

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**JAIPUR BENCH**

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

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

**IA (IBC) No. 449/JPR/2023**  
**CP No. (IB)-83/9/JPR/2022**

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

**IN THE MATTER OF:**

**M/S V K R PROJECTS PRIVATE LIMITED**

... Operational Creditor/Applicant

Versus

**M/S VARAHA INFRA LIMITED**

... Corporate Debtor/Respondent

**MEMO OF PARTIES**

**M/s V K R Projects Private Limited**

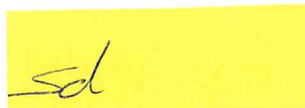
Regd. Office at: H. No. 8-2-293/82/III,  
Plot No. 550P, Road No. 92,  
Near Apollo Hospital Second Gate, Jubilee  
Hills,  
Hyderabad, Telangana – 500096

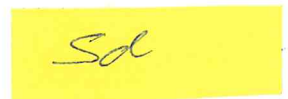
... Applicant / Operational Creditor

VERSUS

**M/s Varaha Infra Limited**

IA(IBC) No. 449/JPR/2023  
CP No. (IB)-83/9/JPR/2022





Umesh Smriti, 6 Jalam Vilas Scheme,  
Paota 'B' Road,  
Jodhpur, Rajasthan – 342006

... Respondent/Corporate Debtor

For the Applicant : Mr. Anurag Kalavatiya, Adv.  
Ms. Akshita Koolwal, Adv.  
For the Respondent : Mr. Umang Gupta, Adv.  
Ms. Aditi Khandelwal, Adv.

**Order Pronounced on: 31.08.2023**

**ORDER**

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

1. This Application is filed by M/s V K R Projects Private Limited through its authorised signatory Mr. V. Koteswara Rao ('Operational Creditor' / 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Varaha Infra Limited ('Corporate Debtor' / 'Respondent'), under Section 9 of the Insolvency and Bankruptcy Code 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules'). A copy of the authorisation in the Board Resolution dated 13.10.2022 is annexed as Annexure – 1 of the Application.

2. The Applicant, M/s V K R Projects Private Limited, is engaged in the business of contract works for utilities shifting including shifting of electric lines, poles, and other electric utilities from the highways. Its registered office is located at H. No. 8-2-293/82/III, Plot No. 550P, Road No. 92, Near Apollo Hospital Second Gate, Jubilee Hills, Hyderabad, Telangana – 500096. The

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alleged default on the part of the Respondent is for the non-payment of operational dues amounting to Rs. 6,89,87,301/- (Rupees Six Crores Eighty-Nine Lakhs Eighty-Seven Thousand Three Hundred and One Only) along with interest.

3. The Corporate Debtor, M/s Varaha Infra Limited, is a public limited company incorporated under the Companies Act, 1956 on 11.04.2008, having CIN: U45201RJ2008PLC026344. The Respondent has its registered office at – Umesh Smriti, 6 Jalam Vilas Scheme, Paota ‘B’ Road, Jodhpur, Rajasthan – 342006. The Corporate Debtor has an Authorised Share Capital of Rs. 20,00,00,000/- (Rupees Twenty Crores Only) and Paid-Up Share Capital of Rs. 17,62,22,900/- (Rupees Seventeen Crores Sixty-Two Lakhs Twenty-Two Thousand Nine Hundred Only).

4. The details of the transactions leading to the filing of this Application are averred by the Applicant *vide* Diary No. – 3415/2022 dated 21.11.2022 are as follows:

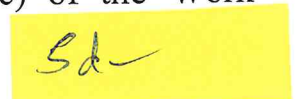
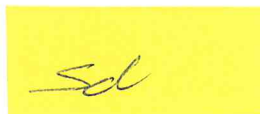
- i. The Applicant and Respondent entered into a Work Order dated 13.01.2012 (‘Work Agreement’) for electric utility shifting on four lanning of Ludhiana to Talwandi section of NH-958 from K.M. 92+000 to K.M. 170+000 under NHDP Phase III on Design, Build, Finance, Operate and Transfer (‘Project’). The original work of the Project was issued by the National Highway Authorities of India (‘NHAI’) to M/s Essel Ludhiana Talwandi Toll Roads Private Limited (‘Essel’) *via* a

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Concession Agreement dated 20.01.2011 ('Concession Agreement'), thereby issuing a Letter of Intent dated 11.11.2011 ('Letter of Intent') to the Corporate Debtor for the purposes of utility shifting for Rs. 35,18,01,714/- (Rupees Thirty-Five Crores Eighteen Lakhs One Thousand Seven Hundred and Fourteen Only).

