

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

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

**SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER**

CP No. (IB)- 89/9/JPR/2022

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

IN THE MATTER OF:

M/S OM ENTERPRISES

...Operational Creditor

VERSUS

M/S RAVI INFRABUILD PROJECTS PVT. LTD.

...Corporate Debtor

MEMO OF PARTIES

M/S OM ENTERPRISES

Through its Partner Sh. Sharad Shrivastava
Shop No. 5, DDA Market,
Defence Enclave, Vikas Marg,
Delhi- 110092

...Operational Creditor

VERSUS

M/S RAVI INFRABUILD PROJECTS PVT. LTD.

95, Hiran Magri, Sector 11,
Udaipur- 313002 (Rajasthan)

...Corporate Debtor

FOR THE PETITIONER(S) : Parveen Kumar Aggarwal, Adv.
FOR THE RESPONDENT(S) : Vinay Kothari, Adv.

Order Pronouncement On: 19.09.2023

ORDER**Per: Shri Deep Chandra Joshi, Judicial Member**

1. This is an Application filed by *M/s OM Enterprises through its partner Mr. Sharad Shrivastava* ('Applicant'/ 'Operational Creditor') to initiate Corporate Insolvency Resolution Process ('CIRP') against *M/s Ravi Infrabuild Projects Private Limited* ('Respondent'/ 'Corporate Debtor') under Section 9 of the Insolvency & Bankruptcy Code, 2016 ('IBC'/'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The Applicant is a supplier of Construction Materials including Aggregates, Sand, Stone etc. The registered office is located at Shop No. 5, DDA Market, Defence Enclave, Vikas Marg, Delhi. The Applicant has alleged default on the part of the Corporate Debtor for non-payment of operational dues amounting to Rs. 1,39,90,495.46/- (Rs. One Crore Thirty-Nine Lakhs Ninety Thousand Four Hundred Ninety-Five and Forty-Six Paise Only) as on 24.05.2022.
3. The Corporate Debtor is a private limited company incorporated under the provisions of Companies Act, 1956 on 26.02.2009 having CIN: U45201RJ2009PTC028378. The registered office is situated at 95, Hiran Magri, Sector 11, Udaipur, Rajasthan. The Authorized Share Capital of the Corporate Debtor is Rs. 10,00,00,000/- (Rupees Ten Crores Only) and Paid- Up share Capital is Rs. 5,00,00,000/- (Rupees Five Crores Only).

The aforesaid has been verified from the online database of the Ministry of Corporate Affairs.

4. The Applicant has filed the present application under Section 9 of the IBC, 2016 alleging the following set of facts:

4.1. During the period between June 2020 to September 2021, the Corporate Debtor purchased construction material worth Rs. 17,87,72,960.88/- (Rupees Seventeen Crores Eighty-Seven Lakhs Seventy-Two Thousand Nine Hundred Sixty and Eighty-Eight Paisa) from the Applicant. The Corporate Debtor made part-payments against various sales invoices to the Applicant which were issued against the goods supplied.

4.2. An amount of Rs. 1,12,53,832.03/- (Rs. One Crore Twelve Lakhs Fifty-Three Thousand Eight Hundred Thirty-Two and Three Paisa) remained outstanding against the invoices mentioned hereinabove. As per the terms of the contractual rate of interest, the Corporate Debtor is liable to pay interest @ 18% per annum. The Corporate Debtor failed to pay the aforesaid amount despite repeated requests and reminders by the Operational Creditor.

4.3. The Applicant was constrained to issue statutory notice dated 31.05.2022 under Section 8 of the IBC, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 calling upon the Corporate Debtor to pay the aforesaid

sum within a period of 10 days from the date of receipt of notice.

The said notice was duly received by the Corporate Debtor at its registered office on 06.06.2022 as per tracking report.

