

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT NO. 5**

**IA 1670 OF 2021**

**IN**

**CP (IB) 246/MB/2021**

**MEP Infrastructure Developers  
Limited**

A-412, Boomerang, Chandivali Farm  
Road, near Chandivali Studio, Andheri  
(east), Mumbai – 400 072

.....Applicant in IA No. 1670 of 2021

AND

**CP (IB) 246/MB/2021**

Under Section 9 of the I&B Code, 2016

In the matter of

**South Delhi Municipal Corporation**

Civic Centre, Minto Road, New Delhi –  
110 003

... Petitioner

v/s

**MEP Infrastructure Developers  
Limited**

A-412, Boomerang, Chandivali Farm  
Road, near Chandivali Studio, Andheri  
(east), Mumbai – 400 072

...Corporate Debtor

Order Delivered on: 08.10.2021

**Coram:**

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

**For the Petitioner:** Mr. J. P. Sen, Senior Counsel, Ms. Garima Parshad, Mr. Sanjay Vashishtha, Mr. Shreyas Shrivastava, Advocates.

**For the Corporate Debtor:** Mr. Ravi Kadam, Senior Counsel, Mr. Rohit Gupta, Ms. Tanmayi Rajadhyaksha, Mr. Deepak Deshmukh, Ms. Swati Singh, Ms. Pritha Mitra, Advocates i/b Naik Naik & Co.

*Per: Chandra Bhan Singh, Member (Technical)*

### **ORDER**

1. This is an application being CP(IB) 246/MB/2021 filed by **South Delhi Municipal Corporation**, Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (**Code**) against **MEP Infrastructure Developers Ltd.**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).

2. In the requisite Form, under the head "Particulars of Operational Debt" the total amount in default is stated to be Rs. 788,45,20,136/-.

### **SUBMISSIONS BY THE PETITIONER**

3. The Petitioner is a statutory body incorporated under the Delhi Municipal Act, 1957 having the responsibility of monitoring, upgrading and developing civic amenities which are enshrined to it under the statute as detailed in Delhi Municipal Act, 1957.

4. The Corporate Debtor is a public limited company, incorporated on 08.08.2002. The Corporate Debtor is classified as Non-govt company and is registered at Registrar of Companies, Mumbai. It is involved in building of complete constructions or parts thereof; road infrastructure, etc.

5. The Petitioner submits that the one of the main sources of revenue for the Municipal Corporations under Section 113(2)(g) of the Delhi Municipal Act, 1957 is the collection of Toll Tax from commercial vehicles entering Delhi from 124 toll points around Delhi.

6. Since the Corporation themselves do not have the manpower to collect Toll tax and monitor the huge daily cash collection of almost Rs. 3,00,00,000/- per day from 124 toll points around Delhi, the said work is given on a lumpsum contract to third parties. After following the due tender process, the Corporate Debtor was awarded the contract on 28.09.2017 for a period of 5 years since it was the highest bidder at Rs. 1,206 crores per annum. Accordingly, it was agreed that the Corporate Debtor will pay the lumpsum amount of Rs. 1,206 crores in 52 equal weekly instalments amounting to Rs. 23.19 crores (approx.) per week irrespective of the actual traffic or actual toll collection.

7. However, the Corporate Debtor started making defaults and made delayed remittances to the Petitioner from the beginning itself, for which penalties were imposed on the Corporate Debtor from time to time as per Clause 12.1A(b) of the duly signed and agreed contracts.

8. Thereafter several intimations of outstanding pending payment/penalty amount were issued by the Petitioner to Corporate Debtor vide letters dated 03.11.2017, 08.11.2017, 04.12.2017, 26.04.2018, 18.05.2018, 05.06.2018, 22.06.2018, 29.06.2018, 04.07.2018, 20.07.2018, 06.09.2018, 01.10.2018, 08.11.2018, 19.11.2018, 01.02.2019, 22.02.2019, 12.04.2019, 12.06.2019, 31.07.2019 and 24.10.2019. in response the Corporate Debtor vide its letters dated 29.05.2018, 01.06.2018 and 07.06.2018 made categorical assurance to pay outstanding dues and further promised that outstanding dues will not exceed that the performance security

available with the Petitioner. Some of the letters in this regard were issued by the Corporate Debtor on 26.11.2018, 02.02.2019, 25.02.2019, 13.05.2019, 21.05.2019, 19.06.2019, 05.08.2019, 04.10.2019 and 09.10.2019.

