



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH (SPECIAL), COURT NO. II  
KOLKATA**

**Company Petition (IB) No. 38/KB/2022**

2. Heard the Ld. Senior Counsel, Shri Joy Saha for the Applicant and Ld. Counsel, Shri A.K. Srivastava for the Respondent.
3. This instant application is filed under **Section 9 of the Insolvency and Bankruptcy Code, 2016**, for brevity **I&B Code/ IBC**, read with other provisions of law, by one **Ramjee Power Construction Limited**, through its Director, Mr. Satish Kumar Das, having its registered office at Kumar Niwas, Bright Lane, Kokar Ranchi, Jharkhand- 834001, hereinafter referred to as **“Applicant” (“Operational Creditor”)** against **M/ s. Jharkhand Bijli Vitran Nigam Limited**, through its Managing Director, having its registered office at Engineering Building, H.E.C. Dhurwa, P.S.-Hatia, Ranchi, Jharkhand- 834002 hereinafter referred to as **“Respondent” (“Corporate Debtor”)** seeking the direction from this Adjudicating Authority to initiate **Corporate Insolvency Resolution Process** (for brevity **“CIRP”**) in respect of the Corporate Debtor herein.
4. The Corporate Debtor was incorporated on 23/10/2013, having the Nominal share capital- Rs. 31,08,93,00,000/- in which Paid-up Share Capital of Rs. 31,08,93,00,000/-.
5. The Total amount claimed to be in default is **Rs. 6,38,82,813.80/-** as on the **date of default i.e., 19/09/2018**, and Rs. 7,67,81,068.58/- as on the date when the **Demand Notice dated 01/10/2021**, annexed at Page 143-153 as **Annexure -R** to this Application, was issued inclusive interest.

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**6. Submission made by the Ld. Senior Counsel, Shri Joy Saha for the Applicant:**

**6.1.** The Applicant company is a small enterprise registered under the provisions of the MSMED Act, 2006 and the Corporate Debtor, M/ s Jharkhand BijliVitrان Nigam Limited is one of the successors of the erstwhile Jharkhand State Electricity Board (JSEB).

**6.2.** Upon being a successful bidder in the bidding process organized by the JSEB, an agreement dated 10.02.2005 was made between the Operational Creditor and JSEB, (annexed as Annexure “J” at Pages 94-97) to the Application, to execute the work pursuant to the said agreement. In the course of the completion of assigned work, a dispute arose between the parties owing to default and delay in payment against the bills and a sole arbitrator, **Mr. Ramayan Pandey** was appointed by the JSEB on 24.08.2007 to resolve the dispute between the parties (annexed at Page 98 to the Application).

**6.3.** An award dated 29.03.2009, has passed in the Arbitration Case No. 02/ 2007 by **Mr. Ramayan Pandey**, annexed at **Annexure “L” at Pages 99-106** to this Application, in favour of the operational creditor and the instant claim arises out of the same **“Award dated 29.03.2009”** so drawn in favour of the operational creditor.

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**6.4.** Further, a challenge to the said award under Section 34 of the Arbitration & Conciliation Act, 1996 was preferred on 04.11.2010 before the Ld. Subordinate Judge, Ranchi. The Hon'ble Jharkhand High Court vide its order passed on 11/07/2021 in Civil Revision No. 02/2011, (annexed at Page 107-111 to this Application as Annexure "M"), held the petition is maintainable. Aggrieved by the decision, the Applicant herein, preferred an appeal before the Hon'ble Supreme Court of India and vide an order Dated 19.09.2018, Hon'ble Apex Court in **SLP (C) No. 1005-1006 of 2012**, (annexed at Page 112-116 to this Application as Annexure "N") allowed the appeals preferred by the Applicant herein, and set aside the impugned orders passed by the Hon'ble High Court in favour of the Respondent herein, by granting liberty upon the Respondent herein, to pursue such remedies in respect of the loss caused to them as may be advised.

