



**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

CP (IB) No.486/ALD/2019

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

SRV Techno Engineering Pvt. Ltd.

Having its registered office at:

B-295, Sector-19,

Dwarka, New Delhi-75

...Applicant/Operational Creditor

Versus

Purvanchal Vidyut Vitran Nigam Ltd

Having its registered office at:

Vidyut Nagar, P.O. DLW,

Varanasi, Uttar Pradesh-221004

...Respondent/Corporate Debtor

Order pronounced on 12th October, 2023

CORAM:

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

PRESENT-

Sh. Rohit Arora, Adv. : For the Operational Creditor

Sh. Manu Khare, Adv. : For the Corporate Debtor

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ORDER

1. The instant application is filed on 26.11.2019 by **M/s SRV Techno Engineering Pvt. Ltd.** under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "**I & B Code, 2016**") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "**the Rules**"). The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as '**CIRP**') in respect of **Purvanchal Vidyut Vitran Nigam Ltd.** due to default in payment of total outstanding amount of Rs.4,43,42,607/- (Rupees Four Crore Forty Three Lakh Forty Two Thousand Six Hundred and Seven only) inclusive of interest up to 31.08.2019.

2. Briefly stated facts of the present case as averred by the Applicant/Operational Creditor in its application filed in Form-5 containing part I, II, III, IV & V are that:-

- i. SRV Technology Engineering Pvt. Ltd. operates as a Private Limited Company, governed by shares, and is officially registered under the Companies Act of 1956. It will henceforth be referred to as "SRV/Applicant/Operational Creditor." Purvanchal Vidyut Vitran Nigam Ltd. (herein after

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to be referred as "PuVVNL/Respondent/Corporate Debtor") is a company engaged in distribution of Electric Power in Eastern area of U.P

- ii. PuVVNL, through its Tender specification No. EAV-53/RAPDRP-B/15-16, initiated the solicitation for the improvement, strengthening, and augmentation of systems aimed at reducing Aggregate Technical & Commercial (AT&C) losses and enhancing consumer supply within Kopaganj town under the RARPDRP Part-B scheme. SRV submitted its proposal in response to the aforementioned tender.
- iii. SRV received a Letter of Intent (hereafter referred to as "LOI") on 03.03.2016, as documented in letter No. 611/PuVVNL(V)/MM/EAV-53/RAPDRP-B/15-16, in favor of their company. By means of the aforementioned LOI, SRV was entrusted with the responsibility of executing the project for System Improvement, Strengthening, and Augmentation, aimed at reducing Aggregate Technical & Commercial (AT&C) losses and enhancing consumer supply within Kopaganj town under the R-APDRP Part-B scheme, amounting to Rs. 6,81,80,795.78/-

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- iv. On 21.03.2016, the PuVVNL /Corporate Debtor issued Order No. 783/MD/PuVVNL(V)-MM/EAV-53/RAPDRP-B/15-16, directing SRV to supply materials for the System Improvement, Strengthening, and Augmentation project aimed at reducing Aggregate Technical & Commercial (AT&C) losses and enhancing consumer supply in Kopaganj town under the R-APDRP Part-B scheme. The total value of this supply order was Rs.6,21,51,547.36/-
- v. Additionally, on the same date, 21.03.2016, the PuVVNL /Corporate Debtor issued Order No. 784/MD/PuVVNL (V)-MM/EAV-53/RAPDRP-B/15-16, instructing SRV to handle the erection of materials, testing, and commissioning for the System Improvement, Strengthening, and Augmentation project in Kopaganj town under the R-APDRP Part-B scheme. This erection order was valued at Rs.60,29,248.43/-
- vi. An agreement was formally entered into on 21.03.2016 between SRV and the PuVVNL /Corporate Debtor regarding both the Supply Order and Erection Order issued on the same date for the Kopaganj Town project.
- vii. Subsequently, the Bill of Quantities (BOQ) for the Kopaganj

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town project underwent a revision and received approval from the Superintending Engineer, Nodal Officer, R-APDRP Part-B, PuVVNL, Varanasi, on 27.09.2016. The revised BOQ valued the work at 7,37,93,117.92/-

- viii. In an another project, PuVVNL initiated a tender, specified as No.EAV-55/RAPDRP-B/15-16, inviting applications for a project involving System Improvement, Strengthening, and Augmentation to reduce Aggregate Technical & Commercial (AT&C) losses and enhance consumer supply in Ghosi town under the RAPDRP Part-B scheme. SRV submitted its bid in response to the aforementioned tender.
- ix. On 27.04.2016, an official Letter of Intent (LOI) was issued in favour of SRV, as documented in letter No. 1127/PUVVNL(V)/MM/EAV-55/RAPDRP-B/15-16.

Through this LOI, SRV was entrusted with the task of executing the project for System Improvement, Strengthening, and Augmentation, aimed at reducing Aggregate Technical & Commercial (AT&C) losses and enhancing consumer supply in Ghosi town under the R-APDRP Part-B scheme. The total value of this order amounted to Rs.5,37,84,634.89/-.

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- x. Additionally, on 10.05.2016, the PuVVNL /Corporate Debtor issued Order No. 1259/MD/PuVVNL (V)-MM/EAV-55/RAPDRP-B/15-16, directing SRV to supply materials for the project involving System Improvement, Strengthening, and Augmentation in Ghosi town under the R-APDRP Part-B scheme. This supply order was valued at Rs.4,81,07,687.59.
- xi. Simultaneously, Order No.1260/MD/PuVVNL(V)-MM/EAV-55/RAPDRP-B/15-16, also dated 10.05.2016, was issued by the Corporate Debtor to SRV, instructing them to handle the erection of materials, testing, and commissioning for the same project in Ghosi town under the R-APDRP Part-B scheme. This erection order amounted to Rs. 56,76,947.30/-
- xii. An agreement was formalized between SRV and the PuVVNL /Corporate Debtor on 10.05.2016 regarding both the Supply Order and Erection Order issued on the same date for the Ghosi Town project.
- xiii. On October 18, 2016, the Superintending Engineer, Nodal Officer of R-APDRP Part-B, PuVVNL, Varanasi, revised and officially approved the Bill of Quantities (BOQ) for Ghosi

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town. The approved value of the project, as per the revised BOQ, amounted to INR 6,72,24,729.64 after receiving approval from the Managing Director, PuVVNL, Chief Engineer, and Director (Technical). Subsequently, SRV commenced its work in accordance with the aforementioned agreements.

- xiv. In a letter dated January 11, 2017, the Corporate Debtor communicated that the BOQ for both the Kopaganj Town project and Ghosi Town Project had been revised. The revised BOQ for Kopaganj Town was INR 7,37,93,117.92, while for the Ghosi Town project, it stood at INR 6,72,24,729.64.
- xv. Approval for the BOQ revision for both the Kopaganj Town Project and Ghosi Town Project was jointly granted by the Managing Director, PuVVNL, Director (Technical), Chief Engineer (RAPDRP-B), and Superintending Engineer (RAPDRP-B). SRV/Operational Creditor successfully completed the entire project and submitted a completion report to the CEO of the projects for subsequent submission to PFC/REC.
- xvi. Upon completion of the project, SRV submitted the completion report to the CEO of the projects, which was



accepted by the Superintending Engineer of Mau and the Managing Director of PuVVNL, both signing as a symbol of acceptance of the work's completion.