- ii. The Corporate Debtor allocated/ assigned the work of shifting utilities to the Operational Creditor through the Work Agreement for an estimated contract value of Rs. 31,06,17,035/- (Rupee Thirty-One Crore Six Lakhs Seventeen Thousand and Thirty-Five Only). A copy of the Work Agreement is annexed as Annexure – 2 of the Application. Resultantly, the Applicant started executing his part of the contract while raising invoices for the work performed till March 2014 on a running account basis.
- iii. Meanwhile, the estimated contract value under the Work Agreement was revised to Rs. 34,60,72,888/- (Rupees Thirty-Four Crores Sixty Lakhs Seventy-Two Thousand Eight Hundred and Eighty-Eight Only) through an Addendum Letter dated 28.09.2012 ('Addendum') for which Respondent has been making 'on account payment' instead of 'bill-to-bill' payment. A copy of the Addendum is annexed as Annexure – 3 of the Application. Subsequently, the agreement between Essel and Corporate Debtor got terminated. As per Clause 44(c) of the Work



Agreement, the work contract between Operational Creditor and Corporate Debtor ceased with effect from 31.03.2014.

- iv. The Operational Creditor *vide* Letter dated 27.02.2014 informed the Office of NHAI, Jalandhar with a copy to Essel concerning non-disbursement of the outstanding operational dues despite continuous correspondence and requested NHAI to make payment directly to the Applicant based on the Ledger Account of the Respondent. A copy of the Letter dated 27.02.2014 is annexed as Annexure – 6 of the Application. Consequently, the Corporate Debtor sent a termination letter dated 24.03.2014 ('Termination Notice') wherein it was assured that the Applicant shall be reimbursed in its entirety the outstanding operational dues inclusive of the tax remittances. A copy of the Termination Notice is annexed as Annexure – 4 of the Application.
- v. Further, an Indemnity Bond dated 24.03.2014 ('Indemnity Bond') was executed in favour of the Operational Creditor incorporating payment of Rs. 2,51,04,743/- (Rupees Two Crores Fifty-One Lakhs Four Thousand Seven Hundred and Fouty-Three Only) along with interest payable @ 12% per annum from 01.01.2013. This amount shall be payable on or before 30.04.2014 to the Operational Creditor. The Indemnity Bond states the discharge of prescribed forms towards deduction of TDS-VAT/WCT by the Respondent within fifteen days from the Indemnity Bond. A copy of the Indemnity Bond is annexed as Annexure – 5 of the Application.

- vi. Given the inaction of the Respondent, pursuant to the Termination Notice and Indemnity Bond, the Applicant sent a Statutory Notice dated 30.05.2014 ('Statutory Notice') under Sections 433 and 434 of the Companies Act, 1956. A copy of the Statutory Notice is annexed as Annexure – 7 of the Application. Respondent neither replied to the Statutory Notice nor made any tender of payment. The non-compliance of the Statutory Notice suggests the inability to pay debts as enshrined under Section 433(e) of the Companies Act, 1956. Thus, it leads to the filing of the S.B. Company Petition No. 08/2014 ('Company Petition') before the Hon'ble Rajasthan High Court, Jodhpur Bench. A copy of the Company Petition is annexed as Annexure – 8 (Colly) of the Application.
- vii. The Corporate Debtor filed its preliminary reply to the Company Petition dated 20.08.2015 ('Preliminary Reply') wherein it accepted the receipt of the Statutory Notice and stated that does not shy away from the responsibility of making payments to the Applicant. However, its payment was stuck with the NHAI and Punjab State Power Corporation. A copy of the preliminary reply is annexed as Annexure – 9 of the Application. This was followed by the Operational Creditor through the filing of its rejoinder to Preliminary Reply dated 07.10.2015 ('Rejoinder to Preliminary Reply'). A copy of the Rejoinder to Preliminary Reply is annexed as Annexure – 10 of the Application.

