IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH,
KOLKATA

C.P (IB) No.696/KB/2020

In the matter of

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

And

In the matter of:

Mr. Raj Kumar Sharma, carrying on business under the name and style of "Express Cargo Carriers" as sole proprietor thereof 187, Rabindra Sarani, Kolkata- 700007.

... Operational Creditor

Versus

In the matter of:

Ceebuild Company Private Limited , (CIN: U29256WB1994PTC065254), having its Registered office at "Fortuna Tower",2nd Floor, Room No.19 and 20, 23A Netaji Subhas Road, Kolkata-700001.

...Corporate Debtor

Date of hearing : 30 /11/2021

Order Pronounced on :17 /02/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Kuldip Mallik,Adv.] For Operational Creditor
2. Ms. Nikita Bardhan, Adv.]

1. Mr. Abishek Guha, Adv.] For Corporate Debtor
2. Ms.Kasturi Dasgupta Adv.

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under section 9 of the IBC has been filed by Raj Kumar Sharma, carrying on business under name and style of “Express Cargo Carriers” sole proprietor thereof a corporate entity, (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **Ceebuild Company Private Limited , (CIN: U29256WB1994PTC065254),** having its Registered office at “Fortuna Tower”,2nd Floor, Room No.19 and 20, 23A Netaji Subhas Road, Kolkata-700001**,** (hereinafter referred as the Corporate Debtor).

3. It is submitted by the Operational Creditor that sole proprietor Mr.Raj Kumar Sharma, carries on business under the name and style of “Express Cargo Carries”. It is submitted that the Corporate Debtor is corporate entity and in the usual course of business, the Corporate Debtor approached the Operational Creditor to avail of its services for transportation of certain materials to diverse destinations. The Operational Creditor lifted the goods and materials according to the instructions of the Corporate Debtor and transported the same to their respective destinations. It is submitted that as per the understanding between the parties, the accounts between the parties of a running and continuous nature and that after giving credit for all the part payments made by the Corporate Debtor, principal sum of Rs.50,90,861/-(Rupees Fifty lacs Ninety Thousand Eight Hundred Sixty one only) was still due and payable as on March 31, 2018. It is further submitted that the Corporate Debtor had unambiguously and unequivocally confirmed that the aforesaid principal sum was due and payable to the Operational

Creditor by issuing "Confirmation of Accounts". It is submitted that the last part payment of Rs. 1,00,000/- was made by the Corporate Debtor on June 04,2018 leaving a principal sum of Rs.49,90,861/- still due and payable.

4. It is further submitted that the Operational Creditor issued a Demand Notice dated 2nd January, 2020 in terms of Section 8 of the IBC, 2016. The Corporate Debtor has not raised any dispute with regard to such debt despite issuing a reply thereto dated 14th January, 2020.

5. It is submitted that the Corporate Debtor has committed default within the meaning of the Insolvency and Bankruptcy Code, 2016.

6. In Part-IV, the Operational Creditor has submitted that the total amount of debt due and outstanding is Rs.49,90,861/- along with the interest on the said sum @ 24% p.a. from June 5,2018 till the actual payment thereof. The Operational Creditor has annexed with the petition a tabular chart describing the details of the amounts in default and dates on which the default actually occurred " Table-1".

7. It is submitted that the Operational Creditor had lifted the goods and materials according to the instructions of the Corporate Debtor and transported the same to their respective destinations and duly raised its invoices upon the Corporate Debtor, all of which were duly accepted by the Corporate Debtor without any protest, demur or objection, which are collectively marked as Annexure-A.

8. It is submitted that the Corporate Debtor used to make ad-hoc lump sum payments in favour of the Operational Creditor from time to time and the Operational Creditor would adjust such payments against invoices raised by it. The Bank account statement of the Operational Creditor reflecting the ad-hoc payment made by the Corporate Debtor from time to time is annexed with the petition and marked as Annexure-B.

