



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (COURT II)  
KOLKATA**

C.P. (I.B.) No. 268/KB/2021

*A Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with  
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority)  
Rules, 2016*

**IN THE MATTER OF:**

**MASYC PROJECTS PRIVATE LIMITED,** having CIN:  
U74899DL1990PTC038957 and having its Registered Office: 23, Community Centre,  
Mayapur Phase – I, New Delhi 1100645

**..... Operational Creditor/ Applicant**

**-Versus-**

**HIRANMAYE ENERGY LIMITED,** Erstwhile India Power Corporation (Haldia)  
Limited, having CIN: U40105WB2008PLC125220 Registered Office: Centre for  
Excellence, Plot No. X-1, 2&3, Block-EP, Sector-V, Salt Lake City, Kolkata 700091

**..... Corporate Debtor/ Respondent**

**Date of Hearing: December 23, 2022**

**Date of Pronouncing the Order: June 05, 2023**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)**

**SHRI BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)**

**Ld. Counsels on Record appeared Physically/ through Video Conferencing:**

**For Operational Creditor:**

1. Mr. Shyak Mitra, Adv.
2. Mr. Abhidipto Tarafder, Adv.
3. Ms. Anshumala Bansal, Adv.
4. Ms. Prarthana Singha Roy, Adv.

**For Corporate Debtor:**

1. Mr. Joy Saha, Sr. Adv.



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2. Mr. Aasish Choudhary, Adv.
3. Mr. Ritoban Sarkar, Adv.
4. Ms. Puja Tripathi, Adv.

**ORDER**

**Per: Bidisha Banerjee, Member (Judicial)**

1. This Court is congregated through hybrid mode.
2. This instant petition has been filed by **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “**I&B Code**”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 by **MASYC Project Private Limited**, the **Applicant** hereinafter referred as **Operational Creditor** against **Hiranmaye Energy Limited**, the **Respondent** hereinafter referred as **Corporate Debtor** seeking to initiate insolvency resolution process against the Corporate Debtor.
3. It is claimed that the Corporate Debtor is a non-govt. public company limited by shares, incorporated on 28/04/2008 and has the Authorized Share Capital of Rs. 10,20,00,00,000/- and Paid-up Share Capital of Rs. 5,11,82,46,100/-
4. **Particulars of the Operational Debt:**

<b>Total Amount of Debt:</b>	<b>Rs.1,71,87,500/- (Rupees One Crore Seventy One Lakhs Eighty Seven Thousands And Five Hundreds Only)</b> , which in terms of the Arbitral Award passed on 30.07.2019 in the Arbitration Case No. 520 of 2018 comprises of the Principal Amount of Rs.1,25,00,000/- (Rupees One Crore And Twenty Five Lakhs Only) along with the Accrued Interest @18% per annum calculated with effect from 30.07.2019 till 17.08.2021 as Rs.46,87,500/- (Rupees Forty Six Lakhs Eighty Seven Thousands And Five Hundreds Only) .
<b>Total Amount</b>	<b>Rs.1,71,87,500/- (Rupees One Crore Seventy One Lakhs Eighty Seven Thousands And Five Hundreds Only)</b> , which in



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<b>in Default:</b>	terms of the Arbitral Award passed on 30.07.2019 in the Arbitration Case No. 520 of 2018 comprises of the Principal Amount of Rs.1,25,00,000/- (Rupees One Crore And Twenty Five Lakhs Only) along with the Accrued Interest @18% per annum calculated with effect from 30.07.2019 till 17.08.2021 as Rs.46,87,500/- (Rupees Forty Six Lakhs Eighty Seven Thousands And Five Hundreds Only) .
<b>Date of Default</b>	<b>July 30, 2019</b>

**5. Operational Creditor has relied on the following documents in support of its claims:**

- i. Annexure “B”:** Copy of Master Data of the Corporate Debtor.
- ii. Annexure “C”:** Copy of Board Resolution dated 17/08/2021.
- iii. Annexure “D”:** Copy of the Workings for Computation of default in tabular form.
- iv. Annexure “E”:** Copy of the Arbitration Award dated 30<sup>th</sup> July, 2019 passed in the Arbitration Case No. 520 of 2018.
- v. Annexure “F”:** Copy of the Execution Petition being the Misc. Execution (Arbitration) No.1 of 2019.
- vi. Annexure “G”:** Copy of the Objection Petition bearing Arbitration Case No. 18 of 2020 & Title “Hiranmaye Energy Limited Versus MASYC Projects Private Limited” filed under Section-19 of the Micro, Small and Medium Enterprises Development Act, 2006 read with Section- 34 of the Arbitration and Conciliation Act, 1996
- vii. Annexure: “H” (COLLY):** Copy of the Notice under Section-8 of the Insolvency and Bankruptcy Code, 2016 dated 17.08.2021 along with the Postal Receipt and Tracking Report showing delivery.