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- viii. The Company Petition was admitted by the Hon'ble High Court *vide* Order dated 18.02.2016 ('Admission Order') with a direction for publication of Company Petition in Form No. 48 in terms of Rule 99 of the Companies (Court) Rules, 1959. A copy of the Admission Order is annexed as Annexure – 11 of the Application. Therefore, the Applicant made newspaper publications in Rajasthan Patrika on 14.07.2016, in Rajasthan Gazette on 25.07.2016 and in the Times of India on 28.07.2016. The Corporate Debtor filed its detailed reply to the Company Petition dated 07.09.2016 ('Reply to Company Petition') which countered with the Rejoinder dated 20.09.2016 ('Rejoinder to Reply'). A copy of the Reply to Company Petition and Rejoinder to Reply is annexed as Annexure – 12 and 13 of the Application, respectively.
- ix. Moreover, the Corporate Debtor during the course of winding up proceedings changed its counsel, who filed an Additional Reply to the Company Petition dated 09.03.2017 ('Additional Reply'). The Applicant filed its Rejoinder to Additional Reply dated 20.05.2017 ('Rejoinder to Additional Reply') evidencing the release of payment by NHAI to Essel for the Project along with Form 26AS indicating confirmation from the Corporate Debtor of the running accounts bills of the Operational Creditor. This Rejoinder to Additional Reply was opposed *via* Sur-Rejoinder dated 04.10.2017 ('Sur-Rejoinder'). A copy of the Additional

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Reply, Rejoinder to Additional Reply, and Sur-Rejoinder is annexed as Annexure – 14, 15, and 16 of the Application, respectively.

- x. However, the emergence of the Code made all such aforementioned petitions transferred, on the application, before the Adjudicating Authority. Hence, an application bearing number 01/2019 ('Transfer Application') was filed before the Hon'ble High Court for transfer to the Company Petition before the National Company Law Tribunal ('NCLT'). A copy of the Transfer Application is annexed as Annexure – 17 of the Application. The Hon'ble High Court *vide* Order dated 10.09.2020 ('Transfer Order') directed to transfer the Company Petition to the Adjudicating Authority exercising territorial jurisdiction. A copy of the Transfer Order is annexed as Annexure – 18 of the Application.
- xi. Accordingly, the Adjudicating Authority *vide* Order dated 26.09.2022 directed the Operational Creditor to comply with Section 8 of the Code. Hence, the Applicant, in pursuance of the above cause of action, issued a Demand Notice dated 13.10.2022 ('Demand Notice') to the Respondent through speed post on the registered office address of the company and marketing office addresses, including Directors of Respondent.
- xii. The Demand Notice under Section 8 of the IBC stated unpaid Operational Debt as Rs. 6,57,40,979/- (Rupees Six Crores Fifty-Seven Lakhs Forty Thousand Nine Hundred and Seventy-Nine Only) including interest. The notice called for the immediate payment of the operational due within ten

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days from receipt of the Demand Notice failing which proceedings to initiate CIRP against the Respondent was stated to start. The demand notice was accompanied by a computation of interest, details of invoices, and relevant dates of default. A copy of the Demand Notice along with postal slips and tracking reports are annexed as Annexure – 20 (Colly) of the Application.

xiii. The Respondent did not acknowledge the aforementioned Demand Notice, and the same was answered *vide* Response Letter dated 26.10.2021 ('Response Letter'). It intimated the Applicant of Clauses 21 and 22 of the Work Agreement regarding conditional responsibility & obligation of *back-to-back* contracts whereby the Respondent had to release payments after the undertaken work was verified by the concerned officials and receiving the payments from the NHAI and Essel. Thus, the Indemnity Bond and Cancellation Agreement is subject to aforesaid clauses of the Work Agreement. It is stated that a prior dispute exists regarding the quality and quantity of the product within a stipulated time. Consequently, Essel *vide* Letter dated 16.12.2013 sought to encash the bank guarantee for breach of contractual obligations; it received no payments either from NHAI or Essel. A copy of the Response Letter is annexed as Annexure – 21 of the Application.