9. Thereafter, the Petitioner issued a demand notice for Rs. 450.69 crores on 18.11.2019. Subsequently, vide letter dated 19.11.2018, the Corporate Debtor acknowledged that the cheques were given as additional security and requested the Petitioner to withhold deposit of said cheques and confirmed that the weekly remittance will be made through RTGS/NEFT on regular basis. Thereafter, several letters giving clear cut acknowledgement of making agreed weekly remittance were sent by the Corporate Debtor to the Petitioner, but the Corporate Debtor continued repeated defaults in making agreed remittance to the Petitioner. The Corporate Debtor also requested the Petitioner not to take coercive action against it but at the same time the Corporate Debtor never kept its promises.

10. The Petitioner mentions that the Corporate Debtor resorted a series of litigations before the Hon'ble High Court of Delhi:

Order Date	Directions violated by MEP
26.11.2019	Directions in W.P.(C) No. 12483/2019: (i) Deposit Rs. 20 crores per week (ii) Deposit PDCs worth Rs. 312 crores within two weeks
02.03.2020	Directions in W.P.(C) No. 2241/2020: (i) To continue to deposit Rs. 20 crores per week in compliance order dated 26.11.2019 (ii) To deposit the arrear of Rs. 115 crores in three instalments. First instalment within 15 days from today.

	(iii) To give PDCs worth Rs. 312 crores to SDMC as per order dated 26.11.2019
	Order dated 02.03.2020 not complied: - Payment of Rs. 20 crores due on 02.03.2020 not paid. Payment of Rs. 20 crores due on 09.03.2020 not paid. Payment of Rs. 20 crores due on 16.03.2020 not paid. Payment of Rs. 38 crores due on 16.03.2020 not paid. PDC worth Rs. 312 crores not given.
20.03.2020	Directions in LPA No. 139/2020 - to immediately comply with order dated 02.03.2020 before next date i.e. 24.03.2020 (Not complied – order stood vacated)
20.04.2020	Application filed by MEP in W. P. No. 2241 of 2020 (C. M. No. 10326/2020). Directions: MEP to pay actual Toll collected to SDMC till handling over – not complied. Not even a penny deposited.
12.06.2020	Order dated 12.06.2020 in W. P. 2241 of 2020: (i) Deposit Rs. 77 crores within 10 working days (ii) Deposit actual Toll collected less 15% (iii) Deposit the PDCs within two weeks Not complied. Instead, Review filed. Dismissed on 24.06.2020. Again, not complied.

26.06.2020	Order in LPA No. 165/167 of 2020: Comply with the order dated 12.06.2020 – no compliance. Instead, Application for recall of order 26.06.2020 rejected. Only part amount deposited. PDC not given. Actual toll collection not deposited.
28.07.2020	Order in LPA No. 165/167 of 2020: Division Bench again directs strict compliance. Still, only meagre amount of Rs. 2.75 lakh deposited from 29.07.2020 onwards.
06.11.2020	Directions of Division Bench judgement 06.11.2020 not complied by MEP: 1- Actual amount collected by MEP to be deposited with SDMC after deducting the administrative and toll collection expenses @7.5% for the period from 26.03.2020 till (06.11.2020) within 15 days from 06.11.2020. 2- Reconcile accounts from 03.03.2020 onwards to ensure strict compliance of the order dated 02.03.2020. excess administrative and toll collection expenses deducted by MEP are to be deposited by MEP with SDMC in 15 days. 3- The MEP shall ensure that all the bank guarantees and PDCs have been deposited with SDMC and the bank guarantee are kept valid during the period when the writ petition no. 2241/2020 remains pending before the learned Single Judge.

	<p>4- The steps to extend the bank guarantees and revalidate the post-dates cheques be taken well in time by MEP to ensure that no lapse is committed in this regard.</p> <p>5- MEP shall pay SDMC weekly payment of Rs. 20 crores till 25.03.2020 and after resumption of 90% traffic in comparison to the pre-lockdown period on weekly basis during pendency of the writ petition.</p>
--	---

11. The Corporate Debtor filed various motions before the Delhi High Court till the learned Single Judge in W. P. 2241 of 2020 passed an interim order dated 12.06.2020 on an application for modification of order dated 02.03.2020, holding that the termination notice dated 16.03.2020 was null and void mainly on the ground that the Bank Guarantees were available to be encashed by SDMC as on 09.03.2020 and 15.03.2020 and such as non-payment by MEP could not be held as default/ violation of order dated 02.03.2020. also, that the first instalment was due only on 17.03.2020 and that the termination notice dated 16.03.2020 was wrongly issued a day earlier. Though there were another default committed by the Corporate Debtor i.e., not depositing PDCs. The issues raised before the Hon'ble High Court vis-à-vis the question of fact was liable to be adjudicated before a Civil Court, however, the Corporate Debtor has maliciously commenced several bouts of litigation at Delhi High Court in an endeavour to deny statutory dues to the Petitioner and others.