- xvii. An Electrical Safety Certificate dated October 24, 2017, was issued by the Deputy Director of the Electricity Safety Department, Gorakhpur Region, Uttar Pradesh Government. This certificate, issued in accordance with the Electricity Rules, 1956, attested that both the Kopaganj and Ghosi projects were in a satisfactory and safe working condition.
- xviii. On December 23, 2017, the Superintending Engineer in Mau issued a certificate confirming the successful completion of both the Kopaganj project and the Ghosi project. In relation to the completed work under the Kopaganj Town project, SRV/Operational Creditor issued invoices and R.A. bills totaling Rs. 7,38,13,510/-The specifics of these invoices are outlined below:

S. N	Bill / Invoice No	Amount (Rs.)
1.	SRV/PUVVNL/KOPAGANJ/RAPDRP-B/611/KOPAGANJ RA BILL NO.- S-1 dated 29.09.2016	4,41,07,633
2.	SRV/PUVVNL/KOPAGANJ/RAPDRP-B/611/KOPAGANJ RA BILL NO.- E-1 dated 29.09.2016	30,39,478
3.	SRV/PuVVNL/KOPAGANJ/RAPDRP-B/611/KOPAGANJ RA BILL NO.- S-2 dated 01.03.2017	2,23,75,303

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4.	SRV/PUVVNL/KOPAGANJ/RAPDRP-B/611/KOPAGANJ RA BILL NO.- E-2 dated 01.03.2017	42,91,096
Total		7,38,13,510

xix. SRV issued invoices amounting to Rs. 6,72,24,553/- for the work they carried out on the Ghosi Town project. Here are the particulars of the invoices generated:

S. N	Bill / Invoice No	Amount (Rs.)
1.	SRV/PUVVNL/GHOSI/RAPDRP-B/1127/GHOSI RA BILL NO.- S-1 dated 03.10.2016	2,43,66,031
2.	SRV/PUVVNL/GHOSI/RAPDRP-B/1127/GHOSI RA BILL NO.- E-1 dated 03.10.2016	18,14,328
3.	SRV/PUVVNL/GHOSI/RAPDRP-B/1127/GHOSI RA BILL NO.- S-2 & S-3 dated 25.03.2017	3,62,59,510
4.	SRV/PUVVNL/GHOSI/RAPDRP-B/1127/GHOSI RA BILL NO.- E-2 & E-3 dated 25.03.2016	47,84,684
Total		6,72,24,553

xx. That the total supply made by SRV in regard to Kopaganj Town project and Ghosi Town project were as follows:

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Sl. N	Particulars	Amount (Rs.)
A.	Kopaganj	7,38,13,510
B.	Ghosi	6,72,24,553
Total		14,10,38,063

xxi. Following payments were made by Corporate Debtor:

Sl. N	Particulars	Amount (Rs.)
A.	Kopaganj Town	6,96,21,343
B.	Ghosi Town	4,84,87,320
Total		11,81,08,663

xxi. An outstanding sum of Rs. 4,43,42,607/- (Four Crores Forty-Three Lacs Forty-Two Thousand Six Hundred Seven Only), which includes interest up to August 31, 2019, remains unpaid. However, interest will continue to accrue until the final payment date.

xxii. Due to the persistent default, the Operational Creditor personally delivered a Demand Notice on September 3, 2019, and sent another via registered post on September 12, 2019, to the registered office of the Corporate Debtor. This Demand Notice was made in accordance with "Form 3" as per the provisions outlined in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

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- xxiii. No dispute notice has been received from the Corporate Debtor within the prescribed 10-day period following the receipt of the Demand Notice dated September 3, 2019, as stipulated in Form-3 of the Insolvency and Bankruptcy Code, 2018, disputing the amounts related to the unpaid operational debt. Despite the issuance of the necessary Demand Notice, the Corporate Debtor has not made any payments to the Operational Creditor.
- xxiv. On September 6, 2019, the Operational Creditor sent a letter to the Superintending Engineer of Electricity Distribution Circle-Mau, PuVVNL, District-Mau. The Superintending Engineer, Electricity Distribution Circle-Mau, PuVVNL, District-Mau, responded with a letter dated September 11, 2019, confirming that the details of the outstanding payment to the Operational Creditor had been communicated to the PuVVNL Corporate Debtor via email on July 31, 2019. This email was re-sent to the Corporate Debtor on September 11, 2019.
- xxv. The Central Bank of India, through a certificate dated October 16, 2019, confirmed the amount paid by the

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Corporate Debtor. Thus, this petition u/s 9 has been filed by the SRV/Operational Creditor in light of the aforementioned circumstances.

3. The Respondent/Corporate Debtor has submitted its reply stating that the present Insolvency and Bankruptcy petition has been filed by **M/s SRV Techno Engineering Pvt. Ltd.**, falsely representing itself as an Operational Creditor of the Respondent in question. The following contentions have been raised in the reply of the Respondent pleading for the dismissal of this petition:

- i. The Respondent has contended that earlier generation, distribution and transmission of electrical energy was in the hands of U.P. State Electricity Board (UPSEB), a statutory body constituted under Section 5 of the Electricity Supply Act, 1948. The respondent has stated that with expansion of generation unit, a government company Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited was incorporated under the Company Act, 1956, a wholly owned by the State of Uttar Pradesh. The respondent has further stated that a major reform was introduced by promulgation of the Uttar Pradesh Electricity Reforms Act, 1999 and Section 13 of the Uttar Pradesh Electricity Reforms Act, 1999 provide for

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formation of a company namely Uttar Pradesh Power Corporation Ltd. (U.P.P.C.L.) registered under the Company Act, 1956 which was required to undertake planning and coordination in respect to transmission, to determine electricity requirement in the state and be a legal successor of U.P.S.E.B. in relation to all power purchase and transmission agreement. The respondent has further stated that Section 23 of the Uttar Pradesh Electricity Reforms Act, 1999, provides that all properties interest rights of UPSEB shall be vested in the State Government and thereafter shall be re-vested in UPPCL and its subsidiaries.

- ii. The Respondent has further stated that it is a subsidiary of UPPCL and was continued on 5th July, 2003, aimed for distribution of electric power in Eastern U.P. covering 21 District and thus the respondent is a 100 percent State owned Government Company and is an instrumentality of State in terms of Article 12 of the Constitution of India.
- iii. The Respondent has further stated that for work of system improvement, strengthening and augmentation for bringing down aggregate technical and commercial (AT&C) losses and to improve consumer supply of Kopaganj town and

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Ghosi town, decision was taken by the competent committee i.e. committee headed by Managing Director (PuVVNL) for store purchase and works, on 2.3.2016 for total packaging value of Rs.6,81,30,795.78/- for Kopaganj town and on 26.04.2016 for Rs.5,37,84,634.89/- for Ghosi Town under RAPDRP- Part B Scheme on turnkey basis from claimant. The respondent has enclosed copy of Minutes of meeting dated 02.03.2016 and 26.04.2016 as **Annexure R1** with the reply.

- iv. The Respondent has further stated that pursuant to the said decision dated 02.03.2016 and 26.04.2016 a letter of intent dated 21.03.2016 was issued allotting total package value of Rs.6,21,51,546.36/- for supply of material and Rs.60,29,248.43/- for erection of material, testing and commissioning in respect of Kopaganj Town by the Respondent.
- v. The Respondent has further stated that similarly, a letter of intent dated 10.05.2016 was issued in favour of the claimant for a total package value of Rs.4,81,67,687..59/- for supply of material and Rs.56,76,947.30/- for erection of material testing and commissioning in respect of Ghosi town by the

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Respondent.

- vi. The Respondent has further stated that in consequence of the said letter of intent agreement/contract was executed between claimant and the respondent on 21.03.2016 and 10.05.2016 in respect of Kopaganj and Ghosi town respectively. The Respondent has enclosed copy of the said agreement/contract dated 21.03.2016 and 10.05.2016 as **Annexure R-3** with the reply.
- vii. The Respondent has further stated that a letter dated 11.01.2017 was issued to the claimant, intimating that by earlier letters dated 02.12.2016 and 05.12.2016, the representative of the claimant has already been informed that Bill of Quantity (BOQ) equivalent to Rs.6,722,24,729.64 for Ghosi town and Rs.7,37,93,117.92p for Kopaganj town has been approved and that all other terms and conditions and rates will be as per agreement The respondent has further stated that along with this letter dated 11.01.2017 notings of the office file bearing signatures of Managing Director (PuVVNL), Director Technical, Chief Engineer (technical) (R-APDRP) and Superintending Engineer (R-APDRP) stating to be an approval for revised agreement

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value of Rs.7,37,93,117.92p for Kopaganj and Rs.6,72,24,729.64p for Ghosi town have been appended with the petition.

viii. The Respondent has contended that from perusal of the letter dated 11.01.2017 and official noting, it appears that the claimant had raised invoice, which was over and above the contracted amount claiming to be the additional work having been done apart from the work assigned under the contract. The respondent has further contended that noting in the file do not have behind them sanction of the law to be an effective order and merely writing in the file cannot constitute an effective order which can be relied for the existence of a debt. The respondent has further contended that the signature of the Managing Director does not in itself demonstrate the approval been given and it is at the best counter signature having no trappings of approval by proper application of mind.

ix. The Respondent has alleged that there was no privity of contract for the additional work, any statement letter or communication issued by

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subordinate authority to the competent authority is no consequence for proceeding further under the MSME Act. The respondent has stated that admittedly the payment of Rs.12,33,48,188/- has already been remitted to the claimant and the proceeding is only an attempt to extort money for the excess work done without any approvals. The respondent has alleged that the subordinate authority failed to appreciate the facts and circumstances of the case.

