



IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.153
C.P.(IB)/11(AHM)2021

Orders under Section 9 IBC

IN THE MATTER OF:

EBPL Ventures Pvt Ltd
V/s
Sarguja Rail Corridor Pvt Ltd

.....Applicant

.....Respondent

Order delivered on ..23/08/2022

Coram:

Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER


The case is fixed for pronouncement of the order. The order is pronounced in open Court vide separate sheet.

SD/-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

SD/-

**MADAN B GOSAVI
MEMBER (JUDICIAL)**



**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
Court No. I**

C.P. (I.B.) No.11/NCLT/AHM/2021

(An Application under section 9 of the Insolvency and Bankruptcy
Code, 2016)

In the matter of:

EBPL Ventures Private Limited

Through its Authorized Representative)

CIN No: U60200CT2006PTC020033

Having its Registered Office at:

4/3, Nehru Parisar, Nehru Nagar,

Behind Hero Honda Show Room

Bhilai Ct – 490 020

.....Applicant

Versus

M/s. Sarguja Rail Corridor Private Limited

CIN No. U60200GJ2010PTC115649

Having its Registered Office at:

Adani Corporate House, Shantigram,

Near Vaishno Devi Circle, S.G. Highway,

Khodiyar, Ahmedabad, Gujarat – 382 421

.....Respondent

Order delivered on: 23.08.2022

**Coram: Madan B. Gosavi, Member (Judicial)
Kaushalendra Kumar Singh Member (Technical)**



Appearance:

For the Operational Creditor : Mr. Navin Pahwa, Ld. Sr. Adv. a.w. Mr. Kunal Goyal, Ld. Adv. & Ms. Drashti Modi, Ld. Adv.

For the Corporate Debtor : Mr. Saurabh Soparkar, Ld. Sr. Adv. a.w. Mr. Gaurav Mathur, Ld. Adv. & Mr. Yashraj Champawat, Ld. Adv.

[ORDER]

1. The instant company application is filed by M/s. EBPL Ventures Pvt. Ltd. – applicant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“**IB Code**”) against the Respondent- M/s Sarguja Rail Corridor Pvt. Ltd. [**‘SRCPL’**] for the default amount of Rs.22,12,90,900/- along with of Rs. 6,95,15,656/- as interest @ 18 % P.A. as on 06.10.2020. The date of default as stated by the applicant is 09.04.2018.

2. The averments made by the applicant are summarised as under;

(i) The Respondent [**‘SRCPL’**] had awarded a contract to M/s Gannon Dunkerley and Co. Ltd. [**‘GDCL’**] for construction of railway private siding track. The GDCL further awarded some of the work to the applicant vide work orders dated 01.08.2015 bearing reference no. D/003841 for P.way works and reference no. D/003840 for OHE works for Rs. 21.27 Crores (phase IIA-33 to 54 Kms) which was later reduced to Rs. 18 crores on reduction of the scope of the work.

(ii) The Respondent [SRCPL] also awarded contracts to M/s. Vijay Nirman Company Pvt. Ltd. [**‘VNCPL’**] vide contract dated 07.08.2014 and 05.12.2015 for construction of private railway sidings (phase IIB-54 Kms to 70 Kms and phase IIC-70 Kms to



75.56 Kms). The VNCPL further awarded contracts for the construction of P.way & OHE work **to the applicant** for Rs.26.70 Crores vide work order dated 16.06.2016 bearing reference no. VNCPL/SRCPL/2016-17/EBPL/003 (for OHE work) and vide order dated 31.12.2016 bearing reference no. VNCPL/SRCPL/2016-17/EBPL/10A for P.way work. Later on, the scope of the aforesaid works was increased to some extent without any increase in the contract value. The name of the applicant was approved by all three companies - (The Respondent, GDCL, and VNCPL).

(iii) The GDCL and VNCPL (**“Contractors”**) committed various wrongs/errors during the tenure of the applicant’s work such as non-payment of GST. When things became very difficult for the applicant due to non-payment of the due amount by the aforesaid contractors then the Respondent stepped in as principal owner and agreed in writing to make all the payments due to be paid by contractors. As per the minutes of the meeting dated 09.04.2018, the Respondent agreed to the enhancement of the contract value to Rs. 26 Crores plus GST on behalf of GDCL as against the original contract value of Rs. 18 crores; and also for the payment of Rs. 1.7 Crore plus GST on behalf of the VNCPL over and above the original contract value of Rs. 26.70 crores. Thereafter, the applicant issued five proforma invoices in the name of the Respondent. The Respondent paid the first installment of agreed liability i.e. Rs.1,74,29,063/- for GDCL and Rs. 85,00,000/- for VNCPL but failed to pay the balance amount. The Respondent further admitted and promised to return the bank guarantee given by the applicant of Rs. 66.85 Lakh which was not returned and was wrongfully encashed by VNCPL on 19.04.2019.