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**6. In a Nutshell, the Submissions of the Ld. Counsel of the Applicant would be this:**

- 6.1.** The Operational Creditor is a MSME incorporated in the year 1990, having an authorized share capital of Rs. 1,00,00,000.
- 6.2.** The Operational Creditor entered into an agreement with the Corporate Debtor to design, engineer, manufacture and supply an external coal handling system for a thermal power plant at Haldia, West Bengal.
- 6.3.** Disputes and differences arose between the parties which led to the Operational Creditor invoking arbitration.
- 6.4.** In August, 2018, the Operational Creditor filed a claim under Section 18 of the MSME Act, 2006 which was referred to arbitration.
- 6.5.** After due adjudication of the disputes by a competent Arbitral Tribunal constituted under the MSME Act, by an award dated July 30, 2019 the operational creditor was awarded a sum of Rs. 1.25 Crore with interest at 18% p.a. for non-payment within 45 days which together with the interest amounted to a total of **Rs. 1,71,87,500/-** as on **September 7, 2019** being the date on which the present petition was filed.
- 6.6.** The Applicant/ Operational Creditor has also filed an execution petition being Misc. Execution (Arb) No. 1 of 2019 before the Commercial Court at Rajarhat which is pending.
- 6.7.** In the interim, the Corporate Debtor had filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 objecting to the award dated July 30, 2019. As the said application was filed belatedly, the condonation application was rejected by an order dated November 09, 2021. A Copy of the order dismissing the application is marked with the **Letter "A"** of the Rejoinder Affidavit filed on April 29, 2022 by the Operational Creditor/ Applicant. The Applicant, thus, contends that the award survives.



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- 6.8.** It is alleged that Post dismissal of the application challenging the award, the Corporate Debtor filed an appeal under Section 37 of the Arbitration and Conciliation, 1996 on December 09, 2021, but neither moved it, nor is there any order of stay. A Copy of the case status as downloaded from the website of the Hon'ble High Court of Punjab and Haryana appears as annexure "B" of the Rejoinder Affidavit, filed on April 29, 2022 by the Operational Creditor/ Applicant.
- 6.9.** That, mere filing of the appeal cannot by and of itself be a bar to the present applications especially when no attempt has been made to move the same and/or get any order of stay. That neither notice has been issued on the appeal nor has the same been served on the operational creditor till date.
- 6.10.** That, there exists an arbitral award dated **July 30, 2019** which is in favour of the Operational Creditor and the Corporate Debtor is liable to make over the said sum to the Operational Creditor. Hence, the present application is maintainable.
- 6.11.** That, the Principal amount awarded and hence in debt is Rs. 1,25,00,000/-. The interest awarded thereon is @18% which calculated up till 17/08/2021 is Rs. 46,87,500/-. Therefore, the total amount in debt as on 17/08/2021 is Rs 1,71,87,500/-. Date of Default is July 30, 2019 being the date of the award. Hence, the application is within time.
- 6.12.** That, the Operational Creditor has already filed execution proceedings against the Corporate Debtor. It has taken every measure to stall the proceedings. The Corporate Debtor has filed various applications under the Code of Civil procedure, 1908, all of which have been dismissed by the Id. Commercial Court at Rajarhat.
- 6.13.** That, the Arbitral Award passed by the Ld. Tribunal at Panchkula, Haryana on July 30, 2019 has now become a crystallized amount in favour of the Operational Creditor herein. There is no challenge to the said award and none could be registered as the said award being under Section 18 of the



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MSMED, Act, 2006 could only be challenged subject to the fulfilment of the conditions under Section 19 of the said MSMED Act, 2006 which envisages as follows:

*“Application for setting aside decree, award or order – **No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent. of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court: Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.**”*