- x. The Respondent has contended and stated that the existence of letters dated 02.12.2016 and 05.12.2016 are seriously disputed as the same are not available with the respondent and the same have not been appended with the petition. The respondent has further contended that the exercise was carried out in respect to the additional work performed beyond the contract for Kopaganj and Ghosi towns on the basis of invoice sent by the claimant. The competent committee entitled for be sanctioning/ approving additional work and consequential

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payment is the committee under Managing Director (PuVVNL) for store purchase and work as is also evident out from the decision taken in the meeting dated 02.03.2016 and 26.04.2016. The respondent has contended that no such approval/sanction was granted by the Competent Committee and as and when approval for additional work is granted, consequential payment linkage is also provided for, which is missing in the present case.

- xi. The respondent has further contended that no agreement/ contract was executed for the additional work and consequential payment as undertaken by the claimant on the basis of alleged approval as appended in the petition. The respondent has further contended that the rights and liabilities between the parties are strictly determined by the contract entered into by them and neither the claimant was required to perform additional work than provided in the contract nor is the respondent required to pay more than the contracted amount. The respondent has further contended that they paid

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Rs.12,36,33,000/- in total in respect to both contract and in case of any further/ additional work having any major financial implication as existing in the present case additional agreement has to be executed, which can then be made the basis of seeking additional payment. The respondent has contended that such exercise was not undertaken, there is no basis to enforce contractual right before this forum. The respondent has contended that any communication or letter issued by any officer dehors the contract is insignificant and inconsequential. The respondent has enclosed photocopy of Profit and Loss account along with details of officers and staff as **Annexure R-5** with the reply.

- xii. The Respondent has also contended that the contract does not envisage charging of interest on account of late payment and under circumstances any alleged late payment cannot ipso facto attract levy of interest. Respondent further states that reference of seeking interest as per MSME Act, 2006 is misconceived and not maintainable. As per the Respondent, the provisions of MSME Act, 2006 shall be applicable if proceedings for recovery of the alleged unpaid amount is claimed under the MSME Act, 2006. It is

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emphasized by the Respondent in the reply that contrary to proceeding under MSME Act, 2016 being for recovery, proceedings under the Insolvency and Bankruptcy Code are for seeking corporate insolvency resolution process and not for recovery of a debt and hence, proceeding before this Tribunal cannot be a substitute for debt enforcement procedure and further the Code, 2016 overrides other laws. It is also contended by the Respondent that the Operational Creditor has misused the provisions of the I.B. Code for extraneous consideration and is using the provisions of the Code for recovery of their alleged claim and therefore as per it, petition is not maintainable and is liable to be rejected.

xiii. The Respondent further states that a sum of Rs. 4,43,42,607 as claimed by the operational creditor along with interest is not admitted and disputed. The additional amount claimed along with disputed rate of interest in the teeth of the fact stated aforesaid requires adjudication through proper adversarial litigation. It is further stressed by the respondent that the aforesaid dispute raised by the Corporate Debtor/Respondent required further

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investigation and it is not merely a feeble legal argument. It is also pointed out by the respondent that this tribunal is not entitled to be satisfied that the defense taken by the Corporate Debtor/Respondent is likely to succeed and only the existence of a genuine dispute is all which is required to be seen. As per the Respondent, the approval of the additional work was not granted by the competent committee and hence, in the present case there is a serious dispute with regard to the debt amount. Therefore, the present petition is liable to be dismissed as per section 9(5)(ii)(d) of the I&B Code, 2016.

- xiv. It is further stated by the Respondent that that the Respondent is a government Company and 100% of it is held by the state government which makes it instrumentality of State and therefore, insolvency proceedings cannot be initiated against it.
- xv. The Respondent further states that the Corporate Debtor has an annual turnover of Rs. 11,036.93 crore and employs approximately 7,964 officers and staff. In comparison, the alleged operational debt is relatively insignificant when viewed in the context of the company's substantial worth,

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which amounts to thousands of crores. Therefore, initiating the insolvency process under the Insolvency and Bankruptcy Code, 2016 for such a small amount seems inappropriate. The photocopy of the relevant statement of profit and loss account, along with details of the officers and staff, marked as **Annexure-R5** has also been appended to the reply.

- xvi. Respondent further states that the corporate debtor's failure to respond to the demand notice issued under section 8(1) is not necessarily fatal, and the corporate debtor retains the right to assert the existence of a dispute when the application under section 9 of the IB Code, 2016 is considered by the adjudicating authority.

4. The Operational Creditor filed a rejoinder countering all the contentions raised in the reply filed by the Corporate Debtor and made the following averments:

- i. The Respondent through its own Superintending Engineer (R-APDRP), forwarded a letter dated 11.01.2017 via email to the Applicant. The said letter mentioned that vide earlier letters dated 02.12.2016 and 05.12.2016, the representative of the Applicant has been intimated that the BOQ for Ghosi

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Town and Kopaganj Town worth Rs.6,72,24,729.64/- and Rs.7,37,93,117.92/- respectively, has been approved and that all other terms shall be in accordance with the agreement. The Applicant has appended the said email as **Annexure -I** to this Rejoinder.

- ii. With respect to the Respondent's contention that the letters dated 02.12.2016 and 05.12.2016 are not available, the Applicant submitted that since the reference vide letter dated 11.01.2017 was already with reference to the earlier letter on record i.e. dated 02.12.2016 and 05.12.2016 in respect of Goshi Town and Kopaganj Town Project respectively; hence the same was not adduce to the petition at the relevant time. However, in the Rejoinder, the applicant sought permission to produce both the letters along with two letters dated 03.01.2017 as annexed in **Annexure- II(colly)** with the Rejoinder and the same is allowed to be taken on record.
- iii. The Applicant in its Rejoinder emphasized that the respondent has not questioned the authenticity of the letter dated 11.01.2017 and BOQ and notings. These are the official notings which have been approved by the Competent

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Authority of the Respondent itself. Since these notings have not been questioned, payments thereunder cannot be questioned. This is not merely a matter of signatures confined to internal filing; it's a situation where the Competent Authority's approval and intent were communicated to the Operational Creditor/Applicant, along with additional instructions to proceed with revised terms via a letter dated 11.01.2017. Therefore, as per the Applicant, the Corporate Debtor cannot claim incompetence or lack of jurisdiction at this stage, especially when the specified tasks were completed three years ago and to the satisfaction of the Competent Authority through their authorized representative, and the supply of goods and services was duly accepted by the Corporate Debtor. Simply arguing that these notations and the letter dated 11.01.2017 lack legal validity doesn't address the issue, particularly when there's no reference to the specific legal provisions that would deem it as an illegal sanction.