12. It is most pertinent to highlight here that what transpired through the above spate of litigations was most exclusively relating to circumstances arising post COVID-19, more particularly the issue of force majeure which has been acknowledged in the interim order of the Ld. Single Judge. However, all the liabilities of the Corporate

Debtor under the Agreement, arising pre COVID-19, stand as it is. There is no dispute in respect of such pre COVID -19 amounts which have become due at different points in time before 25.03.2020 and the Corporate Debtor continues to be in default of such payments without demur.

13. The Petitioner mentions that the Petitioner as well as the Corporate Debtor challenged the interim order dated 12.06.2020 in LPA No. 165 of 2020 and LPA No. 167 of 2020 before the Division Bench of Hon'ble High Court. The Ld. Division Bench, upholding the said order of the Ld. Single Judge, permitted the LPA No. 165 of 2020 to continue operating the 124 toll points with the sole intention to avoid public inconvenience. However, the LPA No. 165 of 2020 in complete disregard to its obligations, was still remitting meagre amount of Rs. 2.75 lakhs a day towards toll tax, and it is only after SDMC made efforts through various random surveys to assess the actual collection is being deposited as per direction of Hon'ble Court.

14. The Petitioner mentions that although, Ld. Division Bench has upheld the direction of the Ld. Single Judge that Corporate Debtor be allowed to deposit the actual Toll tax it collects less 7.5% completely ignoring the terms of the contract. Yet, the Petitioner adds that there is no change in the position in respect of the collections done before 25.03.2020. the said collections are still regulated by the unchallenged order of the Ld. Single Judge dated 26.11.2019.

15. The orders passed by the Ld. Single Judge as well as Division Bench in W. P. No. 12483 of 2019 and No. 2241 of 2020 with the LPA bearing No. 165 of 2020 and 167 of 2020 have time and again been blatantly disregarded and not complied with despite clear extant directions. The Petitioner mentions that none of the said orders have absolved the Corporate Debtor of its underlying financial obligations

under the contract including any penal interests and statutory obligations such as ECC.

16. The Petitioner submits that the Corporate Debtor has enjoyed the benefits of all the orders dated 26.11.2019, 02.03.2020 and 20.04.2020 passed by Ld. Single Judge and the orders dated 20.03.2020, 25.06.2020 and 28.07.2020 passed by the Hon'ble Division bench of the High Court but has deliberately and knowingly defied the conditions imposed by each of these orders for collections made before 25.03.2020.

17. The Petitioner also mentions that the Corporate Debtor continues to avoid its clear obligations to pay the amounts due, more particularly claimed in Form 3 for the period pre-COVID 19. In response to the said notice has issued a callous reply claiming a dispute where none exist. The exception claimed by the Corporate Debtor in their reply to Form 3 notice citing dispute is completely misplaced and liable to be disregarded. Therefore, the Petitioner is compelled to approach this Hon'ble Tribunal under Section 9 of Insolvency and Bankruptcy Code, 2016.

**SUBMISSIONS BY THE CORPORATE DEBTOR IN ITS REPLY AND IN I.A. 1670 OF 2021:**

18. The Corporate Debtor filed a reply and an Interlocutory Application No. 1670 of 2021 challenging the maintainability of the petition for the purported operational debt of Rs. 788,45,20,136/-. The Corporate Debtor in its reply and in Interlocutory Application No. 1670 of 2021 raised the following contentions:

- a. This Bench lacks jurisdiction to decide the present petition. This petition is filed by the Petitioner as if it is an operational creditor. Bare perusal of the facts and documents executed between the parties clearly demonstrate that the present petition is not for

an operational debt as the Petitioner is not an operational creditor.

- b. The Petitioner has failed to demonstrate that the claim made in the present petition is an operational debt. Section 5(20) of the Code, defines an "operational creditor" to mean "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred." In turn, Section 5(21) defines an "operational debt" to mean "a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central government, any State Government or any local authority." Therefore, an operational debt is essentially a claim in respect of the following:
- i. Provision of goods;
  - ii. Provision of services, including employment; or
  - iii. A debt arising under any statute and payable to Government/local authority.

If the claim by way of debt does not fall under any of the three categories as mentioned above, the claim cannot be categorised as an operational debt, even though there may be a liability or obligation due from the Corporate Debtor to the creditor. Hence, such a creditor is disentitled from maintaining a petition for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor.

- c. There is no case of goods or services being rendered to the Respondent by the Petitioner. Further, the purported claim is not arising under any law for the time being in force that is payable any local authority, but a claim under a contract. As far as the Government or local authority is concerned, they can only approach this Bench if the dues are payable under any law and not otherwise. Whereas, it has been specific case of the

Petitioner before the Hon'ble Delhi High Court that this is a claim arising out of a contract which has been and is riddled by disputes. Even otherwise there is no liability of tax against the Respondent.