**6.5.** The Applicant thereafter has served upon the Respondent a bill through a letter dated **25.09.2018** to pay the due after dismissal of challenge under Section 34 of the Arbitration & Conciliation Act, 1996 by the Hon'ble Apex Court. The letter dated 25/09/2018 containing the bill with its enclosures **is annexed at Pages 120-121 as Annexure "O"**. However, no reply has been received by the Operational Creditor from the Corporate Debtor. Thereafter, multiple reminders have been served upon the Corporate Debtor, **annexed at pages 122-144 to the**

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**Application as Annexure “P”**, however, neither any reply nor any payment has been made by the Corporate Debtor.

**6.6.** The Ld. Counsel further submits that on 01.10.2021, the operational creditor had served demand notice on the corporate debtor under Section 8 of the I&B Code, 2016 (annexed at Page No. 143-153 to the Application).

**7. Per Contra, the Ld. Counsel, Shri A.K. Srivastava appearing for the Respondent:**

**7.1.** The Respondent claimed that the instant application is not maintainable in view of pre-existing disputes between the Operational Creditor and Corporate Debtor before the receipt of the demand notice.

**7.2.** That vide order dated 19.09.2018, the Hon’ble Apex Court directed the Corporate Debtor (Respondent) to pursue remedies in respect of the losses incurred by the Corporate Debtor. Pursuant to the Order and direction dated 19-09-2018 of the Hon’ble Supreme Court of India, the Corporate Debtor on 18-01-2019 filed a suit being Original Suit No. 50 of 2019 before the Learned Civil Judge Senior Division, Ranchi under Section 26 of the Civil Procedure Code, 1908 (CPC) *inter alia* seeking recovery of an amount to the tune of Rs. 10,72,16,109/- and Rs. 2,79,02,859/- respectively including interest at the rate 18% till date and the compensation for the losses incurred by the Corporate Debtor for the delay, fraud and other omissions committed

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by the Operational Creditor including Rs. 5 Cr. towards the loss caused to the Corporate Debtor on account of enormous delay in executing the contract. The said Original Suit is annexed as Annexure-A (Pages 8 to 29 of the Supplementary Affidavit dated 08/02/2023). The said suit was filed much before the issuance of the demand notice.

**7.3.** That the Corporate Debtor has filed a petition under Order VII Rule 10 read with Section 151 of the CPC for **withdrawal** of the **said suit No. 50 of 2019** as the Corporate Debtor had inadvertently filed the said suit before the Court of Civil Judge, Senior Division which was required to be filed before the Ld. Commercial Court, Ranchi having jurisdiction to entertain the same as per Section 6 of Commercial Court, 2015. The **said Original Suit No. 50 of 2019** was **withdrawn** on 17-12-2022. (Page 91-94 of the Supplementary Affidavit date 08/02/2023).

**7.4.** Further, the Corporate Debtor instituted a pre-institution mediation on **30-01-2023**, but the Operational Creditor deliberately failed to appear before the District Legal Services Authority (DLSA), Ranchi. As a result, the Corporate Debtor filed Commercial Suit No. 11 of 2023 before the Commercial Court at Ranchi on 30-05-2023. A copy of the pre-institution mediation report and the case details of the Commercial Suit have been attached as Annexure-A.

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**7.5.** It is alleged that the purported demand notice dated 01-10-2021 is barred by the provisions contained in section 238A of the Insolvency and Bankruptcy Code inserted by the Insolvency and Bankruptcy Code (second amendment) Act, 2018 inasmuch as the Operational Creditor has admitted in the notice under reply that the default with respect to the amount purportedly due of **Rs. 7,67,81,068/-** **occurred on 30-03-2009, the date of default is claimed as the date of Order of Hon'ble Apex Court i.e., 19-09-2018, the Demand Notice was issued on 01-10-2021 and the Petition has been filed on 01-12-2021, while the main Company Petition was notarized on 20-01-2022** (Page 19 and 20 of the main C.P). Hence by the admission of the Operational Creditor itself the said claim is ex-facie barred by limitation and as such the Company Petition is liable to be dismissed.

**7.6.** Ld. Counsel for the Respondent further alleges that the date of Notary i.e., 20-01- 2022 whereas the filing of Company Petition on 01-12-2021 reveals the commission of perjury by the Petitioner, making them liable.

