IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)
(Through web-based video conferencing platform)

CP (IB) No.411/BB/2019
U/s 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

In the matter of:

Sterling and Wilson Private Limited
Represented by Chief Financial Officer
(CIN: U31200MH1974PTC017538)
9th Floor, Universal Majestic,
P.L. Lokhande Marg, Chembur (W),
Mumbai – 400 043. ... Petitioner/Operational Creditor

Versus

Embassy Energy Private Limited
(CIN: U40104KA2015PTC082514)
Regd. Off: 1st Floor, Embassy Point,
150, Infantry Road,
Bangalore – 560 001. ... Respondent/Corporate Debtor

Order delivered on: 08th March, 2022

Coram: 1. Hon'ble Shri Ajay Kumar Vatsavayi, Member (Judicial)

2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner	:	Shri Anirudh Krishnan with Shri Hitesh Kumar, Advs.
For the Respondent	:	Shri Sreevatsa, Sr. Adv. with Shri Amogh C.A., Adv.

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ORDER

Per: Ajay Kumar Vatsavayi, Member (Judicial)

1. The instant Company Petition is filed by M/s. Sterling and Wilson Private Limited (hereinafter referred to as 'Petitioner/Operational Creditor') under Section 9 of the I&B Code, 2016 r/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by *inter alia* seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Embassy Energy Private Limited (hereinafter referred to as 'Corporate Debtor / Respondent') on the ground that the Corporate Debtor has committed default for a total outstanding Principal amount of Rs.99,75,88,940/- (Rupees Ninety-Nine Crores Seventy-Five Lakhs Eighty-Eight Thousand Nine Hundred and Forty only) excluding interest, with default date being 31.01.2019.

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner, are as follows:

   (a) It is stated that Embassy Energy Private Limited ('Corporate Debtor') intended to build and operate a solar photovoltaic electricity generation facility situated in the State of Karnataka ('Project'). The solar photovoltaic electricity generation facility was to have a minimum capacity of 100 MW AC, capable of generating atleast 215 million units of electricity by end of the 1st 12 months from the commercial operation date including all units and auxiliaries such as water supply, treatment or storage facilities and all other assets buildings structures equipment plant and machinery, facilities and related assets required for the efficient and economic operation of the solar power generation facility.

   (b) In pursuance of the above, the Corporate Debtor entered into a contract with IL&FS Solar Power Limited ('ISPL') who in turn entered into a contract with IL & FS Energy Development Company ('IEDCL'). IEDCL was appointed as a contractor for

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the Project. IEDCL as the contractor in turn appointed Sterling and Wilson Private Limited ('Operational Creditor') as the sub-contractor.

(c) In pursuance of the above, the Operational Creditor and IEDCL entered into several contracts for the performance of the works in relation to the Project. Pursuant to the contracts, Operational Creditor raised several invoices on IEDCL between the periods 21.12.2017 till 24.11.2018.

(d) IEDCL consistently defaulted in the payment of various invoices, despite several requests from the Operational Creditor. There were several outstanding payments due and payable by IEDCL. Owing to the colossal outstanding dues (amounting to Rs.99,75,88,940/-) due and payable by IEDCL, the Operational Creditor issued a letter dated 04.10.2018 suspending the works in relation to the Project.

(e) In response to the above, the Corporate Debtor issued a letter dated 17.10.2018, stating that if the invoices detailed in Schedule B remained unpaid even after 15.01.2019, the Corporate Debtor would clear them within 15 days from 15.01.2019. In addition to agreeing to pay the principal sum, Corporate Debtor has also promised Operational Creditor, payment of interest to the tune of Rs.1,04,97,436/- (Rupees One Crores Four Lakhs Ninety-seven Thousand and Thirty-six only).

(f) Later, the Corporate Debtor sent another letter dated 05.12.2018 to ISPL admitting the said amounts to be due and payable to the Corporate Debtor.

(g) Subsequent to the completion of the Project by the Operational Creditor, IEDCL, (which has 100% shareholding in ISPL) has issued a verification dated 21.02.2019 to the Operational Creditor, wherein it has verified an amount of Rs.99,75,88,940/- to be due and payable to the Operational Creditor.

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(h) However, there has been no payment from the Corporate Debtor to the Operational Creditor. The Operational Creditor, in finishing the works in relation to the Project was acting on the basis of the future promise of payment made by Corporate Debtor to the Operational Creditor. Further, the Operational Creditor, placing detrimental reliance on the promises made by the Corporate Debtor, commenced and completed works in relation to the Project for the benefit of the Corporate Debtor and on the basis of the promise of payment made by the Corporate Debtor.