- d. The Respondent submits that the claim of the Petitioner comprises of different heads which are illegally clubbed in one petition, which is otherwise not permissible. These claims comprise of disputed contractual dues without considering the claims of the Respondent against the Petitioner which is much higher in number. Toll charges under the contract. These claims also wrongly include Environment Compensation Charge and disputed amount of penalty on account of delay in deposition of toll or environmental cess, NHAI toll, RFID tag charges etc. These claims are separate and distinct arising out of separate transactions or arrangements. Some of them are not even entitlement of Petitioner, still they have been clubbed in same petition, though they have different causes of action. In these circumstances, the petition deserves to be dismissed on this ground itself.
- e. According to the Petitioner the debt has fallen due on 02.10.2017 and therefore, the petition filed after the period of 3 years is barred by law of limitation. The payments made by the Respondent were made under protest and under orders of the Hon'ble Delhi High Court and therefore, the same cannot be considered as part payment to revive the period of limitation. It is admitted by the Petitioner in its own demand notice that the default occurred in 2017. Having failed to take any steps within the period of limitation prescribed, there is default on the part of the Petitioner. There is no acknowledgement of any outstanding amount on the part of Respondent and in fact, the Respondent has in series of correspondence contended that it is not liable to pay any amounts. Further, it was also contended by the

Respondent in its correspondence with the Petitioner that in fact it is entitled to recover substantial amounts from the Petitioner and any payment made by the Respondent under protest or under the orders of the Court cannot be considered as an acknowledgement of debt.

- f. There is no default on the part of the respondent herein. In fact, there is a breach of contract and default on the part of the Petitioner, which is a subject matter of dispute. In view of the above, the petition deserves to be dismissed.
- g. The Petitioner in the present petition is guilty of a gross misrepresentation of facts as it has sought to portray to this Bench that its claim in the captioned petition is a crystallised and an undisputed sum.
- h. On the date of issuance of notice and on the date of filing of petition, Writ petition No. 2241 of 2020 filed by the Respondent challenging the demand notice dated 14.02.2020 was pending before Hon'ble Delhi high court in which in there were interim orders operating. Apart from this, there are multiple proceedings filed by both Petitioner and respondent before the Hon'ble Delhi high Court and Hon'ble Apex Court which would clearly demonstrate that there are genuine and pervasive disputes which have arisen between the parties and such disputes ought to be adjudicated by a civil court or by an arbitral tribunal after conducting a trial.
- i. The need of the adjudication of the disputes pertaining to the rival claims raised by both Petitioner and Respondent against each other is further evident from the observations made by the Hon'ble Delhi High Court in the order dated 06.11.2020 in Letters Patent Appeal No. 165 of 2021 wherein the court observed:

“However, the Ld. Single Judge may explore the possibility of referring the matter to alternative dispute resolution with the consent of parties.”

- j. Similar observations were made by the court in its order dated 09.04.2021, while disposing of Writ petition (C) No. 2241/2020, wherein the court took the view:

“Parties would have to resolve their disputes and enforce their respective rights in accordance with the Contract Act in appropriate civil proceedings before the appropriate Court. The Writ Petition is dismissed and consequently all interim orders are vacated. It is stated that nothing stated hereinabove shall amount to an expression of opinion on the merits of the contentions of either party. All rights and contentions are reserved.”

- k. The multiple proceedings pending with respect to the alleged operational debt and the observations of the Hon’ble Delhi High Court makes it apparent that there are disputes which have arisen between the parties, and that these disputes are yet to be adjudicated by a Civil Court. In these circumstances, any attempt by the Petitioner to portray to this bench that there is a crystallised, undisputed operational debt payable by the Respondent and that this position follows from an order dated 26.11.2019 of the Hon’ble Delhi High Court in nothing but an attempt to mislead.
- l. Prior to dealing with the grounds on which the captioned petition ought to be dismissed, the Respondent would like to place on record the facts and events that transpired between the parties herein, which are pertinent for adjudication of the present petition.
- m. The parties to the present petition had entered into a Toll Collection Agreement dated 28.09.2017. while the Respondent’s role under the contract was collect toll, it was also entitled to

collect certain penalties. Needless to state, the Respondent by then was one of the foremost till-booth operators and infrastructure developers in the country. Even today, the Respondent continue to successfully manage the iconic Bandra-Worli Sea/Link in Mumbai. However, only a few months into contract with the Petitioner, several glitches arose which curtailed the amount of toll that the Respondent would have collected.