- iv. Therefore, the Applicant has contained that the limited issue is only with reference to the amount, which has not been paid as detailed below: -

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Name of Town	Value as per Agreement/LOI	Value as per Approved/revised BOQ	Amount of Bills raised by SRV	Payment Received (including TDS, VAT etc.)
Kopaganj	6,81,80,796/-	7,37,93,118/-	7,38,13,510/-	7,29,86,819/-
Ghosi	5,37,84,635/-	6,72,24,730/-	6,72,24,553/-	5,03,61,369/-

By pointing out the above payments so far made by the Respondent against the bills raised by the Applicant as detailed in the above chart, it has been contended by the Applicant that the Corporate Debtor has been making payments as per revised BOQs and letter dated 11.01.2017, and further argued that if this is an admitted position of the Corporate Debtor itself, then there is no question of raising dispute about the said claim.

- v. The Applicant further states that the mention of the MSME Act, 2006, in the petition was solely for the purpose of calculating interest in connection with electricity supply agreements for Kopaganj and Ghosi Town respectively, not for invoking the Act itself under the IB Code. The Corporate Debtor's arguments suggesting otherwise are incorrect, as the petitioner never sought remedies under the MSME Act in this Tribunal. Furthermore, it pointed by the Applicant

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that the provisions of the IB Code are appropriately applicable in terms of the "Claim" as defined in Section 3(6) of the Code as being a clear case of committing breach of contract, a default by which the Operational Creditor/Applicant is competent to seek Corporate Insolvency Resolution Process as provided under IB Code and accordingly , the Operational Creditor/Applicant had followed the due process as envisaged under section 8 and 9 of the Code as the Corporate Debtor has had consistently and continuously evaded payment of the legitimate claim along with interest , which in view of the Operational Creditor shows that the Corporate Debtor is under financial stress and constraint due to which it is not able to make the payment even after availing the services rendered and supply of goods made by the Operational Creditor . Therefore, the Applicant tried to emphasize that it is not a case of mere recovery of debt but a case of default by the Corporate Debtor as defined under section 3(12) of the Code and hence, it is contended that the present petition has been filed correctly by it under IB Code. Additionally, by relying on the definition of the "Claim" as given in the IB Code, it is

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also argued that the provisions of the IB Code are aptly applicable for recovery of the “Claim” as defined under Section 3(6) of the Code

- vi. The Applicant has further stated that it had already placed substantial documentary evidences to show that there is no scope for the Corporate Debtor to contest against the works executed by the Operational Creditor/Applicant legitimately having a Privity of Contract with reference to the earlier agreements dated 21.03.2016 and 10.05.2016 and further email and letter both dated 11.01.2017, along with the revised BOQs for Ghosi Town, and Kopaganj Town Projects and hence, it is futile argument on part of the Corporate Debtor to claim that the claim of the Operational Creditor/Applicant is disputed.
- vii. As regards the dispute raised by the Corporate Debtor, the Applicant tried to clarify that the dispute raised is on account of alleged infarctions only with reference to the approval of competent authority. It is further stated that if the veil of alleged approval is lifted then it stands clear that the Corporate Debtor got the works done by the Operational Creditor /Applicant and because of which projects were

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completed and electricity distribution network was successfully strengthened by Purvanchal Vidyut Vitran Nigam Limited i.e. the Corporate Debtor. Therefore, in view of the Applicant, such act of the Corporate Debtor amounts to deemed approval and such deemed approval is sufficient to sustain the “claim” of the Operational Creditor/Applicant, which does not require any kind of investigation to ascertain due amount to be paid as the same is already admitted on record on many occasion *viz* Account Confirmation Letter dated 03.10.2017. Works Completion Certificate dated 23.12.2017 and various letters of the Superintending Engineer, Electricity Distribution Circle, Mau to Director (Finance), Varanasi for release of payment.

- viii. As regards the Privity of Contract , it is stated by the Applicant that it has already existed from the original Agreement dated 21.03.2016 and 10.05.2016 in the case of Kopaganj and Ghosi Town works respectively and followed by the letter dated 11.01.2017, duly issued by the Corporate Debtor. It is reiterated that the Corporate Debtor had accepted the supply of goods and services rendered by the Operational Creditor/Applicant consciously and had also

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made some payments out of the same. Therefore, it is emphasized by the Applicant that the present petition is not liable to be rejected as per Section 9(5)(ii)(d) of the IB Code, as much as that the Corporate Debtor is bound to pay the amounts against the works performed by the Operational Creditor/Applicant and received and accepted by the Corporate Debtor and hence, it is further emphasized that the said provisions of IB Code have been rightly invoked.

- ix. As regards the Corporate Debtor, being a Government Company, cannot undergo the corporate insolvency resolution process, it is contended by the Applicant that this argument is absolutely baseless because it is their own case that they are the subsidiary of UPPCL (Uttar Pradesh Power Corporation Limited), which is incorporated under the Company Act, 1956. Therefore, as further stated by the Applicant that there is no bar of seeking remedy under the IB Code against the Corporate Debtor by virtue of being recipient from the Operational Creditor. The Applicant further pointed out that the Corporate Debtor failed to provide in such legal provision under the IB Code regarding any kind of restrictions imposed in the said Code that the

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Corporate Insolvency Solution Resolution Process cannot be initiated against the Corporate Debtor. The Applicant further pointed out that on the contrary after perusing the definition of “Corporate person” under Section 3 (7) of the Code, it is categorically evident that the Corporate Debtor is a company registered under the Companies Act, 2013 (earlier Companies Act, 1956), as per their own submissions vide paragraphs 1 and 2 of their reply and hence, they fall within the definition of a corporate person considering the definition of the Corporate Person given in the IB Code.

- x. As regards the Corporate Debtor being of substantial worth having huge turnover with a large work force and the claim of the Operational Creditor being of miniscule amount in comparison to that, it is stated by the Applicant that it is immaterial for Operational Creditor/ Applicant whether the demanded amount is miniscule for Corporate Debtor and even if so, then there is no reason as to why the Corporate Debtor is not paying the miniscule amount. It is also pointed out by the Applicant that it is not the case that the demanded amount has been restricted or barred under the IB Code in pursuing the recovery of dues. Hence, as per the Applicant,

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the Corporate Debtor had to admit that they were bound to pay the said amount along with interest in view of additional works entrusted to Operational Creditor/ Applicant vide letter dated 11.01.2017 and therefore, it is alleged by the Applicant that instead of accepting the same and making payment thereof without any further delays, the Corporate Debtor is beating around bush in the guise of turnover and strength of the staff of the Corporate Debtor, which have no relevance of and consequence for any purpose under IB Code.

- xi. The Applicant has also stated that the Corporate Debtor in its own wisdom ought to have discharged its liability towards the Operational Creditor/ Applicant whether or not the Corporate Debtor had replied. Hence, had the amount been paid, there would be no question of filing the same.
- xii. The Applicant has finally concluded in the rejoinder stating that the Corporate Debtor instead of making the payments is ironically suggesting for alternate remedy. This claim also proves the fact that the Corporate Debtor had deliberately and intentionally stopped the payment even though, they had no legal and factual grounds to do the same.

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5. An Additional Affidavit dated 08.12.2022 has been filed by the Corporate Debtor on 19.01.2023 bringing on record that the Applicant has filed a claim petition under MSME Act seeking claim of Rs. 6,23,08,474/- with compound interest as per section 16 of the MSME Act, 2006 along with other reliefs, which is pending for adjudication. The averments made in the Additional Affidavit are as under: -

- i. That the applicant has filed a claim petition under MSME Act. It is submitted that the petition bearing MSME PETITION No. DL/10/M/SWC/00031 seeking a sum of Rs. 6,23,08,474/- with the compound interest as per section 16 of the MSME Act, 2006 along with other reliefs is pending adjudication before Shri Deepak Bhanwala learned sole arbitrator. Copy of the plaint of the MSME PETITION No. DL/10/M/SWC/00031 is being annexed as **Annexure-1** of the Additional Affidavit.
- ii. That the respondent corporate debtor is a government company created not only to make profit but the real object is to serve the public purpose even at the cost of incurring losses. The annual turnover of the corporate debtor is more than 10,000 crores. On the contrary the petitioner herein

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has stated that an amount of Rs. 2,29,29,370/- has not been paid. In the demand notice dated 03.09.2019 the debt amount has been mentioned as Rs. 4,43,42,607/- inclusive of interest upto 31.08.2019.