(iv) As per the minutes of the meeting dated 09.04.2018 balance payment was reconciled for GDCL and the Respondent agreed to pay Rs. 3.10 Crore. The GDCL wrongfully tried to encash bank guarantees issued by the applicant and wrongfully filed a case under Section 138 of the Negotiable Instruments Act, 1881 against the applicant.

(v) A meeting was again held between the applicant and Respondent on 04.07.2018 for releasing the payments wherein the VNCPL assured for payment of GST amounts within 40 days of the meeting but payments were not released. The VNCPL vide E-mail dated 28.09.2018 accepted the Input Tax Credit but failed to pay the bills or the GST as required to be paid. The completion certificate with respect to the awarded works to the applicant has been issued by the Respondent as well as the Department of Railways [South East Central Railways Zone] in its favour on 25.06.2018 and 02.07.2018 and the railway line is fully operationalized. But, the Respondent has failed to pay the agreed amount.

(vi) The meeting was once again convened on 14.10.2019 and attended by the Respondent, GDCL, and VNCPL at Gurgaon, where the Respondent acknowledged its liability to pay Rs. 2.85 Crore to the applicant along with GST of Rs. 1.80 Crores but failed to pay the same. The minutes of the meeting dated 14.10.2019 was signed by the applicant in April 2020, however, by that time Respondent had developed a mala fide intention and objected to the minutes. The Respondent is relying on a CA's/Auditor report, however, no auditor(s) were present in the said meeting who agreed to be appointed by the applicant. The Respondent tried to impose biased literature of the CA for which the applicant objected seriously and intimated via E-mail dated



14.09.2020 and 25.09.2020. Thereafter, another meeting was conducted amongst the applicant, the Respondent, GDCL, and VNCPL in Ahmedabad wherein the applicant was forced to accept a mere Rs. 2.85 Crore against the issuance of no dues certificate.

(vii) The Respondent had given a contract to the GDCL for the execution of work for Rs.36.44 Crore, however, the entire work was thereafter assigned to the applicant for Rs.18.07 Crore only. The applicant invested more than Rs.10.50 Crore beyond the awarded contract amount due to delay on the part of GDCL in providing the land and other clearance. Therefore, the Respondent had to step in and agreed to pay the applicant the entire amount. Similarly, a contract was awarded to VNCPL by the Respondent for Rs. 46.78 Crore, the VNCPL further awarded the same to the applicant for Rs. 26.70 Crore.

(viii) The applicant issued a demand notice dated 06.10.2020 under Section 8 of the IB Code at the registered address of the Respondent in Gurgaon. The applicant came to know that subsequently, the Respondent had changed its registered office address from Gurgaon to Ahmedabad. Thereafter, the applicant issued a demand notice dated 01.12.2020 **at its Ahmedabad address**, and the same was received by the Respondent on 07.12.2020. A Demand Notice was also sent through email. Reply to the demand notice was received by the applicant on 25.12.2020 wherein the Respondent has not raised any substantial dispute. It is requested that the CIRP of the Respondent be initiated for default of operational debt as above.



3. The Respondent [SRCPL] filed its reply to the present application on 16.04.2021 and made the submissions which are summarised as under:

(i) The Respondent denied contentions and averments made by the applicant and stated that the present application is not maintainable as the Respondent has no privity to the contract between contractors [GDCL & VNCPL] and the applicant; and that the respondent [SRCPL] is not a Corporate Debtor of the applicant and that GDCL and VNCPL are its Corporate Debtor.

(ii) The Respondent was incorporated for the special purpose vehicle by Adani Enterprises Limited for the construction of a railway line for the transportation of coal from various coal blocks in the state of Chhatisgarh. The said rail line [private railway siding] was to be constructed in a phased manner. The Respondent issued a Letter of Intent [LoI's] in favour of GDCL on 21.05.2014 for the execution of work [construction of private railway siding] for phase-II A (33 to 54 Kms) for the contract value of Rs. 230 crores including all taxes. The work was to be completed within 22 months and the complete work was to be handed over to the Respondent within 24 months from the date of commencement of the work. In view of the aforesaid LoI, a contract came to be executed between the Respondent and GDCL on 13.05.2015 (hereinafter referred to as **“GDCL Contract”**).