- n. The Respondent submitted that from December, 2017 till date, on multiple occasions, the Respondent has raised various claims for the losses suffered by it as a result of the dereliction of obligations on part of the Petitioner. The Respondent also has raised claims to the tune of Rs. 48,38,05,67,569/- by their letters dated 15.07.2021. The said letters set out in details the computation for loss of revenue accrued to the Respondent as a result of various reasons inter alia leakage of traffic due to usage of free lane by commercial vehicles, evasion of toll tax at 13 border points by commercial vehicles, and also due to the COVID-19 pandemic. The claims raised by the Respondent are amply substantiated by the computations provided with the aforementioned letters.
- o. The petition under Section 9 need not be entertained by this Bench where there are pre-existing dispute in relation to the operational debt claimed. The Hon'ble Apex Court has in fact taken a view that the court does not need to be satisfied that the defence is likely to succeed and does not need to examine the merits of the dispute.
- p. There are pre-existing disputes in relation to the purported operational debt claimed by the Petitioner and in light thereof, the captioned petition is not maintainable.

### **SUBMISSIONS BY THE PETITIONER IN REJOINDER**

19. The Petitioner filed a rejoinder to the reply filed by the Respondent and a reply to Interlocutory Application No. 1670 of 2021 reply to made submissions as follows:

- a. The claim of the Respondent that the dues claimed by the Petitioner are not "operational debt" is wholly misplaced. The power of toll collection ultimately flows from Section 113 of the Delhi municipal Corporation Act, 1957.
- b. The Delhi Municipal (Toll tax) Byelaws, 2007 (2007 Bye laws) were promulgated. Clause 4 of the said byelaws provide as follows:

"4. Collection of Toll Tax: -

.....

(2) The Commissioner, subject to his overall supervision, may allot the work of collection of toll tax of all or any of the zones/routes to one or more private agencies by way of auction process or otherwise, and on such terms and conditions as may be decided by the corporation.

Provided that the collection of toll tax may also be given to private agencies on contract basis by adopting either or both the methods of collection, that is to say. Tendering/auctioning all or any number of toll tax posts on the basis of monthly/ annual lump sum payment to the Corporation or on the basis of payment of per cent of collection as collection charges to the agencies:

....

"

- c. The Delhi Municipal Corporation has power under Section 455 of the DMC Act vide which the Corporation can recover any sum due to the DMC on any account under DMC Act or any byelaw thereunder as an arrear of tax.

- d. The aforesaid provision read with Section 156 of the DMC gives the power to the Commissioner to recover such sums in the nature of arrears of tax. The same understanding has been very categorically laid out in the Agreement dated 28.09.2017 between the Petitioner and the Respondent.
- e. The sums dues from Respondent to the Petitioner are payment of dues arising under the DMC Act and payable to SDMC. Accordingly, the claims of the Petitioner are very well operational debt under IBC.
- f. The claims arising out of toll and penalty relating thereto are only considered, even then the said claims are much above the threshold limit of rupees one crore.
- g. The various writ petitions and LPAs filed by Respondent are nothing but a moonshine to save itself from CIRP. In this line of litigations raised by Respondent, the LPA No. 145/2021 before the Division bench of Hon'ble High Court in nothing but another frivolous litigation. The frivolity of it is highlighted by the fact that the respondent itself doesn't find any way merit in the matter and has already moved for withdrawal of the same vide application dated 30.04.2021.
- h. The Petitioner had raised its initial demand of Rs. 450.69 crore vide demand notice dated 18.11.2019 already annexed as Annexure I-1 to the main petition, Respondent has neither refuted not paid a single penny to the Petitioner. All proceedings and orders thereafter are nothing but mere interim arrangements inter se the parties towards continuing the possession of the toll plazas. The amount payable on 18.11.2019 is pre-pandemic and squarely undisputed. This fact alone makes the petition under Section 9 of INC admissible against Respondent who has unequivocally raised moonshine disputes in an endeavour

to avoid paying the fiscal liability arising out of the agreement.

### **FINDINGS**

20. This Petition has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 by the South Delhi Municipal Corporation (SDMC) against MEP Infrastructure Developers Limited (MEPL). The Petitioner's claim of operational debt is under a Toll Tax Collection Agreement. Under this Agreement, toll taxes are to be collected by the Respondents from commercial vehicles entering Delhi from the 124 toll points around Delhi. This debt arises under a contract. The total amount under this contract is for a period of 5 years. The operational debt claimed by the Petitioner under Part-IV of Form 5 of the Petition is about Rs. 788,45,20,136/-.

21. The Bench is beset with mainly two sets of issues for consideration. The first one being whether the amount being claimed falls in the realm of the 'operational debt'. The second issue for consideration under this Petition is whether the claim is a crystallized and undisputed sum.

22. The Bench notes that it has to be demonstrated by the Petitioner that the claim is an operational debt as defined in Section 5(21)

"5(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

23. Therefore, it is to be seen in this case that this operational debt claimed by South Delhi Municipal Corporation is a claim in respect of at least one of the following :-

- a. Provision of goods; or
- b. Provision of services, including employment; or
- c. A debt arising under any statute and payable to Government/  
Local Authority.