That, the Corporate Debtor, by its own admission is unable to deposit the 75% of the award (**Annexure C to the Reply Affidavit at Page 181 Para 7 Vol. II**) and this has also been noted in the order passed by the Ld. Panchkula Court while dismissing the application for condonation of delay. (Annexure B to the Reply Affidavit). The order records at para 8 as follows: **“... the applicant is still not in possession to deposit 75% of the Arbitral amount failing which, the Objection Petition cannot be entertained.”**

- 6.14.** That, the Corporate Debtor has also attempted to raise disputes in the Insolvency Proceedings before this Hon’ble Tribunal by referring to the said application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as “Arbitration Act”) read with Section 19 of the MSMED Act. The Ld. ADJ at Panchkula considered the extensive arguments made by citing the latest judgments passed involving the laws of limitation as applicable to the Arbitration Act. Given the facts and



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circumstances, the Ld. Judge held that there was no sufficient cause to prefer a challenge to the award under section 34 of the Arbitration Act read with section 19 of the MSMED Act, after expiry of the time mentioned therein and refused to condone the delay in filing the same.

**6.15.** The applicant would contend that it is well-settled that where there are no existing challenges to the award or a belated petition under section 34 of the Arbitration Act has been filed, insolvency proceedings may be put into action. In support, the following decisions have been cited:

1. *Gujarat State Disaster Management Authority v. Aska Equipments Ltd* (2022) 1 SCC 61 paras 13 to 15
2. *Tirupati Steels v. Shubh Industrial Component & Anr* (2022) 7 SCC 429 paras 8 to 10

**6.16.** That, as on date, there is no challenge to the arbitral award under section 34 of the Arbitration Act read with section 19 of the MSME Act. An appeal has now been preferred under section 37 of the Arbitration Act before the Hon'ble High Court of Punjab & Haryana at Chandigarh. The appeal has not been pressed or moved and has been filed only for the purpose of alleging the existence of pre-existing disputes between the parties.

**6.17.** On the basis of the contentions as above Ld. Counsel for the applicant would contend that the present case is a fit case to be admitted for CIRP in view of the corporate debtor's own admission of inability to deposit even 75% of the awarded sum to entertain a challenge to the award.

**6.18.** At hearing, the Ld. Counsel would assertively claim that in the absence of any Restraint Order being passed in the Objection Petition the Arbitral Award in question is lawfully enforceable as a Decree of the Court.

**6.19.** The Ld. Counsel for the Operational Creditor would further assert that the Invoice/ Demand Notice in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 under Section- 8 (1) of the Insolvency And Bankruptcy Code, 2016 was duly issued to the



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Corporate Debtor on 17.08.2021 to demand the Unpaid Operational Debt Amount of Rs.1,71,87,500/-, which includes the Principal Amount of Rs.1,25,00,000/- along with the Accrued Interest @18% per annum calculated with effect from 30.07.2019 till 17.08.2021 as Rs.46,87,500/-.

- 6.20.** That the said Invoice/ Demand Notice was duly delivered upon the Corporate Debtor on 19.08.2021.
- 6.21.** That neither, the Corporate Debtor has paid the Unpaid Operational Debt nor there is any Notice under Section-8 (2) (a) of the Insolvency and Bankruptcy Code, 2016 mentioning the existence of any dispute relating to the Unpaid Operational Debt.

**7. Per contra, the Ld. Counsel for the Respondent would contend that:**

- 7.1.** This instant petition under section 9 of the IBC has been instituted solely on the basis of an Arbitral Award dated 30th July 2019 whereby the Operational Creditor has been awarded a sum of Rs. 1.25 Crores together with interest @ 18% per annum and that admittedly, the Date of Default is July 30, 2019 being the date of the said award. (Annexed at Page 132-176 of Reply Affidavit, Volume I)
- 7.2.** The Corporate Debtor had filed an application before the Arbitral Tribunal under Section 33 of the Arbitration Act, seeking correction of the Award on September 04, 2019.
- 7.3.** On October 01, 2019, the application for correction of the award filed under Section 33 of the Arbitration Act was dismissed / disposed by the MSME Facilitation Council (annexed at Page 177 of Reply Affidavit, Volume II).
- 7.4.** On October 04, 2019, the Order dismissing the application under Section 33 was received by the Corporate Debtor.
- 7.5.** On January 04, 2020, a period of 90 days expired from the date on which the order dismissing/disposing of the application under section 33 was received by the Corporate Debtor.