4.4. The Corporate Debtor replied to the aforesaid notice dt. 15.06.2022 wherein no denial to the purchase of material from the Applicant and the balance due by the Corporate Debtor has been made. However, the Corporate Debtor has tried to justify the non-payment on the ground that it had not received its payments from *M/s Welspun Enterprises Limited ('Welspun')*. Such ground is untenable as this was not a case of Tri-Partite Agreement between the Applicant, the Corporate Debtor and the *Welspun Enterprises Limited*. No such Agreement ever existed providing for payment by Corporate Debtor to the Applicant on the basis of payments made by *Welspun* to the Corporate Debtor. The Corporate Debtor has neither paid the outstanding amount due to the Applicant till date of the application nor raised any dispute in terms of Section 8(2) of the Code.

4.5. The Applicant apprehends that the Corporate Debtor will alienate/ dispose of its assets with ulterior motive of prejudicing the interests of the Corporate Debtor as well as other Creditors. Hence, the present application has been filed seeking CIRP of the Corporate Debtor. The aforementioned details, as reflected in Part IV of the Application, are as follows:

S. No.	Particulars of Operational Debt	
1.	Total amount of Debt, Details of Transactions on Account of which Debt fell Due and Date of which such Debt fell Due	<p><u>Total Amount of Debt</u> Rs. 1,39,90,495.46 /- (Rs. One Crore Thirty-Nine Lakhs Ninety Thousand Four Hundred Ninety-Five and Forty-Six Paise Only) along with interest @18% per annum from 25.05.2020 till date of actual payment.</p> <p>On account of unpaid invoices being Tax Invoices Nos. DL21-22RJP004, DL21-22RJP005, DL21-22RJP006 duly raised by the Applicant for supply of Aggregate, Dust, WMM, GSB Grit to the Corporate Debtor at its Delhi- Panipat Section 2 of NH-44 site and interest due thereon.</p> <p><u>Date from which Debt fell due:</u> The debt fell due on various dates including 31.07.2021, 31.08.2021 and 30.09.2021 when the invoices were raised by the Applicant against the supply of desired material and the interest accrued from the due date till actual payment.</p>
2.	Amount claimed to be in default and the date on which the default occurred	<p><u>Amount In Default:</u> Rs. 1,39,90,495.46 and the default occurred on various dates including 31.08.2021, 30.09.2021 and 30.10.2021 after expiry of period of 30 days from the date of invoice.</p>

5. Consequent to the notice issued by this Authority, the Corporate Debtor filed its reply vide Diary No. 1622/2023 dated 11.07.2023 whereby the following was submitted:

5.1. There exists a dispute between the parties to the case. The alleged work orders, which have been annexed in the said Application, were issued to the Applicant for the purposes of execution of contract which was awarded to the Corporate Debtor by *Welspun*, by way of Letter of Intent (LOI) dated 20.05.2020. Subsequently, a Construction Contract dated 04.06.2020 was executed between the Corporate Debtor and *Welspun*, the name of the contract was, “*Civil Construction Works for the section of the Project from Existing chainage Km 29.800 to Km 54.730*” which included the construction of road works, structures, project facilities etc. The said contract was awarded to *Welspun Infrafacility Pvt. Ltd.* by National Highways Authority of India (NHAI), and subcontracted to *Welspun* and out of the said Concession Agreement only part work was awarded to the present Corporate Debtor. Hence, in view of the above-facts & pursuant to the Agreement between the Corporate Debtor and *Welspun*, work orders were issued to the Applicant by the present answering Corporate Debtor wherein the Corporate Debtor was acting in the capacity of a sub-contractor to the sub-contractor.

5.2. While executing the above-mentioned work, a dispute with regard to quality of work allegedly arose between the Answering Corporate Debtor and *Welspun*, whereafter, *Welspun* unilaterally terminated the contract and invoked the arbitration clause pursuant to the terms

of agreement. Particularly, the dispute was pertaining to the quality of material which was used for the purpose of construction of road. It was alleged by *Welspun* that the material used for the purpose of construction is of sub-standard quality. The said material was supplied by the present Applicant.