24. The claim is based on an Agreement where the Petitioner has appointed the Respondent as a "Contractor" to collect toll tax from commercial vehicles. This is evident from Clause 1 of the Agreement which reads as under: -

*"1. Subject to and in accordance with the provisions of this and the applicable laws and relying upon the representations and warranties of the Contractor to fulfil the obligations contained hereunder, **the SDMC hereby appoints the Contractor to provide Toll& ECC collection Service.**"*

*(emphasis supplied)*

25. Therefore, it is clear to the Bench that Petitioner is not providing any goods or services to the Respondent and to that extent is not covered under the definition of Operational Debt u/s 5(21).

26. That the Petitioner is not providing any service to the Respondent is also made clear by several Judgments of Hon'ble NCLAT. In this regard the Respondent has referred to the Hon'ble NCLAT Judgment of 20.08.2020 in the matter of "*Andal Bonumulla v/s Tomato Trading LLP*";

*"12. Now, we have considered the arguments in regard to second issue, this is admitted fact that the Corporate Debtor has agreed to deliver 130 Metric Tons of Sugar to the Operational Creditor, for the same, the Operational Creditor paid an advance amount total Rs. 34,90,180/- to Corporate Debtor and Corporate Debtor has issued Proforma Invoice dated 08.02.2017. The Corporate Debtor refunded Rs. 9*

Lakhs only, balance principal amount of Rs. 25,90,180/- and interest Rs. 4,92,634/- total as on 07.03.2018 a sum of Rs. 30,82,814/- is due from the Corporate Debtor. We have considered whether this amount is come within the definition of Operational Debt under Section 5 (21) of I&B Code. **The Respondent No. 1 has not supplied any goods or provided any services to Respondent No. 2, but paid an advance amount to Respondent No. 2 for supplying Sugar. However, the Respondent No. 2 failed to supply the Sugar to Respondent No. 1. Thus, the advance amount in the hand of Respondent No. 2 cannot termed as Operational Debt. Consequently, the Respondent No. 1 does not come within the definition under Section 5(20) of I&B Code, the Operational Creditor.**"

27. Another Judgment which this Bench can refer to and as given by the Respondent in their submissions relate to Hon'ble NCLAT Judgment on 24.01.2019 in the matter of "Kavita Anil Taneja v/s ISMT Limited"; **"4. Section 5(20) defines 'Operational Creditor' which is r/w Section 5(21) which defines 'operational debt'. In the present case, it is clear from the work order that the amount of Rs. 2,60,000.00/- was advanced by the respondent 'ISMT Limited to the 'corporate debtor' for supply of 10,000 Metric Tons of Indonesian Thermal Coal. From the aforesaid fact, we find that he respondent had not supplied any goods nor provided any services and, therefore, it does not come within the meaning of 'operational creditor' ....."**"

28. However, let us see whether the operational debt claimed in this case, is with regard to payment of dues arising under any law and

payable to Central Government/ State Government or any other local authority under Section 5(21) of IBC.

29. It is to be noted here that if the claim does not fall into any of these categories, then the claim cannot be categorised as an 'operational debt'. In the present case, the Petitioner has not pleaded any supply of any goods or services being rendered by the Petitioner. However, the Petitioner claims that the debt falls under the ambit of 'operational debt' in respect of payment of dues arising under any law for the time being in force and payable to Central Government or any State Government or any Local Authority. The Petitioner mentions that just because the Operational Creditor and Corporate Debtor had entered into a contract, does not render the dues as a due not arising out of a law.

30. It is the claim of the Petitioner that in the instant matter the contract is an outcome of a specialised legislation, that is, Delhi Municipal Corporation Act (DMC Act). To buttress its claim, the Petitioner mentions that under Section 455 of the DMC Act, the Petitioner has power to recover any sum due to the DMC on any account under the DMC Act or any bye-law thereunder as an arrear of tax.

31. The Petitioner mentions that the claim amount is a debt due under a statute. This, it mentions, is on the basis of Section 455 of DMC act which reads as under: -

*"455. Mode of recovery of certain dues*

*In any case not expressly provided for in this Act or any bye-law made thereunder any due to the Corporation on account of any charge, costs expenses, fees, rates or rent or on any other account under this Act or any such bye-law may be*

recoverable from any person from whom such sum is due as an arrear of tax under this Act:

*Provided that no proceedings for the recovery of any sum under this section shall be commenced after the expiry of three years from the date on which such sum becomes due."*

32. Here the Bench notes that these dues do not fall within the category of "any charge, costs, expenses, fees, rates or rent or any other account". However, the Petitioner mentions that its claim is covered as "recoverable from any person from whom such due is due as an arrear of tax under this act". In this regard it is very pertinent to see whether the phrases **(a)** dues which are recoverable as arrears of tax are the same as **(b)** dues which are tax arising under the statute. The Bench is of the view that there is a distinction that Section 455 is indicating regarding the recovery mechanism which exists for recovering taxes which can be used for recovering such dues. Therefore, the words as "an arrear of tax" and not "dues which are tax".