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- 7.6. On January 29, 2020, the award was challenged by the Corporate Debtor by filing an application under section 34 of the Arbitration Act in the Commercial Court at Gurugram being Case No. 20 of 2020, (Page 179-187 of Reply Affidavit, Volume II).
- 7.7. On February 04, 2020, a period of 120 days expired from the date of receipt of the order on the Corporate Debtors petition under section 33 for correction of the Award.
- 7.8. On November 20, 2021, the Case No. 20 of 2020, filed under section 34 of the Arbitration Act was dismissed as barred by limitation.
- 7.9. On December 09, 2021, an Appeal was preferred under section 37 of the Arbitration Act against the order dated 20th November 2021 dismissing the petition under section 34. The said appeal is pending adjudication.
- 7.10. The Ld. Counsel would vehemently oppose the stand of the Applicant and contend that a petition under section 34 of the Arbitration Act challenging an arbitration award bars the institution of any proceeding under sections 7 or 9 of the IBC based on such award.
- 7.11. The following decisions are relied upon: -
- a. ***K. Kishan v. Vijay Nirman Company Pvt. Limited (2018) 7 SCC 662 – paras 22, 27 and 28***, that
27. “... we have no doubt stating that filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicatory process under Sections 34 and 37 has taken place.”
- b. ***Hindustan Construction Co. v. Union of India MANU/SC/1638/2019 – para 65***, that
65. “... the moment challenges are made to the arbitral awards, the amount said to be due by an operational debtor would become



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disputed, and therefore be outside the clutches of the Insolvency Code.”

c. ***Viom Infra Ventures Ltd. v. Bahula Infotech Pvt. Ltd. - MANU/NC/1867/2022– Paras 10, 11 and 12***, that

11. “the CIRP could not be initiated on the basis of Arbitral Award, on the following grounds:

(b) When a challenge has also been filed against the Arbitral Award.”

d. ***Jai Balaji Industries v. DK Mohanty & Ors. - 2021 SCC Online SC 3104 – Paras 41 and 42***, that

42. “... the arbitral awards in the present case had not attained finality and rejection of petitions under Section 34 of the Act of 1996 had been in challenge in appeals under Section 37 thereof. Even if the said appeals were dismissed in default, the respondent company had moved for restoration with advance notice to the appellant. It had not been a clear case of the corporate debtor being in default with no pre-existing dispute.”

7.12. Further, the Ld. Counsel for the Corporate Debtor/ Respondent would contend that upon the dismissal of the petition under section 34 an appeal has been preferred there from under section 37 which is pending adjudication. An appeal under section 37 must be deemed to constitute a continuation of the original proceeding filed under section 34, in terms of the following decisions: -

a. ***Hindustan Petroleum Corporation Limited v. Dilbahar Singh - MANU/SC/0738/2014 – Para 25***, that

25. “An appeal is a continuation of suit or original proceeding, as the case may be.”



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- b. *National Highway Authorities of India v. B. Seenaihah & Company (Projects) - MANU/WB/0651/2012* – Para 16, that  
16(iii) “Appeal being a continuation of the original proceeding, would enjoy the same protection under Section 36 as a proceeding under Section 34 would enjoy.”
- c. *Akhil Bharatiya Manav Kalyan Samiti v. State of UP & Ors. MANU/UP/0197/1999*, that  
“It is settled law that an appeal is a continuation of the original proceeding. If an appeal against a judgment is filed, the proceeding becomes inchoate.”

7.13. The Ld. Counsel for the Respondent to contend that an order dismissing an application under section 34 on the ground of limitation is appealable under section 37 of the Arbitration Act, placed the following decision: -

- a. *Chintels India Limited versus Bhayana Builders Pvt. Ltd. - 2021 4 SCC 602 - Para 40*, that  
40. “Consequently, the question of law is answered by stating that an appeal under section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone delay in filing an application under Section 34 of the Arbitration Act, 1996 to set aside an award.”