(i) Further, the Corporate Debtor is operating the plant and generating the revenue by selling the electricity to its customers and thus it is unjustly enriching itself at the cost of the Operational Creditor who constructed the entire plant at its cost and on the promise of the Corporate Debtor that it would pay its outstanding dues.

(j) In any event, performance of the work by the Operational Creditor was pursuant to the Corporate Debtor's Admission Letter which provided for a consideration for revoking the suspension and performing the work at the Project. However, non-payment of the same despite the work has been performed would result in a total failure of consideration which is yet another ground on which the Operational Creditor is entitled to the sums claimed in the present application.

(k) In addition to the above basis i.e. principles of promissory estoppel and restitution for unjust enrichment, an alternate basis for the amounts becoming due is contractual – the letter dated 17.10.2018 constitutes an offer by the Corporate Debtor to pay the Operational Creditor for future works to be done and as consideration to revoke suspension, which was accepted by the Operational Creditor vide letter dated 24.10.2018. Hence, these letters also have the effect of creating a contractual obligation.

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(l) In light of the above sums remaining unpaid, the Operational Creditor issued a Demand Notice under the Code, dated 28.02.2019, to the Corporate Debtor. In response to the same, the Corporate Debtor issued a letter dated 01.03.2019 to the Operational Creditor ('Reply Letter') not disputing the existence of a debt, but only the amount of debt that was due. The Operational Creditor has furnished a reply dated 18.03.2019 to the said reply letter. However, there has been no payment forthcoming from the Corporate Debtor. Hence, this Petition.

3. The Respondent while opposing the Company Petition has filed its Statement of Objections on 03.03.2021, by *inter alia* contending as under:

(a) The Respondent engaged IL&FS Solar Power Limited (ISPL) as a contractor to develop the Project and in furtherance of the same entered into five separate agreements ('Definitive Agreements') with ISPL. Under the Definitive Agreements, it was agreed and acknowledged that ISPL would appoint IL&FS Energy Development Company Limited (IEDCL) for the purpose of engaging with and appointing the Petitioner as its subcontractor to carry out the requisite works to develop the Project. However, IEDCL was deemed to be a subcontractor qua the Respondent under the Definitive Agreements. The Definitive Agreements further stipulated that the Respondent would not have any contractual relationship with any subcontractor (including the Petitioner) and such subcontractors would not be entitled to prefer any claims against the Respondent. Clause 6.1.3 of the Agreement for Civil Works and Construction dated 07.11.2017 is reproduced hereunder:

> *"The Contractor shall be solely liable and responsible for the performance of the work sub-contracted to any Sub-Contractor and for any and all liabilities arising therefrom. The Contractor shall be held liable for any Defect or*

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deficiency of a Sub-Contractor, and the Contractor represents that it shall not refuse or resist its liability for such Defect or deficiency."

(b) Similar clauses are contained in Clause 6.1.3 of the Agreement for Erection, Testing and Commissioning dated 07.11.2017, Clause 7.1.3 of Engineering, Procurement and Construction Agreement for Evacuation Infrastructure dated 07.11.2017 and Clause 6.1.3 Agreement for Supply of Equipment and Materials dated 07.11.2017.

(c) It was further agreed that the consideration payable to the contractors / sub-contractors for the works carried out / obligations performed under the Definitive Agreements would be funded by ISPL and the Respondent would, in lieu of the same, make deferred payments to ISPL in 180 (one hundred and eighty) equal monthly instalments commencing from the 'Commercial Operations Date' of the Project, in accordance with the terms of the Deferred Payment Agreement dated 03.03.2017. The payment of the outstanding amounts to be paid by the Respondent to ISPL were, *inter alia*, to be secured by a mortgage over the project land, charge over the moveable properties and the receivables generated from the operation of the Facility and a non-disposal undertaking over all the equity shares of the Respondent.

(d) It is pertinent to note that save and except the deferred payments that are payable to ISPL under the provisions of the Deferred Payment Agreement, the Respondent was not required to make any other payments to any other parties or sub-contractors (including the Petitioner) towards the costs / expenses incurred in the construction of the Facility, under the contracts the Respondent was a party to.