33. The Bench is of the view that, amount recoverable as 'arrears of tax' is quite different from 'tax arising under statute'. The Bench is of the view that what is covered in Section 5(21) is 'tax arising under the statute' which is not the same thing as any due which only for the recovery mechanism is termed as "an arrear of tax".

34. The Bench is also of the view that the word "recoverable from any person from whom such sum is due as an arrear of tax under this Act" introduces deeming fiction that the dues can be recovered as an arrear of tax to take benefit of the machinery under the DMC Act. However, this does not make a contractual due which is the case in the instant matter, as a due converted into a tax. The distinction remains between **(a)** dues which are recoverable as arrears of tax, and

(b) dues which are tax, arising under the statute. The Bench is of the view that, what is covered under Section 5(21) is the dues which are arising under the statute and not dues which are recoverable as arrears of tax. Emphasising upon this distinction, reliance has been placed by the Respondents on Judgment SICOM Limited & Ors v/s State of Maharashtra (this judgement relies on Builders Supply Corporation vs Union of India, (1965) 2 SCR 289)

"4. *The learned Counsel appearing for the Appellants relying on the judgment of the Supreme Court in the case of Central Bank of India v. State of Kerala and Ors. MANU/SC/0306/2009: (2009) 4 SCC 94 submits that the Supreme Court in this judgment has considered the entire law on the subject and has held that to a property in relation to which provisions of Section 529A of the Companies Act operates, Section 38(c) of the Bombay Sales-tax Act does not operate. **The learned Counsel relying on the judgment of the Constitution Bench of the Supreme Court in the case of Builders Supply Corporation v. Union of India MANU/SC/0156/1964: (1965) 2SCR 289 submits that the provisions of the land revenue Code which provide for recovery of the dues of the State Government as arrears of land revenue does not elevate the dues to the level of dues of land revenue.** The learned Counsel therefore submitted that the learned single Judge has misread the provisions of the Companies Act and the Bombay sales-tax Act."*

"10. **Perusal of the above quoted provision shows that the Maharashtra Land Revenue Code makes a clear distinction between the sum which is recoverable as a land revenue and sum which is recoverable as arrears of land revenue. What creates paramount charge is the**

**sum which is the amount of land revenue and not the sum which is recoverable as land revenue.** The Constitution Bench of the Supreme Court in its judgment in the case of Builders Supply Corporation, referred to above, in our opinion, has made the position absolutely clear. Following observations in the case of Builders Supply Corporation, in our opinion, are relevant. They read as under:

*We have referred to this decision, because it brings out emphatically the real character of the provisions prescribed by Section 46(2). Section 46(2) does not deal with the doctrine of the priority of Crown debts at all; it merely provides for the recovery of the arrears of tax due from an assessee as if it were an arrear of land revenue. **This provision cannot be said to convert arrears of tax into arrears of land revenue either, all that it purports to do is to indicate that after receiving the certificate from the Income Tax Officer, the Collector has to proceed to recover the arrears in question as if the said arrears were arrears of land revenue.** We have already seen that other alternative remedies for the recovery of arrears of land revenue are prescribed by Sub-sections (3) and (5) of Section 46. In making a provision for the recovery of arrears of tax, it cannot be said that Section 46 deals with or provides for the principle of priority of tax dues at all, and so, it is impossible to accede to the argument that Section 46 in terms displaces the application of the said doctrine in the present proceedings."*

35. Similarly, in the Judgment of *Paramjeet Singh Patheja v/s ICDS* it has been held as under:-

*"39. Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus, a final award, without actually being followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realizing the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so for the purposes of an entirely different statute such as the Insolvency Act are concerned. ... .. ."*

*42. The words "as if" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central."*

36. The Bench notes that in the above Judgment Hon'ble Supreme Court has observed that the legal fiction is not intended to convert an Award into a Decree for all purposes under all statutes - whether State or Central. In this case, the deeming fiction is restricted to the DMC Act and cannot be extended to cover another Act. In light of the above the Bench is of the view that the operational debt claim is not covered as "a debt in respect of payment of dues arising under any law for the time being in force".