xiv. Therefore, the Corporate Debtor is liable to pay the outstanding operational dues of Rs. 2,51,04,743/- (Rupees Two Crores Fifty-One

Lakhs Four Thousand Seven Hundred and Forty-Three Only) with interest @12% per annum from 01.01.2014 to 31.10.2022 amounting to Rs. 2,66,11,027/- (Rupees Two Crores Sixty-Six Lakhs Eleven Thousand Twenty-Seven Only). Further, the Respondent deducted Rs. 35,94,488/- (Rupees Thirty-Five Lakhs Ninety-Four Thousand Four Hundred and Eighty-Eight Only) towards TDS/VAT/WCT from the running account bills totalling Rs. 13,88,63,274/- of the Operational Creditor ('Form VAT-28'). The Applicant charged interest @ 18% per annum from 30.05.2013 to 31.10.2022 on Form VAT-28 of Rs. 60,92,658/- (Rupees Sixty Lakhs Ninety-Two Thousand Six Hundred Fifty-Eight Only). The Applicant has filed a Statement of Bank Account maintained with the State Bank of India from 24.03.2014 to 26.11.2014 at Annexure – 23 of the Application. It is stated that there is no repayment of the unpaid operational debt by the Respondent along with the Affidavit under Sections 9(3)(b) and 9(3)(c) of the Code on Page Number 39 and 41 of the Application.

- xv. Furthermore, NHAI has also withheld Rs. 35,94,495/- (Rupees Thirty-Five Lakhs Ninety-Four Thousand Four Hundred and Ninety-Five Only) toward TDS/VAT on the account of the failure of the Corporate Debtor to remit the same to the Commercial Tax Department, Punjab ('NHAI Withheld Tax'), on this an interest @12% per annum is levied from

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30.07.2013 to 31.10.2022 amounting to Rs. 39,89,890/- (Rupees Thirty-Nine Lakhs Eighty-Nine Thousand Eight Hundred and Ninety Only).

- xvi. The aforementioned details, as reflected in Part IV of the Application, are as follows:

#### Part IV

#### PARTICULARS OF OPERATIONAL DEBT

1.	Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due.	Total amount of debt: Rs. 6,89,87,301/- (Rupees Six Crores Eighty-Nine Lakhs Eighty-Seven Thousand Three Hundred and One Only)
2.	Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Rs. 6,89,87,301/-#  Total Principal Amount: Rs.2,51,04,743/- Total Interest Due: Rs. 2,66,11,027/-* Total Amount against Form VAT-28 (deduction of TDS/VAT/WCT): Rs. 35,94,488/- Total Form VAT-28 Interest: Rs. 60,92,658/- Total Amount against NHAH Withheld Tax: Rs. 35,94,495/- Total NHAH Withheld Tax Interest: Rs. 39,89,890/-  Date from which Debt fell Due: 30.04.2014

\* Calculated the Interest Amount @12% p.a. on the principal operational dues from the period of 01.01.2014 to 31.10.2022.


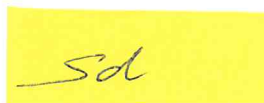
# Computation of Amount to be claimed from Corporate Debtor is annexed at Annexure – 22 of the Application.