(iii) The Respondent issued another LoI on 07.08.2014 in favour of VNCPL for the construction of work [private railway siding] of Phase IIB (54 to 70 Kms) for an amount of Rs. 171 Crores which was required to be completed by 31.10.2015 and the work was to be handed over by 28.02.2016. Thereafter, the



Respondent executed a contract on 15.05.2015. The Respondent issued one more LoI on 05.12.2015 in favour of VNCPL for the execution of work [private railway siding] **of phase IIC** (70 to 75.77 Kms) for Rs. 35,37,89,327/-. The construction work was to be completed by 21.01.2017 and work of finishing and overall completion was to be done by 21.05.2017. For the constructions of the aforesaid work, a contract was executed between the VNCPL and the Respondent on 05.01.2016. The contracts as executed on 15.05.2015 and 05.01.2016 are hereinafter referred to as **“VNCPL Contracts”**).

(iv) Under clause 11.3 of the General Conditions of the contract [page 252 of the reply], the GDCL was entitled to sub-contract any of the works with the consent of the respondent. Further by virtue of clause 11.4, under no circumstances the sub-contracting by GDCL would give rise to any claim by a sub-contractor against the respondent or create any contractual obligation between the sub-contractor and the respondent. Further by virtue of provisions of clause 11.11, if the respondent found that a subcontractor or supplier is not paid or there is a likelihood of non-payment, then the respondent has a right to step in and make such payments subject to being reimbursed by the GDCL such provisions were in the interest of the project and does not create any obligation or liability on the Respondent. The VNCPL Contracts also contain similar provisions as mentioned in the aforesaid clauses in the GDCL Contract.

(v) The GDCL and VNCPL independently appointed the applicant as their sub-contractor for the construction of OHE and track linking. The GDCL placed two work orders dated



01.08.2015 for the execution of the work for the total amount of Rs. 18.06 crores. The VNCPL also placed work orders dated 16.06.2016 and 12.12.2016 for a total value of Rs 26.70 crores. The work order dated 12.12.2016 came to be amended on 31.12.2016 where further terms and conditions were added without changing the value of the contract.

(vi) The applicant has not executed the works as per the terms and conditions of its agreement with GDCL, the defects were brought to the notice of the applicant by the GDCL vide letters dated 12.03.2018 & 14.03.2018. The GDCL on 30.03.2018 issued a letter of termination of work to the applicant. Due to the impasse between the applicant and the GDCL, the completion and handing over of the project of the first phase was suffering especially with respect to EIG (Certificate of Electrical Inspector to Government of India) approval. The applicant also had a dispute with VNCPL with respect to the enhancement of contract value on account of alleged extra work undertaken by the applicant over and above the awarded works.

(vii) Since the dispute with the VNCPL and GDCL remained unresolved, the Respondent called separate meetings with the applicant, GDCL, and VNCPL which took place on 09.04.2018, and the applicant then submitted and executed two indemnity bonds cum undertaking in respect of its contracts with GDCL & VNCPL undertaking to execute the necessary documents for EIG approval and also indemnifying the Respondent against any loss or damage. The Respondent merely facilitated discussion and did not assume any liability of payment. Such action on the part of the Respondent was exercised in view of clauses 11.11 of the GDCL Contract & 11.11 of the VNCPL Contracts. In the said



meeting dated 09.04.2018, it transpired that the applicant's claim for extra work could be considered for increasing of value of the contract with GDCL from Rs. 18.06 crores to Rs. 26 Crores plus GST [page 59 of the application]. Such payment was to be made by the GDCL in accordance with an Indemnity Bond Cum Undertaking [page no. 60-62 of the application] executed on 09.04.2018 itself [**the Bond**"]. Though GDCL did not attend the meeting physically, the decision was taken upon constant telephonic consultations with its managing director and it was agreed that payments are to be actually made by the GDCL. There was no liability or requirement on the part of the respondent under the minutes of the meeting dated 09.04.2018.

(viii) On 09.04.2018 itself, a meeting was held with respect to the applicant's claim against VNCPL wherein it was recorded that a sum of Rs. 1.7 crores plus GST [page 64 of the application] is payable to the applicant in terms of a separate bond [page no. 330- 332 of the reply] executed by the applicant. Again no liability or requirement to make payment was fastened on the respondent.