5.3. Subsequent to termination of the contract, *Welspun* encashed various Bank Guarantees to the tune of Rs. 20.29 Crores (Approx.) out of bank guarantees of Rs. 32.12 crores, which were submitted by the present Corporate Debtor in pursuance to the terms and conditions of contract executed between them. In order to prevent further encashment of the remaining amount of Bank Guarantees of Rs. 11.83 Crores, an ad-interim stay was ordered by the Commercial Court, Udaipur in favour of the present Corporate Debtor on 01.04.2022, in the case bearing no. 03/2022, titled as *M/s Ravi Infrabuild Projects Pvt. Ltd. vs. Welspun Enterprises Limited & Another*. Moreover, *Welspun* did not clear the unpaid bills & dues of the present answering Corporate Debtor. The alleged dispute flagged by *Welspun* pertains to raw material of inferior quality which trails essentially to the Applicant. Thus, there is an ongoing dispute from time much prior to the notice being issued by the Applicant with regard to the contract.

5.4. The interim orders passed by the Hon'ble Commercial Court, Udaipur, were challenged by way of an appeal before the Hon'ble Rajasthan High court, Jodhpur, which at present is also seized of the matter. It is further submitted that against the ad interim stay granted by the learned Commercial Court, Udaipur, *Welspun Enterprises Ltd.* preferred a writ petition assailing the same, which is pending adjudication. The Hon'ble High Court reserved the judgement in the said Civil Misc. Appeal while injuncting the Arbitral Tribunal from proceeding further with the section 17 application against which the answering Corporate Debtor approached the Hon'ble Supreme Court by way of an SLP.

5.5. It is submitted that the Corporate Debtor preferred Petitions under section 9 of the Arbitration Act seeking an ad interim order of injunction restraining the *Welspun* from encashing the bank guarantees submitted by the Corporate Debtor. The Corporate Debtor has also preferred Application under Section 11 of the Arbitration Act for constitution of an Arbitration Tribunal.

5.6. The present status of the dispute in question as it stands on date is that the Arbitral Tribunal has been constituted and is presently seized of Section 17 Applications for grant of interim protection in favour of the Answering Corporate Debtor. The Arbitral Tribunal has continued the interim order originally granted by the

Commercial Court. The above-mentioned ongoing litigation regarding sub-standard quality of material used in execution of the work, has to be considered as a dispute in terms of Section 5(6) and enumerated in Section 8 of the Code.

5.7. In the work order issued to the Applicant by the Corporate Debtor, it is clearly mentioned that the material is being purchased for carrying out the construction work of "*Civil Construction works for the Section of the Project from Existing Chainage Km 29.800 to Km 54.730" under Concessionaire Welspun Enterprises Ltd.*" It was also mentioned that if in case the material supplied turns out to be flaky or does not pass laboratory test for its worthiness and clearance from our/ Client's Material Engineer, then no payment for such material would be made by the Corporate Debtor. In the present case, it is clear from the above-referred documents that the material supplied by the Applicant was of sub-standard quality and due to the same dispute arose between Corporate Debtor and *Welspun*; and therefore, the Corporate Debtor is under no obligation to pay anything for the said material, unless the dispute is finally adjudicated by an appropriate authority.

5.8. The details referencing the history of the litigations between Corporate Debtor and *Welspun Enterprises Ltd.* in relation to the contract in question are tabulated below:

<i>S No.</i>	<i>Case Details</i>	<i>Issue in brief</i>	<i>Status of the case</i>
1.	Case No.- 3/2022, <i>Ravi Infrabuild Projects Pvt. Ltd. Vs. Welspun Enterprises Ltd.</i> before the Commercial Court, Udaipur	An application under Section 9 of the Arbitration Act to grant an ad interim order of injunction in favor of the petitioner therein and restraining <i>Welspun</i> therein from encashing the bank guarantees submitted by the Petitioner	Pending before the Commercial Court, Udaipur.
2.	S.B.C. W.P. No. 14691/2022, <i>Welspun Enterprises Ltd. Vs. Ravi Infrabuild Projects Pvt. Ltd.</i> Before the Rajasthan High Court at Jodhpur	A writ petition against the order passed in the case mentioned at Sr. No. 1	The Court stayed the proceedings before the Commercial Court, Udaipur
3.	D.B.C.M.A. No. 488/2022- <i>Welspun Enterprises Ltd. Vs. Ravi Infrabuild Projects Pvt. Ltd.</i> Before the Rajasthan High Court At Jodhpur	An appeal against the ad interim injunction granted in the case mentioned at Sr. No. 1	Disposed of.
4.	S.L.P. (C) NO. 5234/2023 <i>Ravi Infrabuild Projects Pvt. Ltd. Vs. Welspun Enterprises Ltd.,</i> before Hon'ble Supreme Court	Application against the order dated 29.03.2023 passed by Hon'ble High Court Jodhpur, restricting the Arbitral Tribunal to pass any order on pending Interim Applications seeking stay on encashment of Bank Guarantees.	Pending
5.	O.M.P. (I) Comm. No. 331-332/2022, <i>Ravi</i>	Two applications under Section 9 of the Arbitration	Disposed of.

	<i>Infrabuild Projects Pvt. Ltd. Vs. Welspun Enterprises Ltd.</i> , before the Delhi High Court	Act to grant ad interim order of injunction in favour of the Petitioner and restrain the Corporate Debtor from encashing the bank guarantees submitted by the Petitioner.	
6.	ARB.P. 1290-1291/2022, <i>Ravi Infrabuild Projects Pvt. Ltd. Vs. Welspun Enterprises Ltd.</i> , before the Delhi High Court	Two Applications under Section 11 of the Arbitration Act for the constitution of the Arbitration Tribunal by appointment of an arbitrator.	Disposed of.
7.	Arbitration Proceedings <i>Welspun Enterprises Limited v/s Ravi Infrabuild Projects Pvt. Ltd.</i>	Arbitral Tribunal comprising of Justice (Retd.) Deepak Verma, Justice (Retd.) A. N. Venugopala Gowda and Justice (Retd.) Usha Mehra	Pending
8.	Claim/ Reference No. MSEFC/HQ-1/Offline/001/2022, <i>Ravi Infrabuild Projects Pvt. Ltd. Vs. Welspun Enterprises Ltd.</i> Before the Rajasthan MSME Facilitation Council, Jaipur	A petition against the Corporate Debtor Welspun Enterprises Ltd. claiming back the legally payable dues to the claimant Ravi Infra Projects Pvt. Ltd.	Disposed of.

5.9. Furthermore, it is submitted that the present Applicant was responsible for supplying of material, the precise dispute being brought in front, which has led to the termination of the contract as alleged by Welspun for inferior quality of work. Since the said dispute is pending consideration before appropriate judicial forums,

therefore, the present application is barred by law and the same is not maintainable at this stage.

- 5.10. In support of the above proposition, the law as laid down by the Hon'ble Supreme court in case of *Mobilox Innovations Pvt. Ltd. vs. Kirusa Software (P) Limited*, (2017) 1 SCC Online SC 353) is referred to, wherein it has been held 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. It was further mentioned that all that the Adjudicating Authority has to see at the stage of Admission 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 or a moonshine defence unsupported by tangible materials/evidence. The Hon'ble Supreme Court in the decision *Transmission Corporation of Andhra Pradesh Limited vs Equipment Conductors and Cables Limited* [(2019) 12 SCC 697], categorically laid down that IBC was not intended to be a substitute to a recovery forum. In view of the above-mentioned facts and circumstances, the default as alleged by the Corporate Debtor falls under the definition "dispute" as enumerated and mentioned in Section 8 of the IBC, 2016.
6. The Applicant filed its rejoinder vide Diary No. 1743/2023 dated 18.07.2023, submitting the following:

- 6.1. It is worthwhile to mention that till the date of filing of the present petition, there was not even a single communication from the Corporate Debtor raising any dispute about the amount in question. Further, pursuant to receipt of Demand Notice under Section 8 of the Code, the Corporate Debtor preferred a reply dated 15.06.2022 wherein also no such dispute was raised and it was simply stated that there was some litigation of Corporate Debtor with a third party pending (*Welspun Enterprises Limited*). The amount of unpaid Operational Debt was neither denied nor disputed in any manner in the reply dated 15.06.2022. Further, the receipt of material supplied under the invoices has never been denied, not a single averment has been raised regarding the quality, quantity or specification of the material supplied.
- 6.2. The Corporate Debtor has challenged the maintainability of Petition alleging existence of a dispute under Section 5(6) of the Code without placing any material on record. The documents annexed with the reply do not constitute any dispute whatsoever regarding the amount in question. The Corporate Debtor has not disputed the existence or quantum of debt; has not raised a single averment/ dispute regarding the quality, quantity, specification, or receipt of the material; and has not alleged any breach of representation or warranty.

6.3. It is submitted that the transaction between the Applicant and the Corporate Debtor is independent and has no direct relation with business dealings of Corporate Debtor with any third party, i.e. *Welspun*. From the Work Orders and the Tax Invoices placed on record, it is clear that the liability to make payment by the Corporate Debtor against receipt of desired material was not dependent on receipt of payment from *Welspun* to Corporate Debtor or on any other dealing/ agreement/ dis-agreement/ pendency of any proceedings etc. between them. As submitted above, till date the Corporate Debtor has not made any communication to the Applicant disputing the amount of Operational Debt or raising any dispute regarding the material supplied.

6.4. A bare perusal of the letter dated 18.01.2022 (Annexure R-1) makes it abundantly clear that the alleged dispute between the Corporate Debtor and *Welspun Enterprises Limited* arises out of “*slow progress of works, poor quality of workmanship, usage of incorrect materials, failure to meet specifications and standards, failure to observe safety protocols, delayed/ non-payment of mining royalties etc.*”. It is clear that no dispute with regard to material supplied by the Applicant arose between the Corporate Debtor and *Welspun*. Had it been so, the Corporate Debtor would have written at least one communication to the Operational

Creditor pursuant to the number of letters written to it by *Welspun*.

The absence of any such communication by the Corporate Debtor to the Operational Creditor despite numerous letters by *Welspun* to Corporate Debtor, itself clearly shows that there was no dispute regarding the unpaid operational debt.

- 6.5. It is material to note that after *Welspun* wrote letter dated 18.01.2022 to the Corporate Debtor, the Corporate Debtor made payments of Rs. 25,02,554/- on 20.01.2022 and Rs. 45,00,000/- on 25.02.2022 to the Operational Creditor. In case the amount payable to the Operational Creditor would have any connection with the litigation of *Welspun*, the Corporate Debtor would not have made the above payments.
7. The Applicant has filed its written submissions vide Diary No. 1871/2023 dated 03.08.2023, submitting the following:
- 7.1. The Applicant submitted that this is not a case of pre-existing dispute. The submission of the Corporate Debtor in its reply before this Adjudicating Authority to show that payment of Applicant was dependent on payments from *Welspun*, is absolutely without any evidence. It is established on record that the Corporate Debtor had never written any email or letter to Applicant to raise dispute regarding the amount in question. Mere vague averment to dispute the liability is not sufficient to discharge the onus placed on

Corporate Debtor to establish its contentions. In case, the amount payable by the Corporate Debtor, in this petition, had any connection with its liability of *Welspun*, the Operational Creditor would have been a party to the proceedings. It is admitted fact that Operational Creditor was never a party to those proceedings.

7.2. The alleged letters dated 18.01.2022 & 24.03.2022 written by *Welspun* to the Corporate Debtor were never referred to the Operational Creditor. Even the same were not pleaded by Corporate Debtor while sending reply to demand notice. The letters contained no reference to the material supplied by the Operational Creditor. Admittedly, a number of suppliers supplied material to the Corporate Debtor.