(e) It is contended that in addition to the Definitive Agreements, the Respondent and ISPL entered into an Operations and Maintenance Agreement dated 09.01.2017 ('OM Agreement'), whereby it was agreed that the Petitioner would be appointed as the subcontractor. The OM Agreement specifically recorded that the Petitioner

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would not have any contractual relationship with the Respondent and the Petitioner would not be entitled to prefer any claims against the Respondent. It has also been expressly agreed that ISPL shall be solely liable and responsible for the performance of the works/services subcontracted and for any and all liabilities arising therefrom. It is significant to note that the OM Agreement is distinct from the Definitive Agreements with the Respondent being liable to pay a lump sum operations and maintenance service fees of Rs.8,60,00,000/- (Rupees Eight Crore Sixty Lakh only) to ISPL annually. This was further reduced to Rs.8,40,00,000/- (Rupees Eight Crore Forty Lakh only) vide Minutes of Meeting dated 14.02.2018 which payments have been duly made.

(f) In accordance with the aforementioned terms of the Definitive Agreements, ISPL proceeded to engage IEDCL as a subcontractor by way of a contractual arrangement that the Respondent is not privy to.

(g) IEDCL further appointed the Petitioner as its subcontractor by way of the following agreements for carrying out the requisite works to develop the Project ('Sub-Contractor Agreements').

i. Agreement for Supply of Equipment and Materials dated 07.11.2017

ii. Agreement for Civil Works and Construction dated 07.11.2017

iii. Agreement for Erection, Testing and Commissioning dated 07.11.2017

iv. Agreement for Engineering, Procurement and Construction for Evacuation Infrastructure dated 07.11.2017.

(h) IEDCL and the Petitioner also executed a 'Coordination Agreement' dated 07.11.2017, whereby it was mutually agreed that the Petitioner would *inter alia* be responsible for the coordination of all activities for timely completion of Project. It further provided the Petitioner with the right to suspend all its works in the

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event IEDCL default on the payment contemplated under the Sub-Contractor Agreements for a period of sixty days subsequent to a grace period of fifteen days. It is contended that the Respondent is neither a party to the agreements entered into between ISPL and IEDCL nor the Sub-Contractor Agreements that were executed between the Petitioner and IEDCL and there is no privity of contract between the Respondent and the Petitioner.

(i) The Project achieved commissioning and it was agreed that 28.02.2018 would be treated as the 'Commercial Operations Date'. As of date, the Petitioner is carrying out the necessary / routine operations and maintenance works under the OM Agreement through its personnel who have been stationed at the site of the Facility.

(j) The Petitioner addressed a letter dated 08.10.2018 to the Respondent ('Notice of Suspension'), whereby it forwarded a letter dated 04.10.2018 addressed by the Petitioner to IEDCL. By way of the letter dated 04.10.2018, the Petitioner, *inter alia*, informed IEDCL that it was constrained to suspend its work / operations in respect of the Project, in light of non-payment of Rs.100,00,00,000/- (Rupees One Hundred Crore only) that was payable to it by IEDCL under the Sub-Contractor Agreements.

(k) The Respondent thereafter addressed a letter dated 17.10.2018 to the Petitioner in response to the Notice of Suspension ('said Letter') stating that it did not have any contractual obligation to make any payments to the Petitioner. However, in order to avoid an adverse impact on the Project, the Respondents had explored the possibility of making a conditional offer to the Petitioners and those conditions were accepted by the Petitioner, who duly countersigned the said Letter. Petitioner vide letter dated 24.10.2018 to IEDCL, while copying the Respondent and ISPL, *inter alia*, informed IEDCL that the Respondent had

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requested that the Petitioner revoke the Notice of Suspension. Respondent vide letter dated 05.12.2018 to ISPL, copying IEDCL and the Petitioner therein, *inter alia*, sought a discussion on the best way forward for the Respondent to take up the management of the Project independently, on account of numerous contractual breaches / non-compliances on ISPL's part.

(l) ISPL vide letter dated 12.12.2018 addressed to the Respondent *inter alia* stated that it was not privy to any arrangements the Respondent had with the Petitioner and therefore could not respond to the Respondent's assertions in respect of the claims made by the Petitioner. Thereafter, the Petitioner sought a confirmation of certain amounts payable by IEDCL by way of its letter dated 20.02.2019 and IEDCL, vide its reply dated 21.02.2019 confirmed that an amount of Rs.99,75,88,940/- was payable by IEDCL to the Petitioner for the works carried out in relation to the Project.