(ix) In the interest of its project and to ensure its timely completion as a goodwill gesture, the respondent made payment of a sum of Rs. 93,50,000/- to the applicant on 17.04.2018 in respect of its dispute with VNCPL. Similarly, on 17.04.2018 itself the respondent made a payment of Rs. 1,91,71,000/- to the applicant in respect of its dispute with GDCL [page No. 164 of the application]. Both such payments were as an exercise of the right under clause 11.11 of the General conditions of the contract in pursuance of the minutes of the meeting dated 09.04.2018. Such gesture on the part of the Respondent can not be equated with assuming any liability on itself for the claim of



the applicant against GDCL and VNCPL. Accordingly, the applicant's contention that the Respondent became liable for the claim in pursuance of MoM dated 09.04.2018 and subsequent payment on 17.04.2018 is wrong, misleading and an argument of convenience, which would be evident from the following.

a) On 27.06.2018 a tripartite agreement came to be executed between the applicant, respondent, and VNCPL [page no. 334-337] of the reply, whereby the disputes between the applicant and VNCPL were finally and amicably settled. In the said agreement, it is acknowledged that the payment of Rs. 93.50 lakhs made on 17.04.2018 by the respondent to the applicant would discharge the respondent from making payment to that extent to VNCPL. This clearly demonstrates that the payment of Rs. 93.50 lakhs was made by the respondent on behalf of the VNCPL. It was further agreed that the balance amount would be paid by VNCPL to the applicant subject to reconciliation.

b) In the light of the aforesaid, it is apparent that at no point of time the respondent assumes any liability for making any payment to the applicant. The steps taken by the respondent were merely facilitation in the interest of the project to ensure that the work does not suffer on account of the disputes between the applicant, GDCL, and VNCPL. By no stretch of the imagination, the respondent be termed as owing a debt to the applicant. In such circumstances, the captioned petition is wholly misconceived and deserved to be dismissed.

(x) The claim of the applicant is false, concocted and the applicant is not entitled to any payment whatsoever. The MoM



dated 09.04.2018 and the Bonds executed by the applicant clearly refer to payment being made to the applicant subject to verification and reconciliation. A similar agreement was reached in the tripartite agreement dated 27.06.2018. Accordingly, a firm of chartered accountants namely AJSH and Co. LLP [**the firm**'] was appointed for reconciliation of the account balance of the applicant with respect to GDCL and VNCPL. The applicant participated in the process and attended a joint meeting dated 18.10.2019 [page 353 of the reply]. However, the applicant failed to provide the required documents for reconciliation to the firm. In such a scenario, the firm verified the data including invoices and signed sheets, etc. supplied by VNCPL and concluded that no amount is payable by VNCPL to the applicant under the contract. Similarly, the firm carried out account balance reconciliation between the applicant and GDCL. The applicant chose not to supply the requisite information to the firm. On verification of available data, it was found that the total payment made to the applicant by GDCL including a sum of Rs. 1.95 cores which were paid by the respondent on 17.04.2018 came to Rs. 26.28 crores; and the same is in accordance with the agreement reached vide MoM dated 09.04.2018; and as such no amount is due to the applicant either from GDCL or VNCPL.

(xi) Without there being any reason or Authority the Applicant issued a demand notice dated 06.10.2020 & 01.12.2020 along with the invoice dated 06.01.2019. The said invoice is ex-facie concocted and the Respondent is not liable to pay any amount with respect to the payment due towards the GDCL and VNCPL. The Respondent replied to the demand notice on 08.12.2020 inter-alia pointing out that it has no privity of contract and has denied the claim of the Applicant.



(xii) The Applicant deliberately concealed from this Adjudicating Authority that it has already started recovery proceedings against VNCPL by issuing a demand notice dated 06.10.2020 claiming a sum of Rs. 13,50,72,000/- as an operational debt. The VNCPL has also replied to the demand notice on 14.12.2020, and denied that any amount is payable.

4. The Applicant filed its rejoinder to the reply of the Respondent and made the submissions which are summarized as under:-

(i) The applicant was directly approved by SECR [railway department] as a Sole Electrical Contractor for the Railway siding works of the Respondent as SECR was not agreed with the said arrangement amongst the Respondent, GDCL and VNCPL. This fact can be verified from the letter Nos. Electrical/SECR/207/Pt.-XXIX/976 dated 08.12.2015 and Electrical/SECR/207/Pt.-XXIX (A)/3159 dated 17.10.2016 which are annexed as Annexure A-10 with the application.

(ii) There is no dispute with respect to payment with VNCPL and GDCL as the same was resolved in the meeting dated 09.04.2018 wherein the Respondent has agreed to pay all payments on behalf of the GDCL and VNCPL. Moreover, the Respondent has acknowledged the debt by paying a part payment.