7.3. The Applicant has relied upon following judgments:

7.3.1. *M/s Innovative Industries Ltd. Vs. ICICI Bank, Civil Appeal Nos. 8337-8338 of 2017, decided on 31 August, 2017*

7.3.2. *Jord Engineers India Ltd. vs. Valia & Co., Company Appeal (AT) (Ins.) No. 158/2017*

7.3.3. *Naveen Kumar Dixit vs. M/s Jaswant, International Pvt. Ltd., Company Appeal (AT) (Ins.) No. 164 of 2019.*

8. In the written submissions preferred by Corporate Debtor vide Diary No. 1929/2023 dated 09.08.2023, it is stated that: -

- 8.1. Pursuant to ongoing dispute between the Corporate Debtor and *Welspun*, the payment towards Applicant were not made. Consequently, a notice dated 31.05.2022 was served on the Corporate Debtor which was received on 06.06.2022 and was replied on 15.06.2022, wherein the Applicant was duly informed about the ongoing/ pre-existing dispute between the Corporate Debtor and *Welspun*. However, even after being duly informed about the pre-existing dispute, the Applicant has preferred the instant petition, while making an incorrect declaration in its affidavit about no pre-existing dispute.
- 8.2. It is further pertinent to mention that vide work order dated 20.07.2020 issued by the Corporate Debtor to the Applicant, it was mentioned in the terms and conditions that in case, the material is found to be not fit or flaky (or poor quality), no payment will be made for the same.
9. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, Rejoinder and Written Submissions along with the documents enclosed with the Application.
10. On perusal of the record, it is seen that a Concession Agreement was executed between NHAI and *Mukarba Chowk Panipat Toll Roads Limited* on 28.08.2015 for expanding the existing road from Mukarba Chowk, Delhi to Panipat, Haryana from 6 lanes to 8 lanes. Subsequently,

through an Endorsement Agreement dated 08.06.2020, NHAI substituted *M/s Welspun Infrafacility Pvt. Ltd.* in place of *Mukarba Chowk Panipat Toll Roads Limited*, thereby endorsing the Concession Agreement in favour of *M/s Welspun Infrafacility Pvt. Ltd.*

11. Pursuant to the said Agreement, the *Welspun Infrafacility Pvt. Ltd.* awarded engineering procurement and construction works to *M/s Welspun Enterprises Limited*. In order to facilitate timely execution of the project, *Welspun* appointed Corporate Debtor as subcontractor on 04.06.2020. In addition to the said project, *Welspun* was also awarded several contracts for improvement of roads in Amravati and Maharashtra and therein *Welspun* entered into various contracts with the Corporate Debtor for procurement of materials and equipments and all other works and things necessary for completion of construction works. The said contracts were entered into between the *Welspun* and Corporate Debtor on 25.01.2019, 07.09.2019 and 05.08.2020.
12. It is also seen from the record that *Welspun* and Corporate Debtor entered into Re-works and Rectification Agreement on 23.02.2021 to carry out detailed reworking and rectification works as Corporate Debtor had not adhered to the contractual requirements of the works executed under the contracts dated 25.01.2019, 07.09.2019 and 05.08.2020. Thereafter, *Welspun* wrote a letter dated 24.03.2022 to the Corporate Debtor complaining about deficiencies in the construction work carried out.