(m) The Petitioner thereafter issued a Demand Notice dated 28.02.2019 u/s 8 of the Code *inter alia* alleging that the said Letter constituted an admission of the Respondent's liability and an amount of Rs.99,75,88,940/- as verified by IEDCL had become due to be paid by the Respondent on 31.01.2019. By way of said Letter the Respondent proposed to pay the Petitioner upto the amounts that remained outstanding on 15.01.2019 within fifteen days from verifying the amounts and ISPL confirming that the verified amounts remained due from IEDCL.

(n) In response to the aforesaid Notice, the Respondent vide letter dated 01.03.2019 pointed out that there was no operational relationship between the Respondent and the Petitioner, as there were no goods or services that were provided by the Petitioner to the Respondent or vice versa that could give rise to *an 'operational debt.'* Further, in light of the *moratorium* granted by the Hon'ble NCLAT on account of all IL&FS Group entities including ISPL and IEDCL, being under

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insolvency, the Respondent would not be in a position to make any payments on their behalf.

(o) The Respondent has referred to Section 2(11) of the Code, wherein a 'debt' has been defined to mean *'a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt'.* Further, as per Section 3(6) of the Code, 'claim' includes a right to payment or a right to a remedy for a breach of contract if such breach gives rise to a right to a payment. It is contended that there is no right to payment contemplated under the said Letter and the said Letter does not constitute a claim as defined under the Code.

(p) The Respondent, by way of the said Letter, merely proposed to make payments to the Petitioner on behalf of IEDCL, on the satisfaction of the conditions. This is made abundantly clear by the fact that the said Letter required the Petitioner to continue to pursue its rights against IEDSL for the release of the dues that are owed to it, despite the conditional proposal made under the said Letter.

(q) Even if it is assumed that the said Letter discloses an obligation on the Respondent to pay the Petitioner, such obligation is conditional therefore the said Letter would be in the nature of a contingent contract. The said Letter states that the Respondent would make the payments to the Petitioner within 15 (Fifteen) days of fulfilment of Conditional No.1 and Condition No.2, By co-signing the said Letter, the Petitioner has acquiesced to the conditions contained therein and is bound by the same. It is now not open to the Petitioner to attempt to unilaterally modify the terms thereof by claiming that Condition Nos.1 and 2 are not required to ascertain the enforceability of the proposed obligations under the said Letter.

(r) Further, the Respondent states that the Petitioner has itself admitted vide letter dated 18.03.2019 that *"there is an impossibility in the performance of the condition that ISPL is to verify the amounts due to SWPL".* The Respondent claims

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that in view of the correspondence addressed by ISPL and IEDCL and the Petitioner's admission as set out hereinabove, the said Letter becomes unenforceable and the Respondent cannot be compelled to make payments in furtherance of an unenforceable agreement. The conditional offer to pay as contemplated under the said Letter was not in respect of any services or goods provided by the Petitioner, which goods and services were to be provided to IEDCL under the terms of the Sub-Contractor Agreement, but to secure the Project.

(s) From the letters exchanged between the parties, it is apparent that there is dispute regarding the fulfilment of conditions and consequently, the existence of debt and thus it is not possible to examine the various allegations made by the parties regarding the 'existence of contract', 'satisfaction of conditions of the contract', etc. under the provisions of the Code, which are summary in nature. Further, the Respondent has already paid all outstanding dues in accordance with the Deferred Payment Agreement to ISPL in discharge of all its contractual obligations and cannot be forced to make any additional payment to any third party i.e. the Petitioner with whom the Respondent has no privity of contract.

4. In response to the aforementioned objections, the Petitioner filed the Rejoinder dated 22.03.2021, by *inter alia* stating as under:

a) There exists a debt due to the Operational Creditor from the Corporate Debtor on the basis of the principle of promissory estoppel, which aspect has not been rebutted by the Corporate Debtor. The promise for payment by the Corporate Debtor vide its letter dated 17.10.2018 to the Operational Creditor of the amounts due from IEDCL to the Operational Creditor was in consideration for, among others, the revocation of the Suspension Notice by the Operational Creditor and the immediate recommencement of the Project works and such recommencement

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was carried out by the Operational Creditor solely on the basis of promise/ representation of the Corporate Debtor to make payments of the amounts remaining due to the Operational Creditor from IEDCL.