(iii) The Respondent vide letters dated 17.10.2015 and 10.08.2016 has specifically requested SECR for approval of the name of the applicant as the electrical contractor for the OHE work which was duly approved by SECR vide letters dated 08.12.2015 and 17.10.2016. In the aforesaid letters, it was not discussed about any middleman contractor. The VNCPL and



GDCL had a role to play as subsidiary entities but the contract was always between the Respondent and the Applicant. Moreover, the completion certificate was issued by the Respondent on 25.06.2018 and by SECR on 25.07.2018. The completion certificate was neither issued by VNCPL nor GDCL.

(iv) There is no recovery proceeding initiated by the Applicant against the VNCPL. This fact is totally false and concocted. However, the Applicant is fully entitled to make claim against the Respondent as well as the VNCPL.

5. Heard the learned counsels for both sides and perused the material on record. It is noted that the Respondent awarded work for engineering, procurement, and construction (EPC) of private railway sidings to the GDCL vide contract dated 13.05.2015 for Phase IIA (33 Km to 54 Kms) for Rs. 230 crores, and further awarded contracts dated 15.05.2015 & 05.01.2016 for Phase IIB (54 Km to 70 Kms) for Rs. 171 crores and for Phase IIC (70 Km-75.77 Kms) for Rs. 35,37,89,327/- respectively to VNCPL. The works relating to OHE and linking of tracks were further awarded to the applicant in turn by the GDCL and VNCPL.

The GDCL vide work order dated 01.08.2015 bearing reference No. D/CE/003840 awarded the work of design, supply, erection, and commissioning of overhead equipment (OHE) of rail track (33Km to 54 Kms) for Rs. 10,72,00,000/- and vide work order dated 01.08.2015 bearing reference No. D/CE/003841 for construction work for supply, laying, linking, testing, and commissioning of permanent way work of Rail Track (33 Km to 54 Kms) for Rs. 10,55,30,000/- of phase IIA to the applicant. The total contract amount was of Rs. 21,27,30,000/- for both the aforesaid works. It is not in dispute that the value of the



work orders was thereafter reduced to Rs. 18.06 crores due to the reduction of the scope of phase-IIA work.

6. The VNCPL also awarded works to the applicant vide work order dated 16.06.2016 bearing reference no. VNCPL/SRCPL/2016-2017/EBPL/003 for OHE works for Rs. 13,37,00,000/- and work order dated 31.12.2016 bearing reference no. VNCPL/SRCPL/2016-2017/EBPL/10A for the execution of P-way work for Rs. 13,33,00,000/-for Phase-IIB and IIC respectively. The total contract value was of Rs. 26.70 crores. The aforesaid works were duly completed by the applicant and completion certificates have been issued by the Respondent on 25.06.2018 and also by the SECR on 25.07.2018.

7. The moot question in the present application is whether the respondent can be treated as a debtor to the applicant on the basis of the Minutes of Meeting [**MoM**] dated 09.04.2018. If yes, then whether there is a pre-existing dispute between the applicant and respondent? The present application is filed based on the minutes of the meeting dated 09.04.2018 & the Indemnity Bond Cum- Undertaking thereon given by the applicant separately in respect of the work awarded by GDCL and VNCPL wherein it is clearly stated (para 2 of the MoM) that all the terms and conditions of the work orders issued by GDCL/VNCPL to the applicant shall remain unaltered. It is also mentioned that the GDCL offered an amount of Rs. 25.50 crores including the additional claim for extra work as a full and final settlement work order price which was not acceptable to the applicant. Thereafter, the applicant approached the respondent; and the respondent, without going into the details of the claim for extra work and to attempt the amicable settlement of the case between the applicant and GDCL, agreed for the revised contract price of Rs. 26 crores plus applicable GST on the work (including the additional claim for extra work)