- Welspun* invoked 14 bank guarantees furnished by the Corporate Debtor under the projects, however, out of those 14 bank guarantees, 9 have been duly encashed.
13. After receipt of the letter dated 24.03.2022, Corporate Debtor preferred an Application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Commercial Court, Udaipur. The said Court passed an ex-parte ad interim stay order restraining the *Welspun* from encashing the remaining 5 Bank guarantees. The said order was challenged before the Hon'ble High Court of Judicature for Rajasthan, Jodhpur in *D.B. Civil Misc. Appeal No. 488/2022*. Vide order dated 29.03.2023, the Hon'ble Rajasthan High Court had set aside the order dated 01.04.2022 passed by the Commercial Court, Udaipur. Against the said order of Hon'ble Rajasthan High Court, the petition numbered as *Special Leave to Appeal (C) No. 5234/2023* was preferred by the Corporate Debtor before Hon'ble Supreme Court of India. The Arbitration Proceedings before the Arbitral Tribunal are also pending in form of an Application under Section 17 of the Arbitration & Conciliation Act, 1996.
14. The sole contention of the learned counsel for the Corporate Debtor is that in view of the pending litigation between the *Welspun* and Corporate Debtor prior to issuance of demand notice under Section 8 of the IBC, 2016, the present Application is liable to be dismissed due to pre-existence of dispute.

15. Learned counsel for the Petitioner submits that there was not even a single communication from the Corporate Debtor raising any dispute about the amount in question. Even in reply to the demand notice under Section 8 of the Code, no dispute was raised by the Corporate Debtor, however, reference was made with regard to pending litigation between *Welspun* and the Corporate Debtor.
16. Another contention of the learned counsel for the Petitioner is that letter dated 18.01.2022 (Annexure R-1) issued by the *Welspun* to the Corporate Debtor refers to the slow progress of works, poor quality of workmanship, usage of incorrect materials, failure to meet specifications and standards, failure to observe safety protocols, delayed/ non-payment of mining royalties etc. No dispute with regard to the material supplied by the Applicant was referred in the letter dated 18.01.2022 written by *Welspun* to the Corporate Debtor. Subsequent to letter dated 18.01.2022, the Corporate Debtor has made payments of Rs. 25,02,554/- (Rupees Twenty-Five Lakhs Two Thousand Five Hundred Fifty-Four Only) on 20.01.2022 and Rs. 45,00,000/- (Rupees Forty-Five Lakhs Only) on 25.02.2022 to the Operational Creditor.
17. It is clear that in the present matter, NHAI awarded contract to *M/s Welspun Infracility Private Limited* who in turn sub-contracted to *Welspun Enterprises Limited* by way of Letter of Intent dated 20.05.2020. Then a Construction Contract dated 04.06.2020 was also executed

between Corporate Debtor and *Welspun* which was named as “*Civil Construction Works for the section of the project from existing chainage Km 29.800 to km 54.730 under concessionary Welspun Enterprises Limited*”. The Corporate Debtor had placed work orders dated 20.07.2020 and 15.06.2021 on the Applicant for supply of aggregates and material as per the rates indicated. The Tax Invoices Nos. DL21-22RJP004, DL21-22RJP005, DL21-22RJP006 remained unpaid which were raised by the Applicant for supply of aggregate dust, WMM, GBP Grit to the Corporate Debtor at Delhi- Panipat Section 2 of NH-44. The total default shown in Part IV of the Application is Rs. 1,39,90,495.46/- (Rupees One Crore Thirty-Nine Lakhs Ninety Thousand Four Hundred Ninety-Five and Forty-Six Paisa). Some dispute arose between *Welspun* and the Corporate Debtor for which a letter dated 18.01.2022 was sent to the Corporate Debtor and subsequently, bank guarantees were encashed by *Welspun*. In pursuance to the work orders, the Applicant had supplied some material to the Corporate Debtor and certain payments were also made by the Corporate Debtor to the Applicant subsequent to issuance of letter dated 18.01.2022 by *Welspun*. Moreover, *Welspun* was awarded several contracts for improvement of roads in Amravati and Maharashtra. Thereafter, *Welspun* entered into various contracts with the Corporate Debtor for procurement of materials, equipments and all other works things necessary for completion of construction works. Various bank

guarantees to the tune of Rs. 20.29 crores were encashed by *Welspun* out of the bank guarantees of Rs. 32.12 crores furnished by the present Corporate Debtor.