7.14. Further, to contend that proceedings under the IBC cannot be used for execution of an award the following decisions are relied upon: -

- a. *HDFC Bank v. Bhagwan Das Auto Finance Company – NCLAT - Appeal No. 1329 of 2019 – Para 6*, that  
6. “if it is treated as an application under Section 7 for execution of award, in said case it is to be held that the petition was filed with malicious intent not for the purpose of resolution of insolvency or liquidation.”



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**b. *Jai Balaji Industries v. DK Mohanty & Ors. - 2021 SCC OnLine SC 3104 - Para 26 and 40***

40. “. . . *the code was not a substitute of recovery proceedings;*”

**7.15.** Further, it is further contended that the said Award, annexed at Page 58 of Company Petition, caters to as follows: -

“Taking into consideration all aspects of the matter in view of the peculiar facts and circumstances of the case while rejecting the counter claim and accepting the claim petition, in my opinion, ends of justice would be fully met if a consolidated amount of Rs.1,25,00,000/- ((One Crore Twenty-Five Lacs only) on all counts (including interest component as well as arbitrator’s fee of Rs.50,000 /-) *is paid* by the respondent to the claimant and I order accordingly.”

The Ld. Counsels for the Corporate Debtor, contends the entire claim of the Operational Creditor is based on an award for damages. An award for damages cannot be deemed or construed to be an operational debt under section 9 of the IBC.

**7.16.** The Ld. Counsel for the Respondent alleges that in the arbitration proceedings the Corporate Debtor had filed a counter claim under five heads being: -

**Counter Claim 1-** Liquidity damages towards delays solely attributable to the claimant.

**Counter Claim 2-** Cost incurred in extra four kilometres transportation of coal by engaging dumpers.

**Counter Claim 3-** Advance bearing an interest.

**Counter Claim 4-** Cost incurred for civil works carried out for installation of the ECHS.

**Counter Claim 5-** Cost incurred for civil works carried out for installation of the ECHS

Referred the relevant pages 32 to 36 of the Award



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7.17. To assent that a petition under section 9 cannot be filed for enforcement of a claim for damages reliance is placed on: -

a. *Neeraj Jain v. Cloudwalker Streaming Technologies Pvt. Limited* **2020 SCC OnLine NCLAT 445 – Para 76**, where the Hon'ble NCLAT found that:

76. *“The entire claim of the Operational Creditor is based on the loss caused to it on account of not taking delivery of 21,808 LED TVs which were imported and shipped on the assurance of the Corporate Debtor. Resultantly, Operational creditor suffered a huge loss and had to pay customs charges in addition to the normal customs duty and also suffered losses due to clearance of stock of uncollected LED TVs at heavily marked down prices. The loss to the Operational Creditor is not crystallized. The Adjudicating Authority exercising summary jurisdiction cannot determine the claim amount and initiate the corporate insolvency resolution process...”*

7.18. Again, to contend that the petition under section 9 of the IBC is not maintainable in the event of pre-existing disputes, the following decisions are relied upon: -

a. *Henan Boom Gelatin Co Ltd. v. Sunil Healthcare Limited – NCLAT - Company Appeal [AT] [Insolvency] No. 256 of 2021-para 33*

b. *Mobilox Innovation Private Ltd. v. Kirusa Software Pvt. Ltd - (2018) 1 SCC 353 - Para 38 and 51*, where of is extracted with supplied emphasis for clarity, that

*“38. ... We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into*



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*the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.”*

*“51. . . 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.”*

**c. *Transmission Corporation of Andhra Pradesh v. Equipment Conductors and Cables – MANU/SC/1192/2018 - Para10, 2019 (1) CHN Page 117, 2019 (1) CLJ 74 [(2019) 12 SCC 697]***

- 8. By way of Rejoinder Affidavit, the Operational Creditor has submitted as under:**
- 8.1.** No challenge to any award survives and there is no stay on the award.
  - 8.2.** Mere filing of the appeal cannot by and of itself be a bar to the present applications especially when no attempt has been made to move the same and/ or get any order of stay.
  - 8.3.** Further, it is denied by the Operational Creditor that there is any amount due and payable to the operational creditor. That there exists an arbitral award dated July 30, 2019 which is in favour of Operational Creditor.