awarded by GDCL as full and final settlement which was accepted by the applicant. The clause of the Indemnity Bond refers for agreement on terms of payments for payment of the differential amount (i.e., Rs. 26 crores less the amount actually paid by the GDCL, after verification and reconciliation) in three stages – 50% of the due amount to be released within two working days of signing EIG documents, 25% to be released within 2 working days of obtaining EIG approval by SECR; and the balance amount to be released within two working days from the date of commissioning and placement and removal of rake with OHE loco. Similarly through the separate MoM and Indemnity Bond dated 09.04.2018 in respect of the extra claim on VNCPL, it was agreed that the differential amount of Rs. 1.70 crores plus GST shall be payable to applicant on the same terms. Though as per these MoM and Indemnity Cum Undertaking, the respondent had agreed that differential amount i.e. Rs. 26 crores less the gross values actually paid for GDCL after verification and reconciliation respect of the work awarded by GDCL and settled amount of Rs. 1.70 crores plus GST on to the work awarded by VNCPL was to be paid to the applicant as per the terms set out in the said Minutes/ Indemnity Bond, but that nowhere has mentioned as to who amongst respondent, GDCL or VNCPL would pay the money. It is also noted that as per clause 2 of Indemnity Bond-cum-Undertaking, the applicant has clearly stated that it was appointed as a sub-contractor by the GDCL and VNCPL for the execution of the awarded work of railway siding. Hence, the contention of the applicant that it became a direct contractor to the respondent on the strength of above stated MoMs and Indemnity Bond does not sustain. For ready reference, the relevant paras of the MoM & Indemnity Bond-cum-Undertaking dated 09.04.2018 are reproduced hereunder;



Minutes of Meeting dated 09.04.2018

(between SRCPL and GDCL)

“ 3. All other terms and conditions of the work orders issued by GDCL to EBPL shall remain unaltered”

INDEMNITY BOND-Cum- UNDERTAKING

(MoM with respect to GDCL)

- 1) *“We, EBPL Ventures Pvt Ltd (for short "EBPL") are willingly giving this irrevocable and unconditional indemnity bond - cum - undertaking to Sarguja Rail Corridor Pvt. Ltd. (for short "SRCPL") in the following terms.*
- 2) *We state that we were appointed as a sub-contractor by Gannon Dunkerley & Co. Ltd (for short "GDCL") for execution of work under Work Order No. D/CE/003840 dated 01.08.2015 for OHE works and Work Order No. D/CE/003841 dated 01.08.2015 for P-Way work for contract values of Rs. 10.72 Cr & Rs 10.55 Cr respectively (collectively Rs.21.27 cr.).The said collective value was subsequently amended to Rs. 18.06. However, we were required to undertake certain works beyond the scope of work under the aforesaid work orders and consequently we believe that we are entitled for revision of the aforesaid amended value of work orders to Rs 31.00 Cr. For this purpose, we have approached GDCL with the relevant document evidence and have requested GDCL to consider our claim for extra work and make payment after verifying our claim.*
- 3) *GDCL has reviewed the documents of additional claims and have offered to revise the work order value to Rs. 25.50 cr. including the additional claim for extra work, as a full and final settlement work order price. However, it is not*



acceptable to us and hence we have approached the principal Employer SRCPL for settlement of our issue.

4) SRCPL is yet to go through the details of the claim of extra work. However, pending this as an attempt of amicable settlement of this case, have offered to us a revised all inclusive contract price of Rs. 26 cr plus applicable GST. We have considered and we fully agree for settling the revised collective work orders price at 26 cr plus applicable GST as full and final settlement amount towards all work done by us pursuant the aforesaid work order. SD shall be refunded as per the books of accounts as agreed upon.

5) SRCPL has agreed that the differential amount i.e. Rs 26 Cr less the gross values actually paid and to be paid to or on behalf of EBPL, after verification and reconciliation, as per the terms of payment agreed as under:

i) 50% of the due payment shall be released within two working days of signing EIG documents.

ii) 25% of the due payment shall be released within two working days of obtaining EIG approval by SECR

iii) Balance payment shall be released within two working days from the date of commissioning and placement and removal of rake with OHE loco.....”

*Minutes of Meeting dated 09.04.2018
(between SRCPL and VNCPL)*

“3. All other terms and conditions of the work orders issued by VNCPL to EBPL shall remain unaltered”



**INDEMNITY BOND - cum - UNDERTAKING
(MoM with respect to VNCPL)**

- 1) ***“We, EBPL Ventures Pvt Ltd (for short ‘EBPL’) are willingly giving this irrevocable and unconditional indemnity bond - cum - undertaking to Sarguja Rail Corridor Pvt Ltd (for short ‘SRCPL”) in the following terms.***
- 2) ***We state that we were appointed as a sub-contractor by Vijay Nirman Co. Pvt Ltd (for short ‘VNCPL”) for execution work under Work Order No. VNCPUSRCPL/0016-17/EBPL/003 dated 16.06.2016 for OHE and Work Order No. VNCPL/SRCPL/0016-17/EBPL/010 dated 12.12.2016 for OHE P-Way work for contract values of Rs.13.37 Cr & Rs.13.33 Cr respectively (collectively Rs.26.70 cr.). However, we were required to undertake certain works beyond the scope of work under the aforesaid work orders and consequently we believe that we are entitled for additional cost of about Rs.8.00 Cr. including GST For this purpose, we have approached VNCPL with the relevant document evidence and have requested VNCPL to consider our claim for extra work and make payment after verifying our claim.***
- 3) ***Since an amicable settlement with VNCPL could not be reached we have approached the principal employer SRCPL for settlement of our issue.***
- 4) ***SRCPL is yet to go through the details of the claim for extra work. However, pending this as an attempt of amicable settlement of this case, they have offered to us an additional all inclusive settlement of Rs. 1.70 cr. VNCPL shall return the bank guarantee submitted by EBPL as a security towards this said advance on commissioning of track along with OHE. We have considered and we fully agree the same as full and final settlement. The SD, if any shall be refunded as agreed upon.***