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5. Notices were issued in the aforesaid Application, and the Respondent filed a Reply *vide* Diary No. 345/2022 dated 08.02.2023 stating that:

- i. The Applicant has not approached the Tribunal with clean hands and concealed material information to place itself as an Operational Creditor, as it has submitted an incomplete application based on *suppressio veri* and *suggestio falsi* facts for its benefit. The Operational Creditor failed to provide desired quality, quantity, and delivery of the product within the stipulated time despite correspondence including replies, rejoinders, and sur-rejoinders.
- ii. The Respondent has placed on record the Concession Agreement, Letter of Intent, and Work Agreement as Annexure – R2, R3, and R4 of the Reply, respectively. It is stated the Work Agreement was a back-to-back contract whereby the Respondent had to release payments upon the disbursement from the NHAI which is after the work undertaken by the Operational Creditor is verified by the concerned official of Punjab State Power Corporation Limited ('PSPCL'). Thus, necessary completion and no objection certificates were required for the release of payments, which have not been done by the Applicant.
- iii. Moreover, Clauses 21 & 22 of the Work Agreement specifically provide for qualified and conditional obligation in respect of the outstanding amount, the same is being reproduced for ease of reference:



*'21. Rates, Measurements and Payments: The payments as per the approved estimates of work done duly certified by the concerned official of PSPCL and TPMC/Client will be reimbursed to the contractor, after receiving the respective payment from the authority i.e., NHAI.*

*22. Applicable TDS as per prevailing rules and other applicable taxes shall be deducted from the amount payable to the contractor and shall be released on a back-to-back basis and after receiving the respective payment from the authority i.e., NHAI.'*

In addition, Termination – Clause 44 of the Work Agreement portrays that if the Letter of Intent gets terminated between Essel and Corporate Debtor; the Work Agreement between Corporate Debtor and Operational Creditor would *ipso facto* stand terminated. This also establishes that the Work Agreement was a back-to-back contract. Clause 44 of the Work Agreement is being reproduced for ease of reference:

*'44. Termination: This Work Order may be terminated –*

- a. In the event, the contractor commits any breach of any of the terms of this Work Order or fails to adhere to the rules and procedures promulgated by Client/ NHAI from time to time and non-performance and/ or non-observance of any of the obligations, warranties and undertakings under this Work Order and failure to remedy the same within 30 days of receipt of a written notice from the client;*
- b. The quality of the Work is less than, as prescribed by the PSPCL;*
- c. In the event if the Agreement is terminated due to any reason whatsoever then the present shall be automatically terminated;*

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- d. The contractor becomes incapable of performing due to an action in law/ becomes disabled/ contractor inability;*
- e. Due to the occurrence of any event that makes the performance of this Work Order impossible by reason of Force Majeure Events or otherwise;*
- f. This Work Order may be terminated anytime by Client by providing 15 days' notice in writing.'*

- iv. Supplementarily, the Operational Creditor *vide* Letter dated 27.02.2014 has admitted that the outstanding payments are to be released by the NHAI first and are contingent upon the same. Therefore, the liability of the Respondent arises when the payment is released by the NHAI to Essel and from Essel to the Corporate Debtor. The Indemnity Bond was subject to the payment received from Essel as no payment was received by the Corporate Debtor, and the Operational Creditor has no cause of action against the Respondent.
- v. Further, the issuance of the completion certificate was delayed as the deficiencies were not removed given the substandard and low-quality work. For the poor performance of work, necessary communication was sent *vide* Letters dated 25.06.2013 and 22.07.2013 and the same is annexed as Annexure – R5 and R6 of the Reply, respectively. Subsequently, Essel terminated the Letter of Intent *vide* Termination Letter dated 24.03.2014 ('Termination Letter'). *It is seen, the aforesaid Letters informed the Corporate Debtor regarding poor work progress of*




*electric utilities shifting while imposing liquidated damages of Rs. 10,000 per day, being limited up to 5% of Contract Value for delay of each day until such completion. Further, it was instructed to the Operational Creditor to expedite the project progress, avoid complicacy, and submit the exact status of the work progress as well as the work program to complete the balance work within seven days.*