**8. Ld. Sr. Counsel for the Applicant in Rejoinder would submit thus:**

**8.1.** That the Corporate Debtor has deliberately and in a mala fide manner tried to create a spurious and sham defence to mislead this Tribunal. The Ld. Sr. Counsel supplied the

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Letter from Chief Engineer dated 2<sup>nd</sup> May, 2008 accepting the **Award dated 25<sup>th</sup> November, 2007 and 14<sup>th</sup> February, 2008** annexed at Page **no. 36 to the Rejoinder.**

- 8.2.** That the corporate debtor with an intent to mislead this Tribunal has referred the other Award dated 26/03/2021 passed by Sole Arbitrator Hon'ble Mr. Justice S.J. Mukhopadhyay with full knowledge that the said Award is neither the part nor the subject matter of the present proceeding.
- 8.3.** The corporate debtor has fully tried to turn the case in the wrong direction with the purpose of evading payment to satisfy the awarded amount plus interest as passed by Sri Ramayan Pandey, Sole Arbitrator on **29.03.2009** and upheld by the Apex Court on 19.09.2018.
- 8.4.** The award dated **29.03.2009** attained finality on **19.09.2018** under the seal and signature of the Hon'ble Supreme Court. Till the challenge petition under Section 34 is pending, no application can be filed under Section 7 or 9 of IBC. A fresh cause of action would arise only on the finality of the Arbitration Award (***Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy 2021 10 SCC 330 Paragraph 136 and 141***). The limitation period will start from the date of Finality of the Award i.e., 19/09/2018, when the Hon'ble Supreme Court upheld the award.

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- 8.5.** The Corporate Debtor in its reply has framed an internal story and as per the doctrine of Indoor Management, the Operational Creditor is not supposed to know the internal functioning of the Corporate Debtor. In the case of *Pushpendra Kumar Sinha vs. State of Jharkhand reported in AIR 2022 Supreme Court Page 3983 in para 13*, the Supreme Court of India gave a chilling observation on the financial condition of the Corporate Debtor **(Annexure-2, pg. 63-86 of Rejoinder, Particularly Page No. 78 Point No. 13)**.
- 8.6.** It is further alleged that purported litigations by the Corporate Debtor are to create sham and spurious defence to avoid the lawful and justified payment of the Operational Creditor.
- 8.7.** Further, in terms of Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, amended from time to time, **no suit lies before any court in case where there is an Arbitration Clause in the Agreement, as the same can be resolved through Arbitration Only and the present dispute is settled through Arbitration and Arbitration Award got finality by Hon'ble Supreme Court on 19/09/2018.**
- 8.8.** It is contended that original suit no. 50 of 2019 Jharkhand Bijli Vitran Nigam Ltd. (the Corporate Debtor) **has been**

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**withdrawn** without liberty to file subsequent suit on 17.12.2022 in the court of Sri Krishna Kant Mishra, Civil Judge, Senior Division, 1<sup>st</sup>, Ranchi. The fact was acknowledged by the counsel of the Corporate Debtor during the course of the hearing.

- 8.9.** That in terms of the provision of Section 238A of IBC, 2016 the period of limitation will be guided under Article 137 of the Limitation Act. Section 14 of the IBC Code, 2016, deals with the moratorium period purported to the institution of suit or continuation of pending suit or proceedings of the corporate debtor. The award passed on 29.03.2009 and the continuing proceeding remained pending till 19.09.2018. Thereafter amidst the unexpected breakdown of the Pandemic Covid-19 the operational creditor issued a statutory demand notice under Section 8 of I&B Code, 2016 on 01.10.2021 for initiation of proceeding Section 9 of I&B Code, 2016. The operational creditor has invoked Section 9 for initiation of the present proceeding on 14.12.2021. The Apex Court has passed an order for the exclusion of a period of limitation due to the outbreak of COVID-19, which commenced on 25.03.2020 and continued till 28.02.2022. During such exclusion period of limitation, the present proceeding has been filed and so the same is not barred by limitation in terms of Section 238A of the IBC, 2016. The present application should have been filed within the period of 3 years after the exclusion of the period of limitation in the wake of the

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unprecedented spike in COVID, Hon'ble Supreme Court of India vide dated April 27, 2021 has restored the order in Writ (Civil) No(s).3/2020 dated March 23, 2020 and has directed that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders. In the cases where the limitation period would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In those cases where the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply. In the present matter notice under section 8 of IBC was sent on 01/10/2021 and the application was filed on 01/12/2021, which is well within the limitation period.