b) The Operational Creditor's letter dated 24.10.2018 makes it clear that the confirmation of balance would be by either ISPL or IEDCL and further, that it should take place on or before 15.10.2019. Neither the Corporate Debtor nor ISPL / IEDCL have disputed the contents of the letter dated 24.10.2018. Further, the CD's letters dated 30.10.2018 and 05.12.2018 make it clear that they do not consider the confirmation of balance by ISPL / IEDCL to be a mandatory condition precedent for creation of liability.

c) The said letter dated 17.10.2018 stipulates that the Operational Creditor would be required to supply the Corporate Debtor with all documents and information that it may require in order to complete such verification. However, admittedly, the Corporate Debtor made no such requests. Moreover, the Corporate Debtor vide its letter dated 05.12.2018 to ISPL has confirmed that an amount of approximately Rs.100,00,00,000/- (Rupees One Hundred Crore) remains due from IEDCL to the Operational Creditor, which will have to be paid by the Corporate Debtor ('CD') to the Operational Creditor as neither any payment nor any indication of payment was made by IEDCL.

d) The said condition has been satisfied by virtue of the CD's letter dated 05.12.2018 to ISPL; by virtue of IEDCL's letter dated 21.02.2019 by which IEDCL confirmed that an amount of Rs.99,75,88,940/- is due to the Operational Creditor.

e) The letter dated 05.12.2018 issued by Corporate Debtor to ISPL clearly establishes that the Corporate Debtor was aware of the amounts owed by IEDCL to the Operational Creditor, thereby satisfying the intention behind the present

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condition. Further, the IEDCL has issued a letter dated 21.02.2019 to the Operational Creditor, which was also sent to the Corporate Debtor, duly confirming the exact amounts that remained outstanding from IEDCL to the Operational Creditor. In letter dated 24.10.2018, the Operational Creditor had referred to confirmation by either ISPL or IEDCL. The said statement was not refuted by the Corporate Debtor and amounts to acceptance.

f) In any event, obtaining the balance confirmation from ISPL, with whom the Corporate Debtor had a contractual arrangement, and whose payment obligation the Corporate Debtor promised to fulfil, was the duty of the Corporate Debtor and having failed the same, the Corporate Debtor cannot take advantage of its own breach.

g) The letter dated 17.10.2018 stipulate that if the Operational Creditor receives any amounts from IEDCL towards the amounts due to the Operational Creditor, then the Operational Creditor shall hold such monies in trust for the Corporate Debtor and immediately handover such monies to the Corporate Debtor. As on date, the Operational Creditor has not received any amounts from IEDCL. Therefore, the existence of moratorium on institution of proceedings against IEDCL and ISPL does not in any manner, affect the present cause of auction.

h) An amount of Rs.777,94,04,965/- was purportedly paid by the Corporate Debtor to ISPL (in full and final satisfaction of its contractual obligations) in December 2020, much after the institution of the present Petition on 31.10.2018.

i) There did exist an operational relationship between Operational Creditor and the Corporate Debtor as the Project was owned by the Corporate Debtor and services were provided by the Operational Creditor for the benefit of the Corporate Debtor

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based upon a promise of payment by the Corporate Debtor directly to the Operational Creditor.

j) It is evident from the record that the existence of a dispute was raised for the first time by the Corporate Debtor, only in its reply to the Demand Notice dated 01.03.2019. Further, IEDCL, being the parent company, was closely involved with ISPL in the present project. Therefore, confirmation of amounts due towards the Operational Creditor by IEDCL ought to be considered as one and the same to confirmation by ISPL.

5. The Respondent has also filed its written arguments dated 08.11.2021, by *inter alia* contending as under:

a) The Petitioner admitted that there is no privity of contract between the Petitioner and Respondent. ISPL engaged certain sub-contractors for the Project. Respondent, being the principal employer, was not responsible for any agreements between ISPL and the sub-contractors and this was specifically agreed to between them. There is no clause in any of the agreements entered into between the Petitioner and IEDCL to suggest that the Respondent would be liable to pay the Petitioner for any default by IEDCL or otherwise. Petitioner admits that several invoices were raised on IEDCL, the entity with which it had a contractual relationship. On account of certain unpaid invoices raised on IEDCL, the Petitioner filed the instant Petition against the Respondent. It is not in question that no invoices were raised by Petitioner on the Respondent. The Petitioner selectively highlighting certain correspondences with the Respondent, ISPL and IEDCL to seek initiation of CIRP against the Respondent.

b) In addition to debt and default, it must be proved that Corporate Debtor is insolvent. The Respondent submits that for the FY 2018-19 the total revenue was

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Rs.147,76,20,000/- and net profit before tax amount to Rs.54,51,00,000/-. It is a solvent company with huge profits.