- iii. That one of the objects of IBC qua operational debts is to ensure that the amounts of such debts which is usually smaller than that of financial debts does not enable operational creditors to put the corporate debtor into the insolvency resolution process, prematurely or initiate the process for extraneous consideration.
- iv. That in the aforesaid background this Hon'ble Tribunal has to examine the existence of dispute raised by the corporate debtor.
- v. That Hon'ble Supreme Court has held that under such circumstances it is enough that disputes exists between the parties. That in the reply filed by the corporate debtor existence of dispute with regard to the issues between the parties has been stated. The petition under section 9 of IBC deserves to be dismissed.
- vi. That in view of the MSME petition filed by the Operational

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Creditor the present application under section 9 of IBC is liable to be dismissed in the interest of justice.

6. During the course of the hearing of the present petition, the Applicant filed an Additional Affidavit/Application dated 03.03.2023 on 12.04.2023 seeking to place on record some relevant information. The same are reproduced as under: -

- i. That the Applicant/ Operational Creditor has filed the present petition seeking the order for initiation of corporate debtor insolvency resolution process of the Corporate Debtor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“Code”).
- ii. That the due date of default to be stated under Part IV of the Petition in the said matter may be read as 24.04.2018 as it is the last date of payment by the Corporate Debtor to the Operational Creditor.
- iii. That the amount of default in the present matter is Rs. 1,76,89,935/-. The amount of invoices raised by the Applicant against the Corporate Debtor is Rs. 14,10,38,091/- (7,38,13,520/- for Kopaganj + 6,72,24,571/- for Ghosi). The payments with tax made by the Corporate Debtor is Rs.

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12,33,48,188/- (7,29,86,819/- for Kopaganj + 5,03,61,369/- for Ghosi). A copy of the calculation sheet is annexed herewith and marked as **Annexure-A**.

iv. That accordingly, the respondent is filing the present application seeking to place on record the additional information and information.

Along with above Additional Affidavit, a computation sheet was also filed by the Applicant providing the Statement of Default Amount, which is reproduced as under:-

STATEMENT OF DEFAULT

Consolidated Amount of Default		
Name of Operational Creditor :SRV Techno Engineering		
Name of the Corporate Debtor - Purvanchal Vidyut Vitran		
I		
(Amount In Rs.)		
S.No.	Details of Tender	Default amount
1	Kopaganj	8,26,701
2	Ghosi	1,68,63,234
Total default		1,76,89,935

STATEMENT OF DEFAULT

Name of Operational Creditor :SRV Techno Enineering Pvt. Ltd.								
CALCULATION SHEET FOR DELAYED PAYMENT OF KOPAGANJ PROJECT								
Name of the Corporate Debtor - Purvanchal Vidyut Vitran Nigam Ltd., Vidyut Nagar, PO. DLW, Varanasi, (U.P) PIN-221004								
S. No.	RA Bill No.	RA Bill Amount	Tax Invoice No.	Date of Invoice	Amount of Invoice	Due Date as per Tender Agreement / Section 16 of the MSMED Act 2006 (after 45 days from Invoice dt.)	Date of receipt of payment from Debtor	Amount received from Debtor including Tax

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1	S-1	44107633	5	29-09-2016	88,90,897	13-11-2016	27-01-2017	2,65,72,231	
2			6	29-09-2016	1,01,83,672	13-11-2016	27-01-2017	30,39,477	
3			7	29-09-2016	34,56,305	13-11-2016	24-04-2017	1,51,00,000	
4			8	29-09-2016	1,05,24,259	13-11-2016	08-06-2017	23,47,111	
5			9	29-09-2016	99,56,543	13-11-2016	13-09-2017	1,59,28,000	
6			10	29-09-2016	10,95,959	13-11-2016	17-10-2017	50,00,000	
7	E-1	3039478	8	29-09-2016	5,61,092	13-11-2016	24-04-2018	50,00,000	
8			9	29-09-2016	1,87,801	13-11-2016		-	
9			10	29-09-2016	3,50,992	13-11-2016		-	
10			11	29-09-2016	6,66,805	13-11-2016		-	
11			12	29-09-2016	6,87,156	13-11-2016		-	
12			13	29-09-2016	5,82,076	13-11-2016		-	
13			14	29-09-2016	3,564	13-11-2016		-	
14	S-2	22375303	21	25-03-2017	99,11,432	09-05-2017		-	
15			22	25-03-2017	40,42,441	09-05-2017		-	
16			23	25-03-2017	70,27,110	09-05-2017		-	
17			24	25-03-2017	13,94,320	09-05-2017		-	
18	E-2	4291096	20	25-03-2017	7,01,809	09-05-2017		-	
19			21	25-03-2017	5,73,965	09-05-2017		-	
20			22	25-03-2017	3,02,077	09-05-2017		-	
21			23	25-03-2017	7,39,227	09-05-2017		-	
22			24	25-03-2017	18,74,246	09-05-2017		-	
23			25	25-03-2017	99,772	09-05-2017		-	
Total Invoice Value					7,38,13,520		Total Received	7,29,86,819	
								Total Default amount	8,26,701

STATEMENT OF DEFAULT

Name of Operational Creditor : SRVTechnoEnneerin2Pvt.Ltd.									
CALCULATION SHEET FOR DELAYED PAYMENT OF GHOSI PROJECT									
Name of the Corporate Debtor - Purvanchal Vidvut Vitran Niem Ltd., Vidvut Naear, PO. DLW, Varanasi, (U.P.) PIN-221004									
S. No.	RA Bill No.	RA Bill Amount	Tax Invoice No.	Date of Invoice	Amount of Invoice	Due Date as per Tender Agreement / Section 16 of the MSMED Act 2006 (after 45 days from Invoice dt.)	Date of receipt of payment from Debtor	Amount received from Debtor including Tax	
1	S-1	24366049	11	03-10-2016	70,39.1	17-11-2016	02-02-2017	1,44,80,952	
2			12	03-10-2016	16,88,0	17-11-2016	02-02-2017	18,14,327	
3			13	03-10-2016	25,40,7	17-11-2016	19-05-2017	60,04,058	
4			14	03-10-2016	1,20,95,7	17-11-2016	08-06-2017	24,03,000	
5			15	03-10-2016	10	17-11-2016	13-09-2017	2,06,59,000	
6	E-1	1814328	15	03-10-2016	4,08,5	17-11-2016	17-10-2017	50,00,000	
7			16	03-10-2016	2,17,4	17-11-2016		-	
8			17	03-10-2016	11,88,3	17-11-2016		-	
9	S-2 & S-3	36259510	25	25-03-2017	29,61,7	09-05-2017		-	
10			26	25-03-2017	3,17,40,7	09-05-2017		-	
11			27	25-03-2017	16,63,0	09-05-2017		-	
12	E-2 & E-3	4784684	26	25-03-2017	4,00,5	09-05-2017		-	
13			27	25-03-2017	7,81,6	09-05-2017		-	
14			28	25-03-2017	27,43,6	09-05-2017		-	
15			29	25-03-2017	6,90,1	09-05-2017		-	
16			30	25-03-2017	62,7	09-05-2017		-	
Total Invoice Value					6,72,24,57		Total received	8,03,61,337	
								Total Default amount	1,68,63,234

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7. During the course of the hearing the present petition, the Respondent/Corporate Debtor filed additional reply on 19.08.2023 bringing out certain facts necessary for proper adjudication of the cases as stated herein below:-

- i. That prior to institution of the present petition a demand notice dated 03.09.2019 was issued by the Operational Creditor. The demand notice has to be issued in terms of Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 5 provides issuance of Demand Notice in Form-3. A perusal of Form-3 shows that the date of default is required to be mentioned mandatorily.
- ii. That the said Demand Notice dated 03.09.2019 does not mention the date on which the debt fell due or the date on which the default occurred. On account of the non-compliance of a statutory requirement the Demand Notice is itself illegal and accordingly proceedings emanating thereafter stands vitiated under law. Thus, the Demand Notice not being on the prescribed format, the present petition is not maintainable.