**9. Analysis and Findings:**

**9.1.** Before examining this petition on merits, we would like to examine whether the corporate debtor would qualify for insolvency resolution process under IBC. This is relevant as Jharkhand Bijli Vitran Nigam Limited being a State Government undertaking engaged in distribution and transmission of electricity to various consumers of the state.

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**9.2.** M/s. Jharkhand Bijli Vitran Nigam Limited the corporate debtor herein is one of the successors of erstwhile Jharkhand State Electricity Board (JSEB). The Government of Jharkhand Energy Department vide notification bearing No. 2917 dated 20.11.2005, introduced the Jharkhand State Electricity Reforms Transfer Scheme, 2005 for effecting transfer of properties, interest, rights, assets, liabilities and complications etc. into successor company. It is also evident from the master data that the corporate debtor herein is a State Government public company limited by shares, which came into existence on 23.10.2013, as a result of unbundling of the erstwhile Jharkhand State Electricity Board into four companies. Therefore, corporate debtor is a wholly owned company of the State Government Jharkhand.

**9.3.** In the above context, we need to examine whether such State Government undertakings are outside the purview of Insolvency and Bankruptcy Code, for the purpose of resolution of insolvency. That take us to the “**Application**” of the Insolvency and Bankruptcy Code. As per Section 2(a) of the IBC, “*any company incorporated under the Companies Act, (18 of 2013), or under any previous law*” would be covered under the Insolvency and Bankruptcy Code. On plain reading of the definition of a corporate person as defined in Section 3 (7) of the Code “corporate person” means “**a company** as defined in Clause 20 of

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*Section 2 of Companies Act, 2013, a limited liability partnership as defined in Clause (n) of Sub-section 1 of Section 2 of the Limited Liability Partnership Act 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.”* The word “Company” has been defined in Section 2(20) of the Companies Act as “company means a company incorporated under this Act or under any previous company law. Further, under Section 3(8) of the Code, “Corporate debtor” has been defined as “a corporate person who owes a debt to any person”.

**9.4.** On a reading of the “application” of the Act, definitions contained in Section 3 of the IBC read with definition of “Company” in Section 2(20) of the Companies Act, we find that Jharkhand Bijli Vitran Nigam Limited, the Corporate Debtor herein, which has been incorporated under the Companies Act, 2013, is covered by the definition of corporate person defined in Section 3(7) of the Code.

**9.5.** At this juncture, to fortify our view, it would be appropriate to refer the judgement rendered by the Hon’ble Supreme Court of India in ***Hindustan Construction Company Limited and Ors. vs. Union of India (UOI) and Ors.*** reported at **(2020) 17 SCC 324: MANU/SC/1638/2019** that:

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*“55. In this view of the matter, it is unnecessary to examine the constitutional challenge to the 2019 Amendment Act based on Articles 19(1)(g), 21 and 300-A of the Constitution of India.*

**Constitutional Challenge to the Insolvency Code**

*56. It now falls on us to decide the second part of the challenges made in the present Writ Petitions, i.e. the challenge to the constitutionality of the Insolvency Code. As mentioned above, Dr. Singhvi has argued that the provisions of the Insolvency Code would operate arbitrarily on his client inasmuch as, on the one hand, an automatic-stay of arbitral awards in his favor would be granted under the Arbitration Act, 1996 as a result of which those monies cannot be used to pay-off the debts of his client's creditors. On the other hand, any debt of over INR one lakh owed to a financial or operational creditor which remains unpaid, would attract the provisions of the Insolvency Code against the Petitioner No. 1 -making these provisions arbitrary, discriminatory and violative of Articles 14 and 19(1)(g) of the Constitution of India. As a result, he has suggested that in order for his client, in turn, to recover monies from Government Companies and NHAI, the definition of 'corporate person' contained in Section 3(7) of the Insolvency Code should either be read without the words "with limited liability" contained in the third part of the definition, or have Section 3(23)(g) of the Insolvency Code, which is the definition of 'person', read into the aforesaid provision. In order to appreciate this contention, it is necessary to set out these definitions:*