c) As per the original agreements with ISPL, the only obligation which the Respondent had was with respect to ISPL and in terms of the Termination Agreement dated 11.12.2020, the Respondent fulfilled all its obligations under the Project with respect to its contractor, ISPL, by paying a sum of Rs.777,94,04,965/- as full and final settlement. Attached to the said Termination Agreement is a letter dated 18.11.2020 detailing the terms of full and final settlement regarding the Project, which categorically states that the money would be used to fulfil the dues to discharge the creditors as mentioned in Annexure-1 to the said letter. In Annexure-1, it can be clearly seen that Rs.153.07 crores out of the full and final settlement was paid towards IEDCL with respect to the Project and the same corresponds to the amount which may have become due to the Petitioner from IEDCL. Thus, the Petition be dismissed.

6. Heard Shri Anirudh Krishnan, learned Counsel with Shri Hitesh Kumar, learned Counsel for the Petitioner and Shri Sreevatsa, learned Senior Counsel with Shri Amogh C.A., learned Counsel for the Respondent and perused the pleadings on record.

7. An examination of the above stated facts and the contentions of the parties reveals that the whole case of the Petitioner is based on the letter dated 17.10.2018 issued by the Respondent to the Petitioner. It is the case of the Petitioner that the said letter dated 17.10.2018 created the contract between the Petitioner and the Respondent and since the Respondent admitted the debt and its liability to pay and since the Respondent failed to pay the same, CIRP proceedings are liable to be initiated on the Respondent-Corporate Debtor. In view of the said heavy reliance on the letter dated

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17.10.2018 by the Petitioner, it is necessary to note the contents thereof and the same reads as under:

ENERGY

October 17, 2018

To,

Sterling and Wilson Private Limited ("SWPL")
9th Floor, Universal Majestic,
P.L. Lokhande Marg,
Chembur (W),
Mumbai-400 043

Attn. : Parameshwar Hegde

Sub: 100 MW AC Solar PV Plant in Karnataka ("Project") – Non-payment of contract dues by IEDCL.

Ref: Letter dated October 8, 2018 issued by SWPL to us ("Letter") enclosing therewith SWPL's suspension notice addressed to IEDCL dated October 4, 2018 on account of non-payment of contract dues ("Suspension Notice").

Dear Sirs,

We take note of the Suspension Notice pursuant to receipt of your Letter dated October 8, 2018.

We understand that as on date, the amounts payable by IEDCL to you are as follows:

Sl. No.	Particulars	Amounts (in INR. Cr.)
1.	Amounts overdue as on October 4, 2018 as set out in the annexure to the Suspension Notice	50.53
2.	Amounts that become due by October 8, 2018	5.95
3.	Delay interest accrued until October 4, 2018	1.05
	TOTAL	57.53

We further understand that invoices to the tune of INR 35 Crore have been certified by IEDCL and these amounts would become due and payable by IEDCL on the facility acceptance date and invoices to the tune of INR 9 Crore are under certification.

We note that due to non-payment of the above mentioned dues and anticipated delays in future payments, you have, as on October 4, 2018, suspended all work in relation to the Project.

EMBASSY ENERGY PRIVATE LIMITED BANGALORE

Embassy-Energy Pvt. Ltd.
Embassy GolfLinks Business Park, Pebble Beach, Off Intermediate Ring Road, Bangalore - 560 071, India.
Tel: 91 80 4039 9999 F: 91 80 4039 9998 www.embassyindustrialparks.com | CIN: U60231KA2009PTC050991

Registered Office: Embassy Point, 1st Floor, 150, Infantry Road, Bangalore - 560 001, India.
T: +91 80 4179 9999 F: +91 80 2228 6912

ANNEXURE

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We have no contractual obligation to make any payments to you in relation to the Projects. However, as suspension of work has an adverse impact on the Project, as owners of the Project, in the interest of the Project, we hereby request you to kindly revoke the suspension and continue to provide your services including in relation to completion of all outstanding works and operation and maintenance of the Project, subject to the following conditions:

(i) we will directly pay you, upto the amounts set out in the Letter that remain due from IEDCL to you as on January 15, 2019, within 15 (fifteen) days from (a) us verifying the amounts remaining due to you, and (b) ISPL confirming to us that these monies remain due from IEDCL to you under your contracts. You shall provide all information and documents that we may require for the purposes of making our verification;

(ii) you shall revoke the Suspension Notice immediately;

(iii) no default interest shall accrue on any outstanding monies from the date of this letter;

(iv) you shall fulfill all your obligations in relation to the completion, operation and maintenance of the Project from time to time and not discontinue your services in relation to the Project. Further, you shall not block access to the personnel or material at the site of the Project or hamper the smooth operation of the Project in any manner whatsoever;

(v) you shall continue to exercise the rights and remedies available against IEDCL for monies owed to you under the contracts relating to the Project. If any amounts are received from IEDCL after we have made payment to you as per terms agreed above, you shall hold such monies in trust for us and immediately handover such monies to us.