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- 8.4.** That the Corporate Debtor has deliberately failed to comply with the orders of the Ld. Commercial Court at Rajarhat as passed from time to time. The proceedings before the same court are thus deliberately prolonged by the Corporate Debtor by seeking regular adjournments.
- 8.5.** Further, it is claimed that neither there is pre-existing dispute between the parties nor that the Operational Creditor has failed to satisfy the existence of an operational debt.
- 8.6.** Further, it is denied that it is denied that the Operational Creditor has prematurely invoked the Insolvency and Bankruptcy Code, 2016 or that the same has been done as a substitute mechanism for enforcement of debt. No steps have been taken in the section 37 application and the matter is kept hanging so as to prolong the process.
- 8.7.** It is further stated that in the absence of any order in the appeal and the fact that section 34 application stands dismissed, there is no challenge to the award and the same is a crystallized debt as on date.
- 8.8.** It is further denied that the discretionary period for allowing appeals has not been exhausted or that the Corporate Debtor is entitled to the benefit of Section 5 of the Limitation Act, 1963.
- 8.9.** That the hon'ble Apex Court has held that when challenges to arbitral awards have been dismissed on grounds of limitation, the Insolvency proceedings may be put into operation.
- 8.10.** Further, it is denied that no sum is due or payable by the corporate debtor to the operational creditor as alleged. It is denied that there has been suppression of any real facts.

**9. Key Issue:**

We have heard the Ld. Counsels appearing for the both parties and perused the records. The principal issue is whether existence of a pre-existing dispute is conclusively proved.



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**10. Analysis and Findings:** The admitted facts that could be culled out from pleadings are the following:

- 10.1.** This instant petition under section 9 of the IBC has been instituted solely on the basis of an Arbitral Award dated 30th July 2019 whereby the Operational Creditor has been awarded a sum of Rs. 1.25 Crores together with interest @ 18% per annum and that admittedly, the Date of Default is July 30, 2019 being the date of the said award.
- 10.2.** It is evident from the Arbitration Award dated July 30, 2019 passed in the Arbitration Case No. 520 of 2018 by the Sole Arbitrator, Shri R.P. Bhasin, that the arbitration award of Rs. 1,25,00,000/- (One Crore Twenty-Five Lakh Only) was considered to pay to the claimant, herein referred as Masyc Project Private Limited, the Operational Creditor to avoid the financial loss due to the act and conduct of Hiranmaye Energy Limited, the Corporate Debtor.
- 10.3.** An application was filed by the Corporate Debtor before the Arbitral Tribunal under Section 33 of the Arbitration Act, for seeking correction of the Award on September 04, 2019 and the application was rejected by an order dated October 01, 2019.
- 10.4.** The order rejecting the application under section 33 of the Arbitration was received by the Corporate Debtor on October 04, 2019.
- 10.5.** The said award was challenged by the Corporate Debtor by filing an application under Section 34 of the Arbitration Act before the Ld. Commercial Court at Gurugram vide the Case No. 20 of 2020 dated January 29, 2020 which was dismissed as being barred by limitation.
- 10.6.** It is evident from the Order dated 09/11/2021 vide Case No. ARB/18/2020 passed by the Court of Vani Gopal Sharma, ADJ, Panchkula, (annexed **at Page 68-85 of the Reply Affidavit filed by Corporate Debtor**) that Corporate Debtor filed an application for condonation of delay for seeking the condonation of 26 days from 04/01/2020 on the ground of discretionary



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period of 30 days which has not expired and Corporate Debtor was entitled to avail the benefit under Section 5 of the Limitation Act, 1963. The Court of Ld. ADJ found no merit in the application and therefore, dismissed the application having stated that:

*“In the light of the above observations and guidelines laid down, this court is convinced that the explanation being provided by the applicant for seeking condonation of delay is not plausible. As rightly pointed out, procedural delay cannot be taken as sufficient reason for delay least as conceded on behalf of the applicant, the applicant is still not in possession to deposit 75% of the Arbitral amount failing which, the Objection Petition cannot be entertained. Moreover, the delay in the present case will not only be from the date of passing of the order under section 33 of the Arbitration Act but more than three months were availed by the applicant before that also. Apparently, as rightly pointed out the application under section 33 of the Arbitration Act and now the application for condonation of delay is only for the purpose of gaining time and delaying the execution on the part of the applicant/objector.”*

**10.7.** It is also evident that against the order of dismissal, the corporate debtor has referred an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 before the Hon’ble High Court of Punjab & Haryana. The said appeal is pending consideration before the Hon’ble High Court of Punjab & Haryana. **(Letter “C” at Page 86-113 of the Reply Affidavit dated April 05, 2022)**

**10.8.** In this context, we would discern that the Amount in Default in the instant Petition is in terms of Arbitral Award and the same is under consideration before the Hon’ble High Court of Punjab & Haryana.

**11. The Identical Pronouncements and their Implications: -**



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11.1. In *K. Kishan v. Vijay Nirman Company Pvt. Ltd.* reported in MANU/SC/0872/2018. The Hon'ble Apex Court of India observed that,

*“18. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process Under Sections 34 & 37 has taken place.*

*19. We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition Under Section 34 has been filed or a belated petition Under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.*

*20. We may hasten to add that there may also be other cases where a Section 34 petition may have been instituted in the wrong court, as a result of which the Petitioner may claim the application of Section 14 of the Limitation Act to get over the bar of limitation laid down in Section 34(3) of the Arbitration Act. In such cases also, it is obvious that the insolvency process cannot be put into operation without an adjudication on the applicability of Section 14 of the Limitation Act.”*



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**11.2.** In *Jai Balaji Industries v. D.K. Mohanty* reported in MANU/SC/1378/2021. The Hon'ble Apex Court noted that,

*“...the arbitral awards in the present case had not attained finality and rejection of petitions Under Section 34 of the Act of 1996 had been in challenge in appeals Under Section 37 thereof. Even if the said appeals were dismissed in default, the Respondent company had moved for restoration with advance notice to the Appellant. It had not been a clear case of the corporate debtor being in default with no pre-existing dispute.”*

**11.3.** In *Hindustan Construction Company Limited v. Union of India*, reported in MANU/SC/1638/2019, it was held that,

*“...the moment challenges are made to the arbitral awards, the amount said to be due by an operational debtor would become disputed, and therefore be outside the clutches of the Insolvency Code.”*

**11.4.** Further, we also rely upon the order passed by the Ld. NCLT, Kolkata Bench in *Viom Infra Ventures Limited v. Bahula Infotech Private Limited*, reported in MANU/NC/1867/2022, where it was observed that

*“...in order to initiate CIRP in case of arbitral award under section 9, the debts need to be undisputed. The Hon'ble Supreme Court also held that the CIRP could not be initiated on basis of Arbitral Award, on the following grounds;*  
*(a) When a counterclaim exceeding the claim awarded was rejected by the Arbitral Tribunal on merits, and such rejection is also a matter of challenge before the Courts; and*  
*(b) When a challenge had also been filed against the Arbitral Award.”*



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**11.5.** Moreover, from the Reply Affidavit filed by the Corporate Debtor (Para 11), it is seen that the liability on the corporate debtor shall arise only on actual delivery of goods which is not taken place in the present case. No goods have ever been delivered to the corporate debtor and therefore, the same would run contrary of the definition of Operational Debt and Operational Creditor definition under the Code. We do not find any satisfactory reply from the Operational Creditor in the Rejoinder. Thus, we have sufficient merit to believe that there is pre-existing dispute between the concerned parties.

**11.6.** In this regard we rely on *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* reported in MANU/SC/1196/2017: (2018) 1 SCC 353, on the pre-existing dispute amongst other points. In view of the law laid down by the Hon'ble Supreme Court of India, it is very clear that we are not here to determine the merits of the dispute. The Apex Court laid down that,

*“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*



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*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.*

- 11.7. We discern that the facts of the instant case are the exact replica and identical to the cases relied upon. Therefore, sans further probe in the mechanics of the dispute, we infer that there is a pre-existing dispute between then Operational Creditor and the Corporate Debtor, which is not feeble in terms of the cited case.
12. As a consequence, thereof, the present application being **C.P. (I.B.) No. 268/KB/2021** filed under Section 9 of I&B Code, 2016, is hereby **rejected** and accordingly **dismissed**.
13. The Operational Creditor may, however, pursue any other legal remedy that may be available under any other law for the redressal of its grievance.
14. Urgent Certified copy of the order may be issued, if applied for, upon compliance with all the requisite formalities.

**Balraj Joshi**  
Member (Technical)

**Bidisha Banerjee**  
Member (Judicial)

**This Order is signed on the 05<sup>th</sup> Day of June, 2023**

Bose, R. K. [LRA]