*Definitions*

*3. In this Code, unless the context otherwise requires, -*

*xxx xxx xxx*

*(7) "corporate person" means a company as defined in Clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in Clause (n) of Sub-section (1) of Section 2 of the Limited Liability*

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Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

(8) "corporate debtor" means a corporate person who owes a debt to any person;

(23) "person" includes-

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership;

(g) any other entity established under a statute;

and includes a person resident outside India.

**57. As correctly argued by the learned Solicitor General, Shri Tushar Mehta, the first part of 'corporate person', as defined in Section 3(7) of the Insolvency Code, means a company as defined in Clause 20 of Section 2 of the Companies Act 2013. Sections 2(20) and 2(45) of the Companies Act, 2013, which define 'company' and 'Government company' respectively, are set out hereinbelow:**

2(20). "company" means a company incorporated under this Act or under any previous company law;

2(45). "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital

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*is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a government company.*

**58. From a reading of the aforesaid definition, Shri Tushar Mehta is clearly right in stating that the three entities who owe monies under arbitral awards to the Petitioner No. 1, being Government companies, would be subsumed within the first part of the definition. However, so far as NHAI is concerned, Dr. Singhvi's argument of either deleting certain words in Section 3(7) of the Insolvency Code, or adding certain words in Section 3(23)(g) of the Insolvency Code into Section 3(7) cannot be accepted.**

**(Emphasis Added)**

**9.6.** Further, the Collateral Bench of this Adjudicating Authority in ***Chevrox Construction Pvt. Ltd. v. Bridge and Roof Co. (India) Ltd.*** decided on **09.02.2024**, in **CP (IB) No. 311/KB/2022** that:

**“15. As far as the Corporate Debtor is concerned , we see from the Articles of Association of the Corporate Debtor which is given in its website , that it has been incorporated under the Indian Companies Act, 1913, therefore, it is clear that the Corporate Debtor is a Company and by virtue of the fact that 99.35 % shares of the Company are held by Govt. of India ( Annual report 2022-23), it is a Govt. Company and IBC 2016 makes no distinction between a Government Company or a Private or Public company for the purposes of Insolvency resolution under Section 7,9 or 10 and hence the Corporate Debtor herein shall fall under the purview of the Code.”**

**(Emphasis Added)**

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**9.7.** Further, it is to be noted that vide an **Order dated 16.02.2024** in **Ravi Kumar v. Chevrox Construction Pvt. Ltd. & Anr.** in **Company Appeal (AT) (Ins.) No.327 of 2024**, the Hon'ble NCLAT has set aside order dated 09.02.2024 in **CP (IB) No. 311/KB/2022** and directed for the closure the CIRP. The Hon'ble NCLAT would record that:

*“13.02.2024: Learned counsel for the Appellant submits that **after order dated 09.02.2024 admitting Section 9 application filed by the Operational Creditor there has been settlement between the parties and as per the settlement part payment has already been made and entire amount has to be paid by 19.02.2024** i.e. Monday. It is submitted that the Appellant is ready to pay the amount even before the agreed date.*

*Respondent No.1 has agreed to the settlement, as stated by learned counsel for the Respondent No.1. Learned counsel for the Appellant seeks liberty to file affidavit/ application bringing settlement and details of payment on record.*

*List this Appeal on 16.02.2024.*

*In the meantime, order dated 09.02.2024 passed by National Company Law Tribunal, Kolkata Bench, Court-1 in **CP(IB) No.311/KB/2022 shall remain stayed.**”*