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iii. That in the view of the above facts and circumstances narrated above it is most expedient in the interest of justice that the present petition deserves to be rejected with cost; otherwise, the respondents/corporate debtor would suffer irreparable loss and injury.

8. The petitioner filed a miscellaneous application bearing MA no.02/2023 seeking to place on record the due date of default since the respondent had argued that no date of default was mentioned in Part-IV of the petition and the demand notice.

It was averred that the Respondent had made last payment on 24/04/2018, hence the due date of default was to be read as the same. The Applicant also stated the amount of default as Rs.1,76,89,935/- and appended a calculation sheet as annexure A to the said application.

In reply thereto, the Respondent denied the occurrence of any default and the amount stated thereof. He also stated that after part-hearing, the petitioner cannot bring on record the information which he already possessed while filing the main petition and hence prayed for rejection of this miscellaneous application.



9. The Respondent filed a miscellaneous application under Section 60 (5) of IBC, 2016 bearing MA no.04/2023 seeking to place on record certain additional documents.

Respondent in his averments apprised this Tribunal of the existence of a claim petition under MSME Act which was filed by the applicant. The said MSME petition bearing no. DL/10/M/SWC/00031 was filed for the recovery of an amount of Rs.6,23,08,474/- with compound interest under Section 16 of the MSME Act, 2006. The said petition was under consideration before a sole arbitrator, namely, Sh. Deepak Bhanwala. A copy of the said petition filed before the MSME Tribunal was also annexed to the said MA. Thus, the Respondent contended the existence of a pre-existing dispute.

It was further averred by Respondent that the turnover of the Corporate Debtor was more than 10,000 crores and the said operational debt was for Rs.4,43,42,607/- and one of the primary objectives of the Insolvency and Bankruptcy Code (IBC) concerning operational debts is to prevent operational creditors from triggering the insolvency resolution process for a corporate debtor prematurely or for reasons unrelated to financial debts. The

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Respondent in view of the aforementioned facts prayed for dismissal of the main petition

The applicant filed objections to the said MA and asserted that an award has been passed against the corporate debtor in the arbitration matter titled "**SRV Techno Engineering Pvt. Ltd. vs. Purvanchal Vidyut Vitran Nigam Limited**" bearing case no. **DL/10/M/SWC/00031 of 2022**. The said award was also annexed to the said objections.

The Applicant further placed reliance on the judgment of Hon'ble NCLAT titled as **iValue Advisors Pvt. Ltd. Vs Srinagar Banihal Expressway Ltd.**

The Applicant further contended that a clear distinction exists between a government company and a government body or entity. A government company is a corporate entity in which the government holds shares, whereas a government entity is an institution or body that acts as an instrument of the state. It is emphasized without bias that the Corporate Debtor in the current case is indeed a government company but not a government entity or body, and therefore, the initiation of Corporate Insolvency Resolution Process (CIRP) against them is permissible.

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Additionally, it was asserted that Section 9 of the Insolvency and Bankruptcy Code (IBC) of 2016 does not prohibit the initiation of CIRP proceedings against a government company. It is well-established in legal precedent that CIRP can be invoked against a government company. In support of its arguments, the applicant relied on certain judgements which were appended to the objections as Annexure-3.

The Respondent countered the objections of the petitioner by stating that the intent of the petitioner to recover the debt is apparent from the filing of the arbitration petition. The intent of applicant is to be examined when an application under section 9 of the Code is filed. Further, the existence of pre-existing dispute is also clear by the filing of said arbitration petition.

FINDINGS AND ORDERS

10. We have heard the arguments of Ld. Counsels of the Applicant/Operational Creditor as well as the Respondent/Corporate Debtor and perused all the submissions made by the both parties as discussed in foregoing paras.

11. The Applicant has been found to be aggrieved because of not receiving the full payments for the work done by it for the Corporate Debtor therefore, an application u/s 9 has been filed by it before

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this Tribunal mentioning the total amount of the operational debt in default in Part-IV of the application at Rs. 4,43,42,607/- as on 31.08.2019 which comprises of the outstanding amount of the bills raised by it coming to Rs. 2,29,29,400/- plus interest charged up to 31.08.2019. However, in Part-IV of the application, no date of default has been mentioned. Before filing of this application, the Applicant/Operational Creditor had also issued and served a notice of demand u/s 8 of the I&B Code, 2016 dated 03.09.2019 in Form-3 mentioning the same default amount of Rs. 4,43,42,607/- as on 31.08.2019 but in this demand notice also, no date of default is mentioned. Later, on being pointed out about not mentioning the date of default by the Corporate Debtor and questioning the validity of the demand notice issued u/s 8 and subsequent application filed u/s 9 on the basis of such illegal demand notice, an application has been filed by the Applicant on 03.03.2023 during the course of the proceedings, stating that the due date of default to be stated under Part-IV of the petition in the said matter may be read as 24.04.2018 as it was the last date of payment by the Corporate Debtor to the Operational Creditor. In the said application, the Applicant has also revised the amount of default. It has been submitted by the Applicant in the said

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application that the amount of default in the present matter is Rs. 1,76,89,935/- for which computation has also been provided. This computation is reproduced in para no. 6(iv) of this order. Thus, initial default amount of Rs. 2,29,29,400/- as shown in the application filed u/s 9 has been replaced with this new amount. Accordingly, we find that before filling of the application u/s 9, the Applicant has not worked out the operational debt in default in proper manner and also has not ascertained as to when actual default has occurred therefore, we find force in the argument of the Corporate Debtor as contended by it in its reply that while issuing demand notice in terms of Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application and Adjudicating Authority) Rule, 2016, the date of default is required to be mentioned mandatorily in the connection to the Corporate Debtor by relying on a decision of Hon'ble NCLAT in the case of **Kodeboyina Srinivas Krishna vs. PVM Innvensys Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 205 of 2020 dated 25.09.2020**. In this judgement in this regard, it has been held as under:

“It is clear from a reading of Section 8(1) that the demand notice or copy of invoice has to be sent by the operational creditor in the prescribed formant for unpaid operational debt on occurrence of default in

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repayment or copy of an invoice demanding payment of the amount involved in the default. The Explanation with Section 8 explains Demand Notice to mean a notice demanding payment of the operational debt in respect of which the default has occurred. Thus is it clear that the demand notice and later the application under Section 9 of IBC should pertain to the operational debt that is in default along with the date of default and documents in proof of the purchase and supply of the items for which the operational debt is said to exist. This is necessary to enable the Ld. Adjudicating Authority establish and adjudicate on the existence of operational debt which is in default and the date of default. The Demand Notice in Form 3 also requires the date of default to be explicitly mentioned in the notice so that on the basis of documents the debt amount and the date of default could be ascertained.”

The above mistake while initiating proceedings under I&B Code, clearly demonstrate that the Applicant was in hurry for recovery of its dues as raised in the bills submitted to the Corporate Debtor and therefore, the petition u/s 9 of the I&B 2016 was filed by it prematurely without resolving the dispute with the Corporate Debtor as it was brought before us during the course of the proceedings. The intention of the Applicant being only the recovery of its outstanding dues is also clear from the fact that it filed a claim petition dated 09.08.2022 under MSMDE Act, 2006 seeking an award for recovery of sum of Rs. 6,23,08,474/- with the compound interest as per Section 16 of the MSMDE Act, 2006.