5) SRCPL has agreed that the settled amount i.e. Rs 1.70 Cr, shall be paid as per the terms of payment agreed as under:

- i) 50% of the due payment shall be released within two working days of signing EIG documents.**
- ii) 25% of the due payments shall be released within two working days of obtaining EIG approval by SECR.**
- iii) Balance payment shall be released within two working days from the date of commissioning and placement and removal of rake with OHE loco.....”**

8. It is noted that following the agreement that was reached as per Minutes of the Meeting dated 09.04.2018, the respondent itself had paid to the applicant Rs. 1,91,71,970/- for GDCL and Rs. 93,50,000/- for VNCPL on 17.04.2018.

9. It is the say of the respondent that it had step in as a facilitator to settle the dispute between the applicant with GDCL/VNCPL as per clause 11.11 of the General Conditions of the Contract and the role of the respondent as a facilitator of the dispute is further clarified from the tripartite agreement dated 27.06.2018 which was executed between VNCPL, applicant, and Respondent wherein it is mentioned that VNCPL and the applicant acknowledged and confirmed that the Respondent had paid to the applicant an amount of Rs. 95,20,000/- (Rs. 93,50,000/- and Rs. 1,70,000/- as a TDS) on behalf of the VNCPL and to the extent of such payment, the Respondent stands discharge towards its payment obligation to VNCPL and the balance 50% of the remaining amount shall be paid by VNCPL after reconciliation of amount. Relevant paras of the tripartite agreement dated 27.06.2018 are reproduced hereunder;

“Now, therefore, the parties hereby agree and this agreement witnessed as follows;



1. **VNCPL and EBPL hereby acknowledge and confirm that SRCPL has made following payments directly to EBPL on behalf of VNCPL and to the extent of such payment, SRCPL stand discharged towards its payment obligation to VNCPL under the contract no SRCPL/Ph-IIB/5700135126 dated 15th May 2015.**

Table A: Details of Payment:

Date of Payment	Amount paid to EBPL (Rs.)	TDS deducted and deposited in name and on account of VNCPL (Rs.)	Total Payment including GST (Rs.)
17-04-2018	93,50,000	1,70,000	95,20,000

EBPL hereby acknowledge the receipt of aforesaid payment and confirms that to the extent of the aforesaid payments, obligation of VNCPL to make these payments to EBPL under its agreement with VNCPL stand discharged.

Further, VNCPL acknowledge and confirm that SRCPL had deducted TDS on the aforesaid payment in compliance with the applicable laws and VNCPL shall further comply with all the applicable laws including requirement of deduction of TDS for the payments made to EBPL on its behalf.

That for the time being, without going through the details of the claim for extra work, SRCPL offers to pay EBPL an additional all-inclusive settlement of Rs.1.70 Cr plus applicable GST (hereinafter called as 'settled amount') which has already been paid by SRCPL (50% on behalf of VNCPL) as per table A above and balance (50%) shall be paid by VNCPL on reconciliation of accounts and EBPL agrees to the settled amount as full and final settlement of its claim on VNCPL except other than routine GST, TDS & contractual amount



reconciliation for the works of complete track kilometer executed in both the orders of P-way and OHE.