- vi. Furthermore, the Respondent has already suffered losses, both financially and reputationally, as there was an encashment of the bank guarantees provided by the Corporate Debtor to Essel *vide* Letter dated 16.12.2013 ('Bank Guarantee Letter') amounting to Rs. 1,93,38,538/- (Rupees One Crore Ninety-Three Lakhs Thirty-Eight Thousand Five Hundred and Thirty-Eight Only). The reasons for encashment of the bank guarantee and Termination Letter are due to poor work progress, continuous breach of the timelines and non-performance of the Applicant's contractual obligations. A copy of the Bank Guarantee Letter is annexed as Annexure – R7 (Colly) of the Reply.
- vii. In the Response Letter, the Corporate Debtor has stated that the Operational Creditor has been unable to demonstrate any default and there exists pre-existing dispute. The operational dues of the Applicant consist of different amounts having different interest rates while such interest rates are disputed. The Operational Creditor has also not placed on record any running account bills, invoices, ledger, or interest




calculation sheets. A copy of the Response Letter is annexed as Annexure – R8 of the Reply.

viii. There have been no shreds of evidence which show any acknowledgement of debt or admission of interest either in the correspondences between the parties or the Indemnity Bond. The Respondent does not owe any amount to the Operational Creditor and is financially sound having many ongoing operations across pan India. A copy of the audited financial statement 2014-15 is annexed as Annexure – R9 (Colly) of the Reply indicating the Corporate Debtor as a going concern and a specialist construction company.

6. The Applicant filed its Written Submission *vide* Diary No. 1714/2023 dated 14.07.2023 and has reiterated its earlier submissions. It is stated that the Termination Notice was an unequivocal undertaking on the part of the Respondent. In the Indemnity Bond, the Corporate Debtor assured disbursement of entire outstanding dues along with simple interest payable @12% per annum and tax remittances. Additionally, the Response Letter failed to bring forth any instances of genuine pre-existing disputes.

7. The Respondent filed its Written Submission *vide* Dairy No. 1683/2023 dated 12.07.2023 and has reiterated its earlier submissions and emphasized that the Indemnity Bond was a conditional indemnity where it would safeguard the Operational Creditor against all suits, actions, proceedings, and demands which may arise due to any delays and such conditional

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Indemnity Bond cannot be considered as an admission of debt. There is no proof submitted by the Operational Creditor that it has received any payment from Essel in this regard.

8. The Corporate Debtor has filed a suit against PAN India Infrastructure Pvt. Ltd., a subsidiary of Essel, for recovery of the encashment of the Bank Guarantee due to poor performance on the part of the Operational Creditor which is pending before the Civil Judge (Junior Division), Ludhiana, Punjab. Also, the Applicant has filed a complaint bearing number 5136 of 2016 before the Court of the Additional Chief Metropolitan Magistrate, City Criminal Court at Nampally, Hyderabad, Telangana for dishonouring the cheque. For the reasons mentioned above, while submitting the Reply, the Respondent relied upon these cases:

- i. Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.*

*The Hon'ble Supreme Court held that '50. ... Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua*



*operational debts are matter to be proved in arbitration or the courts of law.'*

- ii. *Mobilox Innovations Private Limited v. Kirusa Software Pvt. Ltd., 2018 1 SCC 353.*

The Hon'ble Supreme Court held that regarding the pre-existence of dispute, the IBC defines 'dispute' as:

*Section 5(6) – "dispute" includes a suit or arbitration proceedings relating to-*

- a. The existence of the amount of Debt;*
- b. The quality of goods and services; or*
- c. The breach of a representation or warranty;*

Supplementarily, in *R. S. Cottmark (India) Pvt. Ltd. v. Rajvir Industries Ltd., 2019 SCC Online NCLAT 436* and *Chirag Sharma & Ors. v. E. Meditek Insurance Ltd., 2022 SCC Online NCLAT 2055*, the Hon'ble NCLAT while relying aforesaid judgment has reiterated that in cases where there is pre-existence of dispute between the parties before the receipt of the demand notice or invoice, the IBC cannot be used as recovery proceedings.

- iii. *S. S. Engineers v. Hindustan Petroleum Corporation Limited, 2022 SCC Online SC 1385.*

The Hon'ble Apex Court has stated that *on a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process when there is an undisputed debt and a default in payment thereof. If the claim of an Operational Creditor is*

*undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.*

- iv. *Mrs. Neeta Garg, Sole Proprietor of M/s Neelkanth Enterprises v. Deshlehra Metals Private Limited, CP No. (IB) 29/9/JPR/2018.*

This Adjudicating Authority while rejecting the application under Section 9 of the Code has observed that *'the Applicant on one hand are approaching this Authority to initiation of CIRP of the Corporate Debtor on the basis of unpaid 18 invoices and on the other hand approaching the Civil Court for recovery of an amount admitted by the Corporate Debtor does not reflect well in law. The portrayal of the facts by the Applicant in an evasive manner denotes that the Applicant is treating this Adjudicatory Authority like a recovery forum.'*

9. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, Written Submissions, and the Documents enclosed with the Application.