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12. The mistake in the petition u/s 9 filed before this Tribunal has not been rectified by the Application till it was specifically pointed out by the Corporate Debtor and by that time the arbitration award order has also been passed by the Hon'ble Arbitrator u/s 18 of MSMED (Micro Small & Medium Enterprises Development) Act, 2016. This order was passed on 30.12.2022 and conveyed to the Applicant/Operation Creditor on 04.01.2013, awarding and directing the respondent M/s Purvanchal Vidyut Vitran Nigam Ltd. to pay the claimant i.e. the Applicant herein M/s SRV Techno Engineering Pvt. Ltd., the sum of Rs. 3,39,86,382/- (Rs. Three Crore Thiry Nine Lakhs Eighty-Six Thousand Three Hundred Eighty-Two Only) towards the principal outstanding amount, based on the invoices raised, along with interest of Rs. 1,66,01,536/-, as computed according to MSME interest rate. The order granting the award by the Hon'ble Arbitrate is reproduced as under:-

A. The statement of claim as filed by the claimant against the respondent is according allowed, and in view of the above, I award and direct the Respondent to pay to the Claimant the sum of Rs. 3,39,86,382/- (Rupees Three crores thirty nine lakhs eighty six thousand three hundred and eighty two only) towards to principal outstanding amount based on the invoice raised, along with interest of Rs. 1,66,01,536/- as computed according to MSME

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interest rates i.e. compound interest monthly rests at three times of the bank rate notified by the Reserve Bank (at present the bank rate of interest is 4.65% per year and its three times comes as 13.95% per year plus its monthly rest rate), for the period from 07.02.2018 to 30.12.2022.

- B. I considered the claim for pendente lite and future interest claimed by the Claimant and I award the simple interest at provisions of Sec. 16 MSME Act, 2006 pr annum on the w.e.f. from the date of passing of award by this Tribunal i.e. 30.12.2022 till realization.*
- C. Both the parties shall bear their respective cost of arbitration fees.*
- D. I award that the Respondent should pay Rs.1,00,000/- as cost of this proceedings to the claimant.*

In this order, the award amount of Rs. 3,39,86,382/- has been computed in its para no. 93 as under:-

“93. It is, therefore, held that respondent/buyer is liable to pay Compound Interest to claimant/seller of principal amount of Rs. 1,73,84,846/- (Rupees One crore seventy-three lakh eighty-four thousand eight hundred and forty-six only) monthly rests at three times of rate of 4.65% per annum which comes out as Rs.1,66,01,536/-. Hence, it is held that respondent/buyer shall pay claimant/seller the total amount of Rs. 3,39,86,382/- (Rs. 1,73,84,846/- + Rs. 1,66,01,536/-) for a period from 07.02.2018 till 30.12.2022.”

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The principal amount of Rs. 1,73,84,846/- has been computed in the order dated 04.01.2023 of Hon'ble Arbitrator in Para no. 79 of the said order as under:-

*“79. It is admitted position between the parties that the revised BOQ was issued by the respondent for total amounting to Rs. 7,37,93,118/- for Kopaganj Town and for Rs. 6,72,24,730/- for Goshi Town, **total amounting to Rs. 14,10,17,848/-** for both the towns. The claimant has raised total value of invoices for both the towns for Rs. 14,10,38,063/- **but the completion certificate was issued for Rs. 14,10,17,846/- only by the respondent.** The claimant further admitted receiving Rs. 12,33,48,188/- from the both the towns. The respondent however has taken a stand in its SOD that total amount of **Rs. 12,36,33,000/- in respect to both the contract has been paid to the claimant.***

Therefore, even going by the deposition of the respondent of the amount paid and completion certificate issued to the claimant, this tribunal finds that the outstanding principal amount still payable by the respondent to claimant comes to be Rs. 1,73,84,846/- (Rs. 14,10,17,846-Rs. 12,36,33,000) as per the contract.

From the order dated 30.12.2022 of the Hon'ble Arbitrator, relevant paras of which have been reproduced above as regards the computation of the outstanding dues by the Corporate Debtor to the Operational Creditor, it can be seen that the relevant figures have been taken in the application filed by the Applicant dated 03.03.2023 before this tribunal seeking to place on record the

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relevant information for the purpose of rectification to be carried out in the application filed u/s 9 to mention the date of default and the amount of default (*reproduced in this order in para no. 6*) are same as discussed in the order of the Hon'ble Arbitrator. Therefore, we find that considering the decision of the Hon'ble NCLAT in the case of **Kodeboyina Srinivas Krishna vs. PVM Innvensys Pvt. Ltd. (supra)**, a legally valid petition u/s 9 has been filed by the Applicant only on 03.03.2023, after passing of the arbitration order by the Arbitrator under MSMED Act,2006.

13. Before a legally valid application u/s 9 was filed by the Application after placing of relevant information vide its application dated 03.03.2023 by correctly mentioning the date of default and the amount of default, the Corporate Debtor had brought on record the serious dispute between the Operational Creditor and the Corporate Debtor with respect to the amount of default payable to the Operational Creditor as it has been discussed in detail in para 3 of this order, while discussing the submissions made by the Corporate Debtor in its reply dated 13.02.2020. Such dispute existing between the Operational Creditor and Corporate Debtor has also been discussed by the Hon'ble Arbitrator in para no. 87 of its order dated 30.12.2023 and the same is reproduced as under:-

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“87. So far as the two parallel proceedings initiated by the claimant i.e. one petition u/s 9 of Insolvency and Bankruptcy Code, 2016 before the NCLT, Allahabad and the second is the claim petition before this Tribunal. There are no such case law precedent or even no provisions or law as produced by the respondent that the said two simultaneous proceedings are barred or that the said proceedings before the NCLT, Allahabad, barred the present arbitration proceedings before this Tribunal. Upon bare reading of the two statutes i.e. Insolvency and Bankruptcy Code, 2016 and the MSMED Act,2006, it is amply clear that both are special legal remedy due to default committed by the respondent, while in the present claim petition filed under MSMED Act,2006, the claimant has sought recovery by way of claim & Award of the due and outstanding amount against the respondent. Further it is a settled position of law that proceedings before NCLT cannot be initiated for pre-existing disputes. **The respondent has disputed the payment of claimant and taken a stand that the same are not payable and the claimant has preferred the MSEFC forum for adjudication of disputes with respondent, therefore it cannot be said that this tribunal has not the jurisdiction to try and decide the present proceedings. Had it been the case of respondent that it has accepted the due payments of claimant but same were pending due to various reasons and case in respect to this is already pending before the NCLT then it would be having different bearing.** Further no moratorium order if any of NCLT has been placed on record before this tribunal so to deny the continuation of present proceedings before this tribunal.”

(Emphasis Supplied)

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In the above decision, the Hon'ble Arbitrator has also recognized the dispute between the Claimant-Operation Creditor and Respondent-Corporate Debtor as regards the payment of the claimant and therefore, the claimant has preferred the MSEFC Forum for adjudication of dispute with the respondent. It is also specifically pointed out in the said order that "had it been the case of respondent that it has accepted the due payment of claimant but same were pending due to various reason and case in respect of this is already pending before the NCLT then it would be having different bearing". Therefore, the Hon'ble Arbitrator has assumed jurisdiction under the MSMED Act,2006 for awarding the payment to the claimant by adjudication upon the dispute between the claimant and the respondent. In view of the above facts and circumstances of the case, we are of the opinion that the dispute between the Operational Creditor and Corporate Debtor as regards the default amount as defined under the I&B Code, 2016 very much exits in view of the same is relating to the amount of the debt (default amount) and defined u/s 5 (6) of the I&B Code, 2016 and the same has been found to be in the nature of **pre-existing dispute** looking to the fact that such dispute has been brought on record by the Corporate Debtor before a legally valid petition u/s 9

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could be filed by the Applicant after placing the relevant information on record by filing the application dated 03.03.2023 subsequent to passing of the arbitration order under MSMED Act in which such dispute was recognized by the Hon'ble Arbitrator as discussed above and also brought before us in the reply dated 13.02.2020 filed by the Corporate Debtor as discussed in para 3 of this order. Existence of such dispute is material to decide the jurisdiction under the I&B Code, 2016 to initiate CIRP against the Corporate Debtor. Once, a dispute exists, the Adjudicating Authority under the I&B Code, 2016 is not required to examine the merit of dispute. In the present case under consideration, jurisdiction has been assumed by the Arbitrator under the MSMED Act, 2006 only because claim of the Operational Creditor is disputed by the Corporate Debtor and then examined the merit of the dispute before granting award for recovery against the Corporate Debtor. The Hon'ble Supreme Court in the case of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited MANU/SC/1196/2017 : 2018 (1) SCC 353*** has inter alia held that the Court does not need to be satisfied that the defense is likely to succeed in countering the dispute, the Court does not at this stage examine the merits of the dispute, what really

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is to be seen is the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties and also the I & B Code, 2016 is not intended to be a substitute to a recovery forum and cannot be used to jeopardize the financial health of an otherwise solvent company by pushing it into insolvency.