37. The Bench therefore is of the considered view based on the above that the claim of the Petitioner as "operational debt" does not meet the criteria as set out in Section 5(21) of IBC i.e. the claim of the SDMC does not fall in either if the following;

- a. Claim in respect of goods and services;

- b. Debt in respect of dues arising under any law in force and payable to the Government or any local authority.

38. The Bench notes that there are pre-existing ongoing disputes between the Petitioner and the Respondent pending before the Hon'ble High Court at Delhi in which there are several interim orders are currently under operation. There are multiple proceedings filed by both the Petitioner and the Applicant which points towards the fact that there are pre-existing disputes which have arisen between the parties and such disputes are to be adjudicated in a Civil Court or any other forum. Under IBC, 2016, at the Admission stage the Adjudicating Authority is to see whether there is a plausible contention which requires further investigation. Even if there is nascent cross-claim on substantial grounds the same is sufficient to dismiss the Petition of any Operational Creditor.

39. On the issue of pre-existing disputes, the Bench would like to refer to the often-quoted Hon'ble Supreme Court Judgment in the *Mobilox Innovations Private Limited vs Kirusa Software Private Limited* which reads as under:-

*"51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. **Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a***

**patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.**

... ..

"56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. **A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defence as vague, got-up and motivated to evade liability.**"

40. Similarly, the Bench would refer to another Judgment of the Hon'ble Supreme Court in the matter of *Kay Bouvet Engineering Ltd. V. Overseas Infrastructure Alliance (India) Private Limited* dated 10.08.2021 in which the apex Court held as under: -

"17. It is thus clear that once the "Operational Creditor" has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of

*dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is, whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is a mere bluster. **It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.***

41. The Respondent side in their submissions has quoted the Judgment and Order dated 06.11.2020 of the Division Bench of Delhi High Court which reinforces serious disputes between the parties. The relevant paras of the Hon'ble Division Bench of Delhi High Court reads as held as under:-

"20... We hold that there was no need to give notice of Force Majeure as the Government of India has itself made the declaration to be effective from 26.03.2020 vide its Om dated 18.05.2020. It also takes care of the objection of the SDMC that MEP had given notice of invocation of Force Majeure only on 19.03.2020.

.....

29. In view of the above, we hereby dispose of both the Letters Patent Appeals by holding that:

4) **Learned Single Judge may order for an exercise to be conducted by a reputed agency to estimate the flow of traffic passing through toll gates managed by MEP from 26.03.2020 onwards on the basis of the available data and material.** In the meantime, SDMC is at liberty to get

regular inspections done at toll plazas or to install CCTV or any other mechanism to count the vehicles passing through toll gates till 90% traffic is resumed.

5) **The findings of the learned Single Judge regarding termination notice dated 16.03.2020 is upheld** as it was issued a day in advance.

8) There is no occasion to appoint a Retired Judge to adjudicate **the dispute at this stage.** However, the Id. Single judge may explore the possibility of referring the matter to alternative dispute resolution with consent of parties.”

42. In this extant case, the Bench notes on 09.04.2021 Single Judge of the Delhi High Court had dismissed a Writ Petition of the South Delhi Municipal Corporation on the ground of maintainability without going into the merits. The Single Judge in its finding had mentioned that the parties would have to resolve the disputes in appropriate Civil proceedings;

“107. As noticed herein above, Respondent Corporation is alleged to have acted purely within the four corners of the Contract Agreement and sought to exercise its rights under the Contract Agreement to enforce the obligations imposed upon the petitioner. Petitioner has the remedy of enforcing its rights under the Contract Agreement in terms of the contract act before an appropriate Civil Forum. **This court in exercise of**

**powers under Article 226 of the Constitution of India would not go into a purely contractual dispute.....**

**110. Parties would have to resolve their disputes and enforce their respective rights in accordance with the Contract Act in appropriate civil proceedings before the appropriate Court."**

43. Further on record there are several letters addressed to the Petitioner on issues such as (1) leakages on account of specified commercial vehicles using free lanes to escape payment of tax, (2) opening of eastern peripheral expressway and loss caused due to the same.

44. In fact, the Delhi High Court on 09.04.2021 has observed that these two parties, i.e., DMC and the MEP (Petitioner-Respondent) would have to resolve the disputes and enforce their respective rights in accordance with the Contract Act in appropriate Civil proceedings before an appropriate Court. In view of the above, the Bench has no doubt in its mind that this Petition filed u/s 9 deserves "dismissal".

45. Based on the above facts, the Petition CP No. 246 of 2021 filed under Section 9 of the IBC is 'Dismissed'. Consequently, the I.A. No. 1670 of 2021 filed by the Respondent in CP No. 246 of 2021 on maintainability of petition stands 'Allowed'.

SD/-  
Chandra Bhan Singh  
Member (Technical)

SD/-  
Suchitra Kanuparthi  
Member (Judicial)