9. It is submitted that in acknowledgement of its liability to make payment to the Operational Creditor , the Corporate Debtor had also issued a post dated cheque bearing no. 097905 for a sum of Rs.1,50,000/- in favour of the Operational Creditor. However, the Corporate Debtor requested the Operational Creditor not to present the cheque for encashment, citing financial problems and keeping in mind the long business relationship between the parties, the Operational Creditor did not encash the same. A copy of the cheque is annexed and marked "DD".

10. The Operational Creditor has further submitted that the Operational Creditor was constrained to file an application under section 9 of the Code against the Corporate Debtor before the Adjudicating Authority which was registered as C.P. (IB) No. 214/KB/2019. The Corporate Debtor filed is reply unequivocally admitting and acknowledging its dues in the said C.P.(IB) No. 214/KB/2019, which is annexed to the petition as Annexure-E.

11. It is submitted that by an order dated December 13, 2019, this Adjudicating Authority had granted liberty to the Operational Creditor to withdraw the said application to file a fresh application against the Corporate Debtor and pursuant to the said order the Operational Creditor withdrew the said application. Copy of the letter dated December 17, 2019 is annexed as Annexure-G.

12. The Operational Creditor, thereafter, addressed a fresh demand notice dated 2nd January, 2020 under section 8 of the Code to the Corporate Debtor and the same was received by Corporate Debtor on January 14,2020. Copy of the Demand Notice along with postal receipt and Tracking report is marked as Annexure -H collectively.

13. It is submitted that the Corporate Debtor sent reply dated January 20,2020 through its advocate. The Corporate Debtor for the first time denied having any transaction with the Operational Creditor. The reply

dated January 20, 2020 is annexed as Annexure-I.

14. The Operational Creditor has further submitted that he sent a letter dated 29th January, 2020 by way of rejoinder and denied the false allegation contained in the reply dated January 20,2020 and narrated the true and correct circumstances of the case. The said rejoinder letter was received by the advocates of the Corporate Debtor on 5th February, 2020. Copy of the rejoinder letter dated 29th January, 2020 along with postal receipt and tracking report are annexed as Annexure-J Colly.

15. It is further submitted that the reply of the Corporate Debtor dated January 20,2020 is in utter contrast to the reply filed in C.P. No. 214/KB/2019, wherein the Corporate Debtor unambiguously admitted its dues towards to the Operational Creditor. It is, therefore, prayed by the Operational Creditor that since the Corporate Debtor has committed default in making the payment of outstanding principal sum of Rs.49,90,861/- along with interest @ 24% p.a. from June 5, 2018 till actual payment thereof and the date of default is 4th June, 2018 on which the Corporate Debtor made the last payment of Rs.1,00,000/- but failed to make payment of the remaining amount of debt due to the Operational Creditor, the petition might be admitted.

16. In the reply affidavit filed by the Corporate Debtor through Mr. Sandip Kabra authorized representative of the Corporate Debtor. It is submitted that the present application under section 9 of the Code for initiation of CIRP alleging that the Corporate Debtor has defaulted in payment of Rs. 49,90,861/-is false and frivolous and is defective application. It is submitted in the reply that the application is malafide and motivated and filed with intention to arm twist and paralyzee the corporate debtor in order to meet certain arbitrary and unjust demand.

17. The Corporate debtor in its reply affidavit has submitted as under:-
    i. The fact of the case in brief according to the Operational

Creditor is that the Operational Creditor being a transport Company had listed various goods and materials according to the instructions of the Corporate Debtor and transported the same to various destinations. It is claimed that against the delivery of goods, by providing transportation services, the Operational Creditor raised invoices all of which were apparently accepted without any demur or protest .It has also been alleged that the Corporate Debtor had paid substantial sums of money and after giving credits to all the payments, a principal sum of Rs.50,90,861/- (Rupees Fifty Lakhs Ninety Thousand Eight Hundred and Sixty One only) was due and payable as on March 31,2018. Further, a part payment was apparently made on June 4, 2018 leaving a principal sum of Rs.49,90,861/- due and payable. Thereafter, the Appellant sent a demand notice in Form 3 as specified under Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to which the Corporate Debtor had replied raising certain disputes.

