



**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI**

**ORDER SHEET OF THE HEARING ON 10<sup>TH</sup> JANUARY, 2024, 10:30 A.M.**

CP (IB)/11/GB/2023

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao  
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

Name of the Company	UM Green Lighting Pvt. Ltd.- OC Vs CSA, Corporation Pvt. Ltd.-CD
Under Section	U/S 9 of IBC, 2016

For Petitioner (s) : Mr. Akshay Goel, Adv.  
Mr. Rajiv Bhatnagar, for RP.

For Respondent (s) :

**ORDER**

Order Pronounced through VC *vide* separate sheets.

Sd/-

**Satya Ranjan Prasad  
Member (Technical)**

Sd/-

**H.V. Subba Rao  
Member (Judicial)**



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***In the matter of:***

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process;

-And-

***In the matter of:***

**UM Green Lighting Private Limited**, Registered Office at 806, Devika Tower 6, Nehru Place, New Delhi-110019, through its Resolution Professional;

**...Petitioner/Operational Creditor**

**-Versus-**

**CSA Corporation Private Limited**, Registered Office at H No. 297, 1st Floor, 17, Aoyimkurn Village Dimapur Nagaland-797112.

**... Respondent/Corporate Debtor**

***Coram:***

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

***Appearances (through video conferencing):***

For the Petitioner : Mr. Akshay Goel, Adv.  
Mr. S. Fernandes, Adv.

For the Respondent : Mr. G. Mitra, Adv.  
Mr. Amar Vivek, Adv.

**Order reserved on: 14.12.2023**

**Order pronounced on: 10.01.2024**

**ORDER**

1. The Present Application has been filed by the Operational Creditor- UM Green Lighting Private Limited, under section 9 of the Insolvency and Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process with respect to the Corporate Debtor- CSA Corporation Private Limited.



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2. Brief facts as stated by the Petitioner are as follows:
- 2.1 The Operational Creditor is a company incorporated and functioning under the laws of India, currently undergoing Corporate Insolvency Resolution Process in accordance with the Insolvency and Bankruptcy Code, 2016, initiated *vide* order dated 13.12.2021 passed by National Company Law Tribunal, New Delhi Bench and as such, the present Application has been preferred through the Resolution Professional of the Operational Creditor Mr. Rajiv Bhatnagar appointed *vide* order dated 10.01.2023 of the National Company Law Tribunal, New Delhi Bench.
  - 2.2 The Corporate Debtor, CSA Corporation Private Limited (formerly known as Orsus Agro Developers Private Limited) is a company incorporated and functioning under the laws of India.
  - 2.3 The Operational Creditor and the Corporate Debtor entered into a Consortium/ Joint Venture Agreement ('JVA') dated 01.05.2017 for the submission of a joint bid for design manufacture, supply erection, testing and commissioning of 10,000 nos. of Standalone Off Grid Solar Led Street Lights to Energy Efficiency Services Limited (EESL). The consortium of the Parties was awarded the tender by EESL *vide* the Letter of Award dated 10.02.2017, which was subsequently amended on 14.09.2017 *vide* Amendment No. 1 in Letter of Award.
  - 2.4 Subsequently, the Consortium of the Parties bid on and were awarded another similar tender by EESL *vide* Letter of Award dated 13.09.2017.
  - 2.5 In the course of the execution of the aforesaid contracts, and even otherwise, the Corporate Debtor and the Operational Creditor had a running business, wherein the Corporate Debtor purchased several materials at a mutually-agreed rate from the Operational Creditor and the Operational Creditor duly supplied the same and raised the requisite invoices. However, the Corporate Debtor defaulted on making the payments under the Consortium Agreement as well as the said invoices to the Operational Creditor.
  - 2.6 In fact, the Corporate Debtor albeit erroneously, even acknowledged that an aggregate amount of INR 7,15,34,438.21 was due from the Corporate



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Debtor to the Operational Creditor as on 31.03.2021 and the same is yet to be paid by the Corporate Debtor to the Operational Creditor.