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2. An I.A. has been e-filed by the Appellant praying for allowing the application and setting aside the impugned order. **In the application it is stated that entire amount has been paid to the Operational Creditor.**

3. **Learned counsel for the Respondent Operational Creditor appears and submits that he has received the entire amount.**

4. IRP appears and submits that he has made publication and he has to receive payment for his fee and expenses.

5. In facts of the present case, we direct the appellant to pay 50% of the fee of the IRP as directed by the Adjudicating Authority i.e. Rs.1.50 Lakh, which shall cover expenses and fee of the IRP. The said amount be paid to the IRP within two weeks from today. Taking the application on record, **we allow the application. Set aside impugned order dated 09.02.2024. Close the CIRP. Appeal is disposed of.”**

**(Emphasis Added)**

Thus, it is very clear that the Hon'ble NCLAT has set aside the Order dated **09.02.2024**, in **CP (IB) No. 311/KB/2022** as there was a settlement between the parties and as per the settlement entire amount was made to the creditor. There was no overrule on the view regarding the maintainability of an insolvency application against a Government Company, as adopted by the NCLT

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Kolkata Bench in Order dated **09.02.2024**, in **CP (IB) No. 311/KB/2022**, where the debt and default is established against that Government Company.

**9.8.** Since the application of the Code covers any company incorporated under the Companies Act, the State Government undertaking such as the corporate debtor herein are also covered by the Insolvency and Bankruptcy Code. Therefore, we are of the view that the corporate debtor fulfils all the criteria for the Insolvency Resolution Process prescribed under the Code. With these observations, we now proceed to examine the case on merits.

**9.9.** It is a settled position of law that to admit an operational debt, the Adjudicating authority is required to verify whether an **“Operational Debt”** has been defaulted, whether the **“debt”** amount is in excess of the threshold limit prescribed under the I&B Code, the application is filed within the time limit prescribed and the application is complete in all respects and absence of any persisting “pre-existing dispute” between the parties.

**9.10.** Section 5(21) of the I&B Code expounds the **“Operational Debt”** as **“a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and ...”**.

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Further, the word “**Claim**” has been defined under Section 3(6)(b) as “**right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured**”. Thus, on a conjoint reading of Section 5(21) and Section 3(6)(b) of the I&B Code, it can be concluded that the “**Operational Debt**” is **a debt in respect of the payment of dues arising under any law for the time being in force, as a remedy for breach of contract, made between Operational Creditor and Corporate Debtor for providing goods or services.**

**9.11.** It is an admitted position that an **Award** was passed by the sole arbitrator appointed as decided by both parties (vide letter dated 24.08.2007, annexed at Page 98 to the application) to adjudicate the dispute that arose between the Operation Creditor and Corporate Debtor in respect of the contract made between them. The Sole Arbitrator passed its arbitral award on 29.03.2009 in favour of the Operational Creditor which attain finality vide an order dated 19/09/2018 of the Hon’ble Apex Court, granting liberty upon the Respondent, Corporate Debtor, to pursue such remedies in respect of the loss caused to them as may be advised.

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**9.12.** The liberty granted by the Hon'ble Apex Court to the Corporate Debtor would itself manifest that even at that stage when appeal against the Award stood dismissed, there existed some dispute between the parties, which substantiates existences of disputes. We are supported by the judgment passed by the Hon'ble Apex Court in the matter of ***K. Kishan vs. Vijay Nirman Company Pvt. Ltd.*** reported in **MANU/SC/0872/2018**, it is held that order to initiate CIRP in case of arbitral award under section 9, the debts need to be undisputed.

**9.13.** The Ld. Counsel for the Respondent that demand notice served by the Operational Creditor on **01/10/2021** is barred by the provisions contained in Section 238A of the I&B Code. The Ld. Counsel for the Respondent has claimed that the Hon'ble Supreme Court of India on 19/09/2018 has passed the final order on the "Arbitral Award dated 29/03/2009". The demand notice ought to have been served immediately. The operational creditor waited for more than three years from the date the date of Award attained a finality, to issue its demand notice on 01.10.2021 which is belated one.