18. *Welspun* served a letter dated 18.01.2022 to the Corporate Debtor referring to prior letters dated 21.10.2021 and 15.12.2021 wherein it was mentioned that *Welspun* has incurred huge financial losses by the sudden and unexpected abandonment of work by Corporate Debtor. Vide letter dated 06.04.2022, Corporate Debtor has been informed that *Welspun* is invoking arbitration in terms of Clause 16.32 of the Construction Contract. Subsequent to letter dated 06.04.2022, litigation commenced between *Welspun* and the Corporate Debtor. There was not a single communication from the Corporate Debtor raising any dispute regarding quality of material supplied by the Applicant. Even in reply to notice under Section 8, there was no reference regarding the quality of material, rather the Applicant was informed about the pending litigation between *Welspun* and the Corporate Debtor. Payment to the tune of Rs. 70,02,554/- (Rupees Seventy Lakhs Two Thousand Five Hundred Fifty-Four Only) was made by the Corporate Debtor subsequent to receipt of letter dated 18.01.2022.
19. The Hon'ble Supreme Court of India in the matter of '*Mobilox Innovative Private Limited vs. Kirusa Software Private Limited, (Supra)*' held as follows:

“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 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.”

20. It is evident that no suit or arbitration proceeding relating to a dispute was pending between the parties to the case. There is no contractual relation between *Welspun* and the Applicant. *Welspun* served a letter dated 18.01.2022 to the Corporate Debtor alleging work executed by Corporate Debtor under the construction contract has been riddled with issues such as slow progress of work, poor quality of workmanship, usage of incorrect materials, failure to meet specifications and standards, failure to observe safety protocols, delayed/ non-payment of mining royalties etc. The same along with abandonment of the construction activities has caused financial losses to *Welspun*. *Welspun* had no option but to get the balance work executed from another contractor.
21. As stated in the *Mobilox* judgment, the Adjudicating Authority is to see that, when the Application is filed, 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 facts unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court

does not need to be satisfied that the defense 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. The Hon'ble Supreme Court scrutinized the object of IBC and laid down the plausible contention test to determine the existence of dispute. As held, the Court has to determine whether there is plausible contention which requires further investigation.

22. In the present case, exchange of letter between *Welspun* and the Corporate Debtor and further litigation between the parties has nothing to do with the present Application, as the Applicant is not a party to the dispute. Hence, defense raised by the learned counsel for the Corporate Debtor does not seem a plausible contention referring to any pre-existence of dispute.
23. It has very well been established that under Section 9 of the Code, to initiate CIRP proceedings, the Applicant is required to prove that the debt is due, it has not been paid and the debt is an undisputed debt. The dispute alleged by the Corporate Debtor cannot be a way to get out of making the payment for the work undertaken by the other party. Therefore, in the present matter, we are inclined to initiate the CIRP of the Corporate Debtor on account of fulfillment of Section 9 ingredients.

24. Under sub-section (4) of Section 9 of the Code, the Operational Creditor has proposed the name of *Mr. Sudesh Kumar* as IRP. In view of this *Mr. Sudesh Kumar*, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-001/IP-P02525/2021-22/13881 (email: skrtomar@gmail.com; mobile no. +91 9971166789), is hereby appointed as the IRP. The said IRP is directed to file her written consent to act as a resolution professional in Form-2 provided under Rule 9 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.
25. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.
26. Consequences of initiation of CIRP shall be inter-alia as follows:
- 26.1. The IRP appointed by the Adjudicating Authority, *Mr. Sudesh Kumar*, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by her under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.

26.2. Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.

26.3. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray her expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

26.4. In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A

copy of this order shall also be communicated to IBBI for its records.

27. Accordingly, CP No. (IB)- 89/9/JPR/2022 is admitted. In view of the foregoing pending applications, if any, shall stand disposed off.
28. The Registry is directed immediately to send a soft copy of the instant Application along with this order to the RP nominated herein on his e-mail id.

-Sd-

**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

-Sd-

**ATUL CHATURVEDI,
TECHNICAL MEMBER**