ii. The Corporate Debtor in its reply had repeatedly stated that payments, if liable to be made to the Operational Creditor, can be done only after proper invoices are addressed to the Corporate Debtor. Therefore, on accounts of invoices not being delivered to the Corporate Debtor, it has denied existence of any claim and has always levelled it as a figment of Operational Creditor's imagination.

iii. It is submitted that from perusal of Section 9(5)(c) states that the invoice or notice for payment to the Corporate Debtor has to be delivered by the Operational Creditor failing which, an application is liable for rejection under section 9(2)(c)(ii) of the Code. In this regard a perusal of all the invoices stated in the application would reveal contrary to what has been stated in the application. In the application, it has been stated that the invoices have been received by the Corporate Debtor without any demur or protest wherein the perusal of the same would indicate that most of the invoices are never delivered to the Corporate Debtor

iv. It is submitted that Corporate Debtor has been repeatedly writing to the Operational Creditor to give us a proper and final statement of accounts along with the invoices that are due and payable. Out of all the invoices which had been referred, it would indicate that most of them had been dully cleared by the Corporate Debtor.There are many invoices that the Corporate Debtor has not received and the Operational Creditor has failed to demonstrate the receipt of the same. The confusion becomes apparent when it is also found that the transaction for delivery of goods was done without delivery orders as indicated by the Operational Creditor. No such documents had been disclosed which clearly raises apprehension regarding the contradictory position taken by the Operational Creditor by suppressing the actual payment which is due and payable.

v. It is submitted that on such vague premise the Operational Creditor initially filed an application under Section 9 of the IBC Code which was duly numbered as C.P.(IB) No. 214/KB/2019. The cause was heard by the very same Adjudicating Authority and an order was passed dismissing the said application because the said application was found to be defective in nature. This Adjudicating Authority while dismissing the application observed that a proprietary concern cannot file an application under section 9 as the same is only maintainable by the Proprietor himself. The Adjudicating Authority considered the pleadings but dismissed the application granting liberty to the Operational Creditor to withdraw the said application within seven days from the order i.e. 13th December, 2019 and further allowing the Operational Creditor to file fresh petition. It is submitted that it transpires from the document that the earlier application was not withdrawn as directed by this Adjudicating Authority. A simplicitor letter had been addressed to the Registry from where it would clearly transpire that the same was not submitted thereby indicating that the earlier application is still pending before this Hon'ble Tribunal. Therefore, it transpires that the Operational Creditor has waived of his right ad remedy thereby leaving the said application not maintainable as the same is clearly sub judice before the Court.

vi. Further, it is submitted that in any event, the said application and the purported claim made by the Operational Creditor are ex facie barred by the laws of limitation. It is submitted that as would be evident from the details enumerated in Form 5, the Operational Creditor has failed to disclose any continuous cause of action as all transactions and payments made in respect of those invoices which were received, were between the periods of 2013 to 2015. In fact, the last invoice was claimed to have been raised on December 17, 2014, therefore, clearly indicating that the same is barred by the laws of limitation.

vii. Lastly it is stated that although the Corporate Debtor has been going through financial crunch and liquidity crisis in view of looming pandemic but has tried to reach out the Operational Creditor that they are more inclined to extract money and use the provisions of the Code as a tool of money recovering process which is contrary to the intention of the IBC, 2016.

18. It is denied by the Corporate Debtor that the Operational Creditor lifted goods and /or materials according to the instructions of the Corporate Debtor and transported the same to the respective destinations. The Corporate Debtor vehemently denied and disputed that all the invoices were deliver to the Corporate Debtor and the same were received without any demur or protest. It is submitted that the transaction as alleged was continuous in nature and the Operational Creditor would continue

to raise invoices against the transportation service. It is submitted that as indicated in the preceding paragraphs, many invoices which are allegedly claimed to have been relied upon in the application were not delivered and neither any demand was made with respect to such payments to the Corporate Debtor. It is submitted that after giving credits to all the part payments made, a sum of Rs.50,90,861/-was due and payable as on March 31,2018.