14. Apart from finding a dispute between the Operational Creditor and the Corporate Debtor as regards the amount of the amount operational debt, we find that the Corporate Debtor is a solvent company looking to the fact that it is subsidiary of Uttar Pradesh Power Corporation Limited (UPPCL) a fully owned public sector undertaking of the State Government of Uttar Pradesh and having annual turnover in the range of ten thousands of crores with working strength of 7,964 officers and staffs engaged in supply of electricity in the eastern part of the Uttar Pradesh. The disputed amount of the operational debt has been found to be very small amount as compared to the financial resources available with the Corporate Debtor Company and it has already paid a substantial amount of the bills raised by the Operational Creditor, which comes to Rs. 12,36,33,000/- and only a small amount of Rs. 1,73,84,846/- was not paid due to the dispute with the Operational

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Creditor in respect of enhancement in the contract amount not backed by a valid contract as contended by the Corporate Debtor. However, the same has been now adjudicated upon by the Hon'ble Arbitrator and an order has been passed for making the payment by the Corporate Debtor to the Operational Creditor. Now, it is worth considering that whether CIRP can be initiated in respect of a disputed operational debt against the Corporate Debtor which is a solvent company, when it is found that such proceeding was initiated only with a sole purpose of recovering such disputed operational debt. In the regard, the Ld. Counsel of the Corporate Debtor has referred to a decision of Hon'ble Supreme Court in case of ***Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited, 2018 SCC OnLine SC 2113*** in which it has been held that IBC is not intended to be substitute to a recovery forum & whenever there is existence of real dispute, the IBC provisions cannot be invoked. He has also referred to another decision of Hon'ble Supreme Court in the case of ***M/s S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors. Civil Appeal No. 4583 of 2022, order dated 15.07.2022*** in which the Hon'ble Supreme Court has held that the IBC tackles and/or deals with insolvency and bankruptcy. It is not the object

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of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. The relevant part of this judgment is reproduced as under:-

*31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. **The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for nonpayment of disputed dues claimed by an operational creditor.***

*32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. 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 dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.***

(Emphasis supplied)

After finding that the claim of the Operational Creditor in this case is disputed, the Hon'ble Arbitrator has also made somewhat similar observation in his order dated 30.12.2022 stating that the respondent has disputed the payment of claimant and taken a

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stand that the same are not payable and therefore, claimant has preferred the MSEFC forum for adjudication of disputes with respondent, for which jurisdiction lies with Arbitrator. It is also stated in the said order that had it been the case of respondent that it has accepted the due payments of claimant but same were pending due to various reasons and case in respect to this is already pending before the NCLT then it would be having different bearing meaning thereby that if the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor as held by the Hon'ble Supreme Court in the above case of **M/s S.S. Engineers vs. Hindustan Petroleum Ltd. & Ors.(supra)**.

15. In a recent judgment of NCLAT Chennai in case of **Tricolite Electrical Industries Limited vs WIPRO Ltd. (Company Appeal (AT) (Ins) No. 326/2020) dated 04.09.2023**, it has been held that that the bankruptcy law can't be used as a means to recover debt against solvent companies. The relevant part of this judgment is reproduced as under :-

“17. Regarding whether Section 9 Application can be entertained against a Solvent Company, the scope and objective of the Code has to be kept in mind before admission of such an Application. The spirit of the Code

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*is maximization of the assets and Resolution and not Recovery. The Hon'ble Supreme Court in the matter of **'Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Anr.'** (Supra) has held that 'the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.'*

16. Having considered the facts and circumstances of the case as analyzed by us in this order so far, we have found that the alleged default amount of the outstanding operational debt mentioned in the application u/s 9 has arisen on account of enhancement of the scope of the contract work as claimed by the Operational Creditor to have been conveyed through the letter dated 11.01.2017 by the Superintendent Engineer of the Corporate Debtor referring to earlier approval letter dated 02.12.2016 and 05.12.2016 for Ghosi and Kopaganj Project respectively. The privity of which is, however, challenged by the Corporate Debtor as the said enhancement was not done by signing of any fresh contract on being approved by the competent committee as it was done for the original contract. It was rather shown to have been approved on an order sheet on a proposal put up by the Superintendent Engineer and finally approved by the Managing

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Director of the Corporate Debtor, which as per the submission made by the Corporate Debtor was not the Competent Authority as the same should have been considered by the Committee that initially approved the Contract. The said dispute between the Operational Creditor and the Corporate Debtor has also been recognized and adjudicated upon in the order dated 30.12.2022 passed by the Hon'ble Arbitrator under the MSMED Act, 2006 before awarding the recovery of the disputed amount from the Corporate Debtor by the Operational Creditor as it has already been discussed in paras 12, 13 and 14 of this order. It is also pertinent to note that the Operational Creditor has already been awarded Rs. 3,39,86,382/- for making recovery from the Corporate Debtor. From the conduct of the Operational Creditor, it is clear that the present application was filed by it primarily for the purpose of recovering its outstanding dues and this objective is now fulfilled after passing of order dated 30.12.2022 by the MSME Tribunal.

17. We have also taken judicial notice of the fact that after the Operational Creditor has approached the grievances committee of MSME tribunal resulting into referring the dispute to the Arbitrator as per the scheme envisaged under the MSME Act/ Rules, and the

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arbitrator thus has finally decided the dues of the Operational Creditor as against the Corporate Debtor, the process of determination of the dues has thus already gone into. Once, the dispute has been adjudicated by the Arbitrator and award has been passed in favour of the Operational Creditor to the extent of the amount mentioned in the award itself, the Operational Creditor cannot be allowed to go for forum shopping and rake up the issue for making a case for alleged default against the Corporate Debtor U/s 9 of the Code for remaining amount if any. We have also found that the application filed by the Operational Creditor was initially defective and later rectified by filing application to bring on record the date of default and correct amount of the default amount, after passing of the order by the Arbitrator to make the application u/s 9 to be legally valid and by that time the Corporate Debtor has already brought on the record the dispute with regard to the amount of the alleged Operational Debt and hence, we are of the view that dispute herein is in the nature of the **pre-existing dispute** as already held by us in para 13 above. Even if this determination of the dispute may not be a pre-existing dispute, however after settlement of the dispute culminating into passing of the final award by the arbitrator, the Operational Creditor is

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precluded to create existence of such defaults for the remaining amount, if any, against the Corporate Debtor as it will be an infinite process and thus cannot be permitted.

18. Moreover, the Corporate Debtor has been found to be a solvent company having huge turnover and a large manpower and engaged in supply of electricity in eastern part of the state of the Uttar Pradesh, which comes under the category of the essential services. It has been held in catena of judgments by the Hon'ble NCLAT as well Hon'ble Supreme Court that IBC is not meant to be used as a means to recover the disputed dues against a solvent company. We are satisfied that there is a dispute as to payment between the parties and also, the disputed dues is adjudicated upon by the MSME Tribunal ordering the payment and hence, no cause of action for the Operational Creditor against the Corporate Debtor survives now.

19. Having considered our findings as discussed in forgoing paras of this order, we hold that this application is liable to be dismissed u/s 9(5)(ii)(d) as there being pre-existing dispute as regards to the amount of the operational debt and the Corporate Debtor being a solvent company cannot be subjected to CIRP when the application u/s 9 has been found to be filed by the Operational

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Creditor with the sole aim of recovering the disputed dues and now, such recovery has been even ordered by granting award by the MSME Arbitrator

20. Accordingly, the petition CP (IB) No.486/ALD/2019 filed by the Operational Creditor u/s 9 of the I & B Code, 2016 is **hereby dismissed.**

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**(Ashish Verma)
Member (Technical)**

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**(Praveen Gupta)
Member (Judicial)**