- 2. THAT VNCPL agrees to the settlement and claims that it has given mobilization advances and other recoveries to EBPL which are pending and shall be adjusted by VNCPL against the settled amount. EBPL agrees for the same and both VNCPL and EBPL shall jointly reconcile the account and shall settle the pending adjustment. The complete account reconciliation shall be done by VNCPL with EBPL for the work finally completed by EBPL.***

- 3. THAT VNCPL agrees to pay the Rs.85 lac (Rupees Eighty-five lac only) plus applicable GST i.e. balance 50% of the settled amount to EBPL after adjustment of the pending recoveries and reconciliation of the account and EBPL agrees to the same. After account reconciliation, if there is any amount due towards EBPL then VNCPL shall pay the balance amount of EBPL.....”.***

10. As per clause 11.4 (Appendix- VII, General Terms and Conditions) of the GDCL Contract, the applicant will not claim its right against the Respondent under any circumstances and create contractual obligations of the Respondent towards the applicant. As per clause 11.11 of the said contract the respondent reserves rights upon written intimation to the contractors (GDCL and VNCPL) to make payments due hereunder directly to the applicant whenever the respondent has reason to believe that the Contractor (s) has not paid or is likely not to pay the such supplier (the applicant) and an amount is due on a timely basis. The relevant paras of the contract (VNCPL and GDCL Contracts) are reproduced hereunder;



“11.4 regardless of whether or not the contractor obtains approval from the Employer for a Sub Contractor or whether the contractor uses a Sub Contractor recommended by Employer, use of a Sub Contractor by the contractor will not under any circumstances; (a) give rise to any claim by the Contractor against the Employer if such Sub Contractor breaches its subcontract or contract with the contractor; (b) give rise to any claim by such Sub Contractor against the Employer; (c) create any contractual obligation of the Employer towards the Sub Contractor; (d) give rise to a waiver by Employer of its rights to reject any Defects or deficiencies or defective work; or (e) in any way release that Contractor from being solely responsible to Employer for the Work to be performed under the Contract.”

“11.11 the Contractor shall make payments to all Sub Contractors, unless otherwise specified in the Contract, in accordance with the respective agreements between the Contractor and its Sub Contractors such that Sub Contractors will not be in a position to enforce liens and/or other rights against Employer or any of its Affiliates, the Works or any part thereof. Contractor shall provide and shall obtain from all Sub Contractors and deliver to Employer, waivers of all unpaid liens under all applicable Laws. Employer reserves the right, upon written intimation to Contractor, to make payments due hereunder directly to Sub Contractors of Contractor whenever Employer has reason to believe Contractor has not paid or is likely not to pay such suppliers amounts due them on a timely basis, provided that Employer shall give the Contractor notice prior to making such payments. In the event Employer makes such payments to Sub Contractors, Contractor shall immediately



credit, secure or repay to Employer, the amount of such payments.”

11. In view of the above facts, we are of the considered view that the respondent has played a role as a facilitator to settle the dispute so that construction of railway siding work is not delayed/ hampered. Hence, mere facilitation of the dispute cannot create a right in favour of the applicant to file this present application against the respondent as it debtor; and as such the present section 9 application against the respondent is not maintainable.

12. Though we hold that the respondent is not a debtor of the applicant, however, we further analyzed the matter from the perspective of the pre-existing dispute. In the context it is noted that the applicant had issued proforma invoice bearing no. EBPL/P.I/272 on 04.01.2019 of Rs. 13,56,72,000/- upon the VNCPL too and on that basis the applicant issued a demand notice to VNCPL on 06.10.2020. The applicant also issued one more proforma invoice with the same invoice no. (bearing no. EBPL/P.I/272) on 06.01.2019 of Rs. 22,12,90,900/- upon the respondent. The applicant issued a demand notice dated 01.12.2020 which was delivered to the respondent on 07.12.2020, along with an invoice of Rs. 22,12,90,900/-.The applicant at para-4 of its rejoinder has stated that once the Respondent was agreed to pay the dues no scope remains for any to be played by the subsidiary companies (GDCL & VNCPL). Meaning thereby, at the one hand the applicant is saying the respondent is only liable to pay the dues and on the other hand the applicant issued a demand notice to VNCPL for Rs.13,56,72,000/-. Hence, the applicant cannot be allowed to probate and reprobate on the same fact. Moreover, how two invoices of different amounts and dates can



be issued to two different entities with the same invoice number? So, upon considering evidence and material on record, we have noted that there is a serious dispute pending between the parties to this application, about the existence of the Operational Debt against the respondent and its alleged default by the respondent. In view of the Hon'ble Supreme Court ruling in the case of "**Mobilox Innovations Private Limited Versus Kirusa Software Private Limited**", (2018) 1 Supreme Court Cases 353: 2017 SCC online SC 1154: (2018) 1 Supreme Court Cases (Civ) 311 that requires details investigation/ inquiry of the disputed facts and for that reason too the application can not be admitted.

13. Accordingly, CP (IB) No. 11 of 2021 stands rejected and disposed of.

SD/-
(Kaushalendra Kumar Singh)
Member (Technical)

SD/-
(Madan B. Gosavi)
Member (Judicial)

Ramashish