19. It is denied that the Corporate Debtor has unambiguously and unequivocally confirmed that the aforesaid sum was due and payable. It is submitted that the confirmation of accounts was furnished under a mistaken apprehension wherein the Corporate Debtor was lured to sign on a blank paper and based upon good relationship between the parties and to honour the promises of making payment after reconciliation of account is provided, the representative of the Corporate Debtor in good faith had made such signatures in the blank paper. It now transpires that the same document is being used against the Corporate Debtor to harass and to coerce money which is not due and payable. Therefore, Corporate Debtor vehemently denied and disputed that a principal sum of Rs.50,90,861/- is payable to the Operational Creditor and that after receiving the payment of Rs.1,00,000/- till date a sum of Rs.49,90,861/- is still due and payable. The Corporate Debtor denied and disputed that the Corporate Debtor in acknowledgement of its liability issued post dated cheque for a sum of Rs.1,50,000/-. It is also denied that the Corporate Debtor requested the Operational Creditor not to present the said cheque citing financial problems. It is denied and disputed that keeping in mind the good relationship between the parties, the Operational Creditor did not encash the cheque. It is denied that the Corporate Debtor had unequivocally admitted and acknowledged its dues in the Affidavit of Reply filed in C.P.(IB) No. 214/KB/2019. It is stated that the Corporate Debtor was always willing to make payment provided proper reconciliation of account is provided to the Corporate Debtor. It is submitted that despite failure to provide proper accounts,

the Operational Creditor at the present cannot coerce and harass the Corporate Debtor to make payment. It is submitted that the Operational Creditor despite being granted the liberty to withdraw the application, chose to waive off its rights and from the documents it clearly transpires that the application was not withdrawn thereby rendering the present application not maintainable which is liable to be dismissed with exemplary costs.

20. The Corporate Debtor submitted that many of the invoices which are sought to be relied upon by the Operational Creditor are not corroborated or substantiated with documents thereby rendering some of them to be void and it is under these circumstances the Corporate Debtor denied having any transactions with the Operational Creditor. The Corporate Debtor denied and disputed that the Operational Creditor had in its Rejoinder to the earlier application narrated the correct facts and circumstances. It is denied and disputed by the Corporate Debtor that in its Affidavit in Reply the Corporate Debtor had admitted the dues. It is submitted that the previous reply was nothing but a product of after thought to avoid making payment of the legitimate dues of the Operational Creditor. It is denied that failure to make payment as stipulated in the invoice would attract interest @ 24%. It is submitted that when the invoices themselves are disputed, the question of reviving interest cannot arise. Therefore, Corporate Debtor vehemently denied and disputed that the Corporate Debtor had committed default within the meaning of the IBC,2016. It is submitted that the statements pleaded by the Operational Creditor would reflect that they are more inclined to recover Rs.49,90,861/- than to initiate CIRP process and it clearly gives an indication that they want to use this Adjudicating Authority as a money recovering Forum.

21. It is stated by the Corporate Debtor that despite having the previous application dismissed, the Operational Creditor has once again failed to bring any document on record to prove that it is the sole Proprietor of

Express Cargo Careers. It is submitted that the Operational Creditor has grossly suppressed all the facts and disputes involved before this Tribunal while filing this application under section 9 of the Code.

22. It is submitted that the defence of the Corporate Debtor is genuine, substantial and is in good faith and the prima facie proof of the fact is adduced herein and same clearly falls within the ambit of definition of dispute defined under the IBC, 2016. It is submitted that in light of the circumstances as stated hereinabove, the application filed by the Operational Creditor is required to be dismissed.

23. During the course of arguments, the Ld. Counsel for the Corporate Debtor submitted that the Operational Creditor being the transport company has lifted various goods and materials according to the instructions of the Corporate Debtor and transported the same to various destinations. It is claimed by the Operational Creditor that against the delivery of goods, the Operational Creditor raised invoices all of which were apparently accepted without any demur or protest.Ld. Counsel further submitted that the Operational Creditor has alleged that the Corporate Debtor had paid substantial sums of money and after giving credits to all the payments, a principal sum of Rs.50,90,861/- was due and payable as on March 31,2018. Ld. Counsel for the Corporate Debtor however submitted that the payments can be made only after proper invoices are addressed to the Corporate Debtor.