- 2.7 Therefore, the Operational Creditor, through the RP, sent the Corporate Debtor several emails and letters, including an email dated 17.05.2023, providing the Corporate Debtor with the ledger account of the Corporate Debtor in the books of the Operational Creditor While the same were duly acknowledged by the Corporate Debtor, no payment was forthcoming.
- 2.8 The Corporate Debtor has with the sole intention of evading their liability towards the Operational Creditor filed purported complaints under Sections 406 and 420 of IPC, after the CIRP initiation date of the Operational Creditor. The said complaint is nothing but a moonshine defence being prepared by the Corporate Debtor, with no substantiation whatsoever.
- 2.9 The acknowledgment of liability by the Corporate Debtor as late as April, 2021, and the lack of any communication or legal steps having been taken by the Corporate Debtor till such belated time is evidence itself of the fact that the Corporate Debtor has initiated such proceedings in a *malafide* manner to cause wrongful loss to the Operational Creditor and its stakeholders and wrongful gain to itself.
- 2.10 The said complaint case was filed by the Corporate Debtor after the CIRP initiation date of the Operational Creditor and as such, such proceedings are evidently without any merit initiated with the sole intention of wriggling out of their liability towards the Operational Creditor. Hence, the same cannot qualify as a pre-existing dispute between the Parties. The Corporate Debtor has failed to show any document/ communication prior to the CIRP initiation date or prior to the filing of the said complaint which would prove a genuine pre-existing dispute between the Parties.
- 2.11 As such, the Operational Creditor issued a Demand Notice under Section 8 of the Code to the Corporate Debtor, claiming INR 9,35,97,426.00 towards the principal amount due from the Corporate Debtor to the Operational Creditor.



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- 2.12 However, despite the issuance of the said Demand Notice, the Corporate Debtor failed to make the payment to the Operational Creditor within the stipulated 10-day period. On the contrary, the Corporate Debtor served the Operational Creditor herein with a reply to the Demand Notice which is devoid of merits or any substantial defence against the claim of the Operational Creditor. In fact, the Corporate Debtor is merely attempting to hold the Operational Creditor responsible for the actions and inactions of the Corporate Debtor itself which is contrary to the interest of the customers of the Parties, including EESL.
- 2.13 The debt falls due on the respective dates of invoices raised by the Operational Creditor, stands acknowledged *vide* the email dated 26.04.2021 by the Corporate Debtor, and remains due till date. Hence, the present application.
3. In accordance with order of this Tribunal passed on 14.12.2023, the Petitioner *vide* written submissions dated 18.12.2023 submits that:
- 3.1 Maintainability of the instant petition
- i. The goods supplied by the OC to the CD were not to a Special Purpose Vehicle or a specifically incorporated third Party, the supplies were made to the CD under the JV. The goods were supplied to the CD and Invoices were raised in the name of the CD. The profit sharing ratio of 50-50 in the JVA is not for the supplies which were made to the CD as it was the responsibility of the CD to procure the supplies and the OC is entitled to the payment for the supplies made to the CD.
  - ii. The ancillary issues which arose from the JVA are not being sought to be specifically enforced *vide* the instant Application under Section 9 of the Code.
  - iii. There is unequivocal and unqualified admission of the CD *vide* E-mail dated 26.04.2021, wherein the debt has been acknowledged and no dispute whatsoever qua the supplies of the materials have been raised.



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- iv. The entire defence of the CD is predicated on the Show Cause Notice issued by EESL, however, the said notices and also the notices issued by the CD, are silent on any issues qua the materials already supplied to the CD, but refers to other ancillary issues which may or may not arise from the JVA and the OC has not agitated the said issues in the present Petition.
- v. The judgments cited at the Bar by the CD are distinguishable on facts, as first and foremost, the debt which is due and payable by the CD to the OC is only for the supply of the goods which has been duly acknowledged by the OC. The OC is not claiming its part of the profits to the extent of 50% but the exact amount of the Invoices, remaining unpaid, from the CD.
- 3.2 