of the invoice raised by the OC i.e. on 04.09.2017

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- D. Demand Notice dated 03.04.2019 has been served at the Registered Office of the Corporate Debtor and the same has been received by the CD on 06/04/2019.
- E. Petition has been filed within the limitation period.
- F. **Existence of dispute prior to the issue of notice is not found. Corporate Debtor has started raising certain issues, after receipt of Demand Notice, relating to quality of goods, maintainability of the Petition, receipt of insurance claim by the OC which are afterthought and an attempt to avoid its liability.**

Hence, the application filed by the Applicant under Section 9 of the IBC is found to be complete for the purpose of initiation of Corporate Insolvency Resolution Process in respect of the Corporate Debtor.

14. Accordingly, the petition filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is **hereby admitted** for initiating Corporate Insolvency Resolution Process in respect of the Corporate Debtor, M/s Prayag Polytech Pvt. Ltd. The date of admission of this petition is 22/02/2023.
15. Moratorium and public announcement in accordance with Sections of the IBC, 2016 is hereby declared. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate

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Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of subsection (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016 shall be made immediately.

15.1 Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- 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 Securitization 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 possession of the corporate debtor.

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- 15.2 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.
- 15.3 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.
- 15.4 The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution Process. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- 15.5 Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
16. The Applicant has suggested the name of a Resolution Professional Mr. Brij Kishore Sharma to be appointed as IRP. Hence **Mr. Brij Kishore Sharma**, resident at Shivangan, AB-162 Vivekanand Marg, Nirman Nagar, Ajmer Road, Jaipur- 302019, having IP Registration No. IBBI/IPA-002/IP-N00036/2016-2017/10075, is hereby appointed as an Interim Resolution Professional. The IRP has to file Authorisation for Assignment

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within three days from the date this order is uploaded. The Interim Resolution Professional is further directed to make public announcement of moratorium in respect of Corporate Debtor 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 under Section 13 and 14 and other relevant provisions of the Insolvency and Bankruptcy Code.

17. The Operational Creditor has to deposit Rs. 5,00,00.00 (Rupees Five Lakhs Only) in the account of the IRP within three days for initial expenses of CIRP including paper publication etc., which will be apportioned as per the provisions of the Code and reimbursed to the Applicant upon formation of the Committee of Creditors.
18. The Interim Resolution professional is directed to strictly comply with the model timeline for CIRP as provided under Regulation 40A of IBBI (IRP for Corporate Person) Regulation, 2016 and perform the duties as specified under Section 17, 18, 20 and 21 of IB Code. The IRP shall perform all his functions contemplated, inter-alia, in Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honest and strictly in accordance with the provisions of the Code, Rules and Regulations.

It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other persons associated with the

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Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the IRP as may be required by him in managing the day-to-day affairs of the Corporate Debtor. In case there is any violation, the IRP would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The IRP shall be under duty to protect and preserve the value of the property of the Corporate Debtor as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

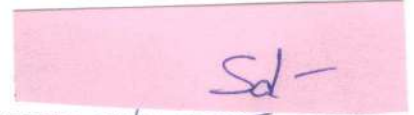
19. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and complete the CIRP in time.
20. Registry is hereby directed to communicate this order to the Operational Creditor, the Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through e-mail immediately.
21. **Hence, CP(IB) No. 108/9/JPR/2019 is hereby allowed and admitted with the above observations and directions.**
22. In view of the foregoing points, the Interim Application bearing **IA(IBC)No.139/JPR/2022 filed in the main petition is having no merits and relevance. Hence this IA is dismissed and disposed of accordingly.**

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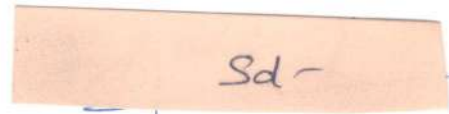
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23. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(DEEP CHANDRA JOSHI)
JUDICIAL MEMBER



(PRASANTA KUMAR MOHANTY),
TECHNICAL MEMBER