10. In *Sudhi Sachdev v. APPL Industries Ltd., Company Appeal (AT) (Insolvency) No. 623 of 2018*, the Hon'ble NCLAT held that *'6. In the present case, it is not in dispute that there is a debt payable to the Operational Creditor and default on the part of the Corporate Debtor. The pendency of the case under Section 138/141 of the Negotiable Instruments Act, 1881, even if accepted as a recovery proceeding, cannot be a dispute pending before a court of law. Thereby we hold that the pendency of the case*

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*under Section 138/141 of the Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute. We find no merit in this appeal. It is accordingly dismissed. No costs.'*

11. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jodhpur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. It is a well-settled principle that the proceedings under the Negotiable Instruments Act, 1881 are quasi criminal and do not conflict with the jurisdiction of this Adjudicating Authority. Further, the claim of the Applicant is not barred by limitation. The Operational Creditor had filed a winding-up Company Petition before the Hon'ble High Court of Rajasthan which came to be transferred in the emergence of the Code.

12. Accordingly, the present application filed on 21.11.2022 is well within the limitation. This matter is within the purview of the Laws of Limitation, as the cause of action arose in 2014, and the Applicant was diligently pursuing the case before the Hon'ble High Court of Rajasthan until the commencement of the Code. Thus, the Application that was filed before this Adjudicating Authority in 2022 has been filed within the prescribed period of limitation.

13. It is abundantly clear from the documents produced before us that the Respondent has defaulted in making full payments against the services provided by the Operational Creditor upon admitting its liability to repay the

Operational Creditor not only under the Termination Notice but also under the Indemnity Bond while showing the admiration for the work undertaken by the Applicant.

14. In the present case, the Corporate Debtor is trying to show dispute through Letters dated 25.06.2013 and 22.07.2013 whereas in the Termination Notice it undertakes to repay the entire operational dues of the Applicant. The Corporate Debtor cannot blow hot and cold at the same time. Besides, such letters were in the nature of a reminder call and actions undertaken by the respective authorities pursuant to contractual obligations. The Corporate Debtor had the option to terminate the contract of the Corporate Debtor pursuant to Clause 44 (a) and (b) of the Work Agreement for failure to provide desired quality, quantity, and delivery of the product within the stipulated time, which was not exercised. Thus, the Work Agreement was terminated for reasons other than the above-mentioned under Clause 44 (c) of the Work Agreement.

15. Further, the claim of the Operational Creditor arises from the Termination Notice and Indemnity Bond duly executed by the Corporate Debtor. The Corporate Debtor's contention of the Work Agreement is a back-to-back contract which is contingent on the release of payment by NHAI. It is observed that the NHAI has already released all the payments in favour of Essel concerning the work of utility shifting. The unsettled due of the Corporate Debtor does not absolve itself from the admitted liability and



cannot be used as a defence to avoid paying the operational dues of the Applicant.

16. Consequently, it is evident from the above that the Corporate Debtor has defaulted in payment of the Debt to the Operational Creditor. Further, he has raised the contention that the dispute flouts the principle of law, which states that if there is a pre-existing dispute between the parties, an Application filed under Section 9 is not maintainable.

17. The first issue for consideration is whether the Demand Notice in Form – 3 dated 13.10.2022 was served upon the Respondent. The Demand Notice was sent *via* an email dated 14.10.2021 and a physical copy through speed post on 14.10.2022 to the Respondent and its Directors. The email and postal tracking slips are attached as Annexure – 20 (Colly) and on Page No. 360 – 362 of the Application, respectively.