Kindly take note of the above by acknowledging receipt of this communication and confirm your acceptance of the above terms by signing the duplicate copy where indicated below and return the same to the undersigned.

Yours sincerely,

For Embassy-Energy Private Limited

Authorised Signatory

EMBASSY-ENERGY PRIVATE LIMITED BANGALORE

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Acknowledged and accepted. We accept the conditions set forth in your letter and hereby confirm revocation of the Suspension Notice and recommencement of our work on this basis.

For Sterling and Wilson Private Limited

Authorized Signatory

Copy to:

1. IL&FS Energy Development Company Limited ("IEDCL")
Plot No.C-22, G-Block,
Bandra Kurla Complex,Mumbai- 4000 051
Attn. : Mr Ashwaini

2. IL&FS Solar Power Limited ("ISPL")
Plot No.C-22, G-Block,
Bandra Kurla Complex,
Mumbai- 4000 051
Attn. : Keshav Prasad

8. In support of it's contentions, the Petitioner drawn our attention to various other letters such as letter dated 24.10.2018 (Annexure-E) of the Petitioner addressed to IL&FS Energy Development Company Limited (IEDCL), letter dated 30.10.2018 (Annexure-F) of the Respondent-Corporate Debtor addressed to IL&FS Solar Power Limited (ISPL), letter dated 05.12.2018 (Annexure-F) of the Respondent-Corporate Debtor addressed to ISPL, letter dated 12.12.2018 (Annexure-F) of the ISPL addressed to the Respondent-Corporate Debtor and letter dated 21.02.2019 (Annexure-F) of the IEDCL addressed to the Petitioner. It was contended on behalf of the Petitioner that the letter dated 17.10.2018 created a contract between the parties of the Company

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Petition and the obligation of the Corporate Debtor to the Petitioner is independent of the Corporate Debtor's obligations to any other Company including ISPL. The Petitioner also pressed into service the Principle of Promissory Estoppel on the part of the Corporate Debtor towards the Petitioner based on the letter dated 17.10.2018 (Annexure-E).

9. The learned Counsel appearing for the Petitioner has placed reliance on the following decisions in support of his submissions:

a) *India Infrastructure Finance Company Limited v. IND Bharat Power Infra Limited, CP/1203/IB/2018;*

b) *The Newabganj Sugar Mills Co. Limited and Others v. The Union of India and Others, (1976) 1 SCC 120;*

c) *Rajahmundry Electric Supply Corporation Limited v. Nageshwara Rao and Others, (1955) 2 SCR 1066;*

d) *Indraprastha Power Generation Company Limited v. Rama Kant Sharma, 2013 SCC OnLine Del 267;*

e) *Carona Limited v. Parvathy Swaminathan and Sons, (2007) 8 SCC 559;*

f) *Manuelsons Hotels Private Limited v. State of Kerala and Others, (2016) 6 SCC 766;*

g) *Arosan Enterprises Ltd. v. Union of India (UOI) & Ors., (1999) 9 SCC 449;*

h) *Kusheshwar Prasad Singh v. State of Bihar and Others, (2007) 11 SCC 447;*

i) *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Others (2011) 1 SCC 236;*

j) *Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353;*

k) *Innoventive Industries v, ICICI Bank Limited, (2018) 1 SCC 407;*

l) *Monotrone Leasing Private Limited vs. PM Cold Storage Private Limited, CA (AT) (Ins.) No.99 of 2020;*

m) *Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay, (1992) 2 SCC 524;*

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10. Per contra, on behalf of the Respondent-Corporate Debtor, the following grounds were raised in support of its submission that the CP is not maintainable and liable to be dismissed:

> *"A. There is no privity of contract between the Petitioner and Respondent; no invoices were raised by the Petitioner on the Respondent and there has been no assignment of debt;*
>
> *B. There is no debt due and there is no acknowledgement of any debt by the Respondent;*
>
> *C. Petition under Section 9 of the IBC is not maintainable on account of existing disputes and fraud as alleged by the Petitioner itself;*
>
> *D. The Respondent is financially and commercially solvent company; and*
>
> *E. Moratorium was imposed by the Hon'ble National Company Law Appellate Tribunal in respect of the IL&FS group companies, the companies with which the Petitioner had direct financial relationship with."*

The Respondent also placed reliance on the following decisions in support of their submissions:

i.) *Essar Oil Limited vs. Hindustan Shipyard Limited and Ors., reported in (2015) 10 SCC 64;*

ii.) *Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited reported in (2019) 12 SCC 697;*

iii.) *Tata Iron and Steel Co. Ltd vs. Omega Cables Ltd., reported in 2008 (142) Comp Cas 468;*

iv.) *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, reported in (2018) 1 SCC 353;*

v.) *M. Ravindranath Reddy vs. G. Krishnan & Ors., Comp Appeal (AT) (Ins.) 331 of 2019;*

vi.) *Himalay Dassani vs. Isolux Corsan India Engineering & Construction Pvt. Ltd., (2017) 142 SCL 365.*

11. During the course of the arguments, both the learned Counsels have submitted that in respect of ISPL and IEDCL, which are part of the IL&FS Group Companies, CIRP proceedings were initiated on 15.10.2018 by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) Nos.346 and 347 of 2018, in exercise of its powers under Section 241

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and 242 of the Companies Act, 2013, as part of its orders against IL&FS Limited and its 348 subsidiary companies and interim moratorium was declared with effect from the said date.

12. In view of what is stated above, the following issues fell for our consideration in the present Company Petition:

a) Whether the principle of promissory estoppel has any place in the Scheme of the I&B Code, 2016?

b) Whether there being no formal contract / agreement / invoices raised in respect of any specific and defined supply of goods or rendering of any services, any operational debt can be established and that the CIRP proceedings can be initiated against the Corporate Debtor?

13. With regard to the first issue, it is to be seen that the I&B Code, 2016 is a self-contained Code and all the actions of the parties are to be examined in terms of the Code and the Rules and Regulations made thereunder only. The Hon'ble Apex Court in a catena of cases has categorically stated the various aspects to be considered by the Adjudicating Authority while deciding the applications filed under sections 7 and 9 of the I&B Code, 2016.

14. The Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353*, while dealing with an application filed u/s 9 of the I&B Code, 2016 has *inter alia* held as under:

> *"25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh?*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*

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

If any one of the aforesaid conditions is lacking, the application would have to be rejected."

15. Therefore, this Adjudicating Authority is only to see whether the ingredients required within the scope of IBC are present. Based on the principle of promissory estoppel, no debt either financial or operational can be established against a Corporate Debtor. None of the decisions relied on by the Petitioner support the submission of the Petitioner, in this regard. Accordingly, the first issue held against the Petitioner.

16. With regard to the second issue, it is an admitted case of the Petitioner that there was no formal contract or agreement between the Petitioner and the Respondent-Corporate Debtor. Similarly, it was also the case of the Petitioner that it has not raised any invoices against the Respondent-Corporate Debtor. The request of the Respondent-Corporate Debtor to the Petitioner to revoke the suspension of the work agreed to perform under the contract between the Petitioner and IEDCL and to complete all outstanding works and that they will directly pay to the Petitioner the amounts due from IEDCL as on 15.01.2019 on confirming the same by ISPL, cannot be equated to a binding contract between the parties to the C.P. The various provisions of the Insolvency and Bankruptcy Code, 2016 defining the 'operational debt' does not include the debt claimed by the Petitioner on the basis of the letter dated 17.10.2018 or any other subsequent or consequential correspondence between the parties. None of the decisions on which the learned Counsel appearing for the Petitioner placed reliance support the contention of the Petitioner that the request of the Respondent-Corporate Debtor not to suspend the work and to complete the same on its assurance to pay certain amount due from IEDCL to the Petitioner, can be termed as an 'operational debt' within the scope of the I&B Code, 2016. The Petitioner failed to

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establish the relationship of Operational Creditor and Corporate Debtor between the parties to the C.P. Therefore, this issue also held against the Petitioner.

17. In the circumstances and for the aforesaid reasons, we do not find any merit in the Company Petition.

18. Accordingly, the Company Petition bearing CP (IB) No.411/BB/2019 is dismissed.

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(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

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(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)

Krishna