**9.14.** We would rely upon the judgment passed by the Hon'ble Apex Court in ***Dena Bank vs. C. Shivakumar Reddy*** reported in **MANU/SC/0502/2021** that **once a claim fructifies into a final judgment and order/decreed, a fresh right accrues to the creditor to recover the**

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**amount of the final judgment and/or order/decree and/or the amount. (Para 138).** Hence, the calculation of fresh limitation period is rightly claimed in the application as on 19/09/2018, i.e., the date of order of the Hon'ble Apex Court.

**9.15.** Further, we are supported by the order passed by the Hon'ble Apex Court in the case of ***Babasaheb Raosaheb Kobarne v. Pyrotek India Private Limited, Special Leave Petition (C) No. 2522/2022*** propounded that:

*“In that view of the matter, **the period from 15.03.2020 till 28.02.2022 shall have to be excluded for the purposes of limitation** as may be prescribed under any General or SPECIAL LAWS in respect of all judicial or **quasi-judicial proceedings**. The Commercial Courts Act, 2015 being a Special Law, the said order shall also be applicable with respect to the limitation prescribed under the Commercial Courts Act, 2015 also.”*

**(Emphasis Added)**

Hence, the limitation that expired between 15.03.2022 and 28.02.2022 got a fresh lease of life continued till 90 days from 01.03.2022 which takes us to 29.05.2022.

**9.16.** Further, we have cross checked with the Registry of this Adjudicating Authority that the Applicant had filed the application under Section 9 of the I&B Code on

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**14.12.2021** vide Filing No. 1908132/02811/2021 and after clearing defects raised by the Scrutiny Department of the Registry, filed a revised application with corrected documents as directed by the Registry, which accordingly registered on **15.02.2022**. Further it is evident that Copy of the Affidavit filed under Section 9(3)(b) of the I&B Code, 2016, annexed at Page 155-158, as Annexure "T" to the Application has been notarized on **04.12.2021** at 01:20:45 PM and after clearing defects, the application has been re-filed with notarization dated 20.01.2022 at 11:01:14 AM. Hence, the assertion of the Respondent regarding the contradiction in the notary date and filing date is completely without any basis. The application was well filed within the available limitation period and after the demand notice was served, the application under Section 9 of I&B Code has been filed.

**9.17.** Section 5(6) of the Code defines a "dispute" includes a suit or arbitration proceedings relating to (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty. The Hon'ble Apex Court in **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited** reported at **[2017] ibclaw.in 01 SC**, held that 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 – So long as a dispute truly exists in

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fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application – A “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the **inclusive** definition contained in Section 5(6).

**9.18.** It is evident that pursuant to the order dated 19.09.2018 rendered by the Hon’ble Apex Court, the Corporate Debtor has filed a suit before the Ld. Civil Judge Senior Division, Ranchi numbered as 50 of 2019. It is admitted by the Ld. Counsel for the Respondent that the said suit has been **withdrawn** by filing a petition under Order VII Rule 10 read with Section 151 of CPC on 17/12/2022 and further a pre-institution mediation has been filed on 30.01.2023 along with a suit before the Ld. Commercial Court at Ranchi filed on 30.02.2023, which is pending. In terms of the decisions rendered in ***Mobilox (Supra)***, **existence of a dispute between the parties or record of pendency of suit filed before receipt of demand notice of unpaid operational debt in relation to such dispute would thwart a Section 9 application.**

**9.19.** Thus, on the date of Section 8 Demand Notice, a suit was pending which was withdrawn on 17.12.2022 long after filing of the instant Company Petition. The present petition is hit by the existence of “pre-existing dispute” as on the date of filing.

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- 10.** In the light of the facts stated in the application bearing **C.P. (IB) No. 38/KB/2022 is dismissed.**
  
- 11.** The **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the companies are registered with by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
  
- 12.** Urgent certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

**Balraj Joshi  
Member (Technical)**

**Bidisha Banerjee  
Member (Judicial)**

**This order is signed on 13th Day of March, 2024.**

Bose, R. K. [LRA]