18. The next issue for consideration is whether the Respondent disputed the operational Debt. The Respondent / Corporate Debtor has filed a Reply and argued that they had been dissatisfied with the service quality and delivery. However, they have not submitted any authentic communication to substantiate the same. Thus, as per the documents placed on record with the Adjudicating Authority, there is no dispute as to the outstanding liability of the Corporate Debtor towards the Operational Creditor.

19. In *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited* (*Supra*), para 34, the Hon'ble Supreme Court laid down what the

Adjudicating Authority has to examine in an Application under Section 9.

Para 34 is as follows:

*'34. 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? (See Section 4 of the Act)*
- 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*
- iii. Whether there is the existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 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. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.'*

However, the defence has to be plausible, and while not examining it on merits, it must not appear as a moonshine defence. Therefore, in the present matter at hand, there is a clear debt, repayment of which has been defaulted by the Corporate Debtor, and there appears to be no pre-existing dispute between the parties. Any allusion to such a dispute does not seem to be confirmed.




20. We have gone through the contents of the Application filed in Form No. 5 and found the same to be complete. As discussed above, there is a total unpaid operational debt (in Default) of Rs. 6,89,87,301/- (Rupees Six Crores Eighty-Nine Lakhs Eighty-Seven Thousand Three Hundred and One Only), including the interest. It is observed that the Operational Creditor has levied various interest rates for services supplied to the Respondent/ Corporate Debtor. This order is made in terms of Section 4 of the Code, that is, for meeting the threshold criteria specified under the Code. Therefore, it is directed to the Interim Resolution Professional /Resolution Professional to check the genuineness of the claim while admitting the operational dues of the Applicant. Applicant/ Operational Creditor has given Demand Notice in Form No. 3 dated 13.10.2022, duly served on the Respondent/ Corporate Debtor. This Adjudicating Authority has held above that the Operational Creditor correctly delivered the Demand Notice in Form No. 3, and no pre-existing dispute is proved.

21. It has been shown that the Corporate Debtor has failed to make payment of the aforesaid amount due as mentioned in the statutory notice to date. It is also observed that the conditions under Section 9 of the IBC stand satisfied. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC.

22. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as



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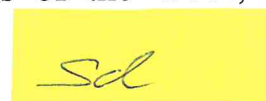
Interim Resolution Professional ('IRP'). In the instant case, the Operational Creditor has proposed the name of Mr. Vijendra Bangar, bearing Registration No. IBBI/IPA-002/IP-N00688/2018-19/12205 with the address 103-A, Shyam Anukampa, O-11, Ashok Marg, C-Scheme, Jaipur – 302001 as the IRP in the present matter. The said IRP has filed his written consent to act as an interim resolution professional in Form – 2 provided under Rule 9 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.

23. In this matter, the Interim Resolution Professional appointed herein, Mr. Vijendra Bangar, shall exercise all the powers enumerated under the Code read with Rules made thereunder. The Applicant shall provide a copy of the Application, if not provided already, along with this order to IBBI for its records.

24. 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.

25. Consequences of initiation of CIRP shall be inter-alia as follows:

- i. The IRP appointed by the Adjudicating Authority, Mr. Vijendra Bangar, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of the Code,



including the issue of the publication is 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.

- ii. 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.
- iii. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defraying his expenses to be incurred and fees on the account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Rupees Two Lakh Only) within three 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.
- iv. In terms of Sections 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.

- v. 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.

26. Accordingly, CP No. (IB)- 83/9/JPR/2022 is admitted.

### **IA (IBC) No. 449/JPR/2023**

This Interim Application ('IA') is filed Rule 11 of the National Company Law Tribunal Rules ('NCLT Rules') proposing the name of the Interim Resolution Professional ('IRP') in the present matter. The Applicant has duly filed the written consent of the IRP in Form – 2 along with his registration certificate and authorisation as Annexure – 1 (Colly) of the IA.

In view of aforesaid narratives and observations, this IA stands disposed off.



**DEEP CHANDRA JOSHI  
JUDICIAL MEMBER**



**ATUL CHATURVEDI  
TECHNICAL MEMBER**