24. Ld. Counsel for the Corporate Debtor submitted that the invoices have not been supported by any purchase order/ work order that might have been issued to the applicant by the Corporate Debtor in support of its claim. It is submitted that even if it is presumed that all the invoices had been legitimately raised, each consignment executed by the Operational Creditor would have been executed under a contract independent by itself. It is submitted that the applicant has mingled the alleged claim arising out of each of the contracts and has filed the present application

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in order to be able to meet the minimum threshold default amount of Rs. 1,00,000/-. Ld. Counsel further submitted that the Hon'ble NCLAT has observed in its order in case of ***International Road Dynamics South Aisa Pvt. Ltd. Vs. Reliance Infrastructure Ltd. -Company Appeal (AT) (Insolvency) No. 72 of 2017;***

> "***10. We are of the view that different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate***".

25. Ld. Counsel for the Corporate Debtor further submitted that the Operational Creditor initially filed an application under section 9 of the Code, which was numbered as C.P.(IB) No. 214/KB/2019. It was heard by the very same Adjudicating Authority and an order was passed dismissing the said application because the said application was found to be defective in nature. It is submitted that while dismissing the application, it was observed that by the Adjudicating Authority that a proprietary concern cannot file an application under Section 9 of the Code as the same is only maintainable when filed by the Proprietor himself. It is submitted that the earlier application was not withdrawn as directed by the Adjudicating Authority. Therefore, it transpires that the Operational Creditor has waived off his right and remedy thereby leaving the said application not maintainable.

26. It is submitted that the application and the claim made by the Operational Creditor are ex-facie barred by the law of limitation as the Operational Creditor has failed to disclose any continuous cause of action as all the transactions and payments made in respect of those invoices which were received, were between the periods of 2013 to 2015. In fact, the last invoice was claimed to have been due and beyond the period of limitation.

27. It is submitted that there is clearly a dispute regarding the very existence

of many invoices and the proper reconciliation of accounts and also discrepancies in the accounts of the same is liable to be investigated and this type of dispute can only be decided by Civil Court wherein evidence can be led and therefore this matter is beyond the scope of this Adjudicating Authority. Ld. Counsel further submitted that the amount claimed is disputed and the Operational Creditor has suppressed the material fact that it has not withdrawn the earlier application as directed by the Adjudicating Authority vide order dated 13th December, 2019.

28. There is an outstanding operational debt repayment of which has been defaulted thereby compelling the Operational Creditor to approach this Adjudicating Authority without there being any pre-existing disputes, in substance.

29. After hearing Ld. Counsel for both the parties and after going through the pleadings and the documents placed on record by the parties. We find that there was no pre-existing disputes at any stage earlier but the Corporate Debtor has unsuccessfully tried to make it a case of that type. We are not convinced by the arguments of the Corporate Debtor and find that it is a fit case for admission, we, therefore, pass the following orders:-

O R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) The Operational Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, so, we appoint Mr. **Bishwanath Choudhary**, **IRP ,** to act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

x) **Mr. Bishwanath Choudhary**, **IRP**, registered with Insolvency and Bankruptcy Board of India, having Registration No **IBBI/IPA-002/IP-N00597/2018-2019/12042**, email choudhary_ bishwanath@redifmail.com and holding AFA under Regulation 7-A of the IBBI (Insolvency Professionals) Regulations, 2016, is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective

Resolution Applicant within 105 days from the insolvency commencement date.

xii) The Operational Creditor/Applicant is directed to deposit **Rs.3,00,000/- (Rupees Three Lac only)** with the IRP appointed hereinabove within three days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

30. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

31. List the matter on **29/04/2022** for filing of **Progress Report**.

32. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 17th day of February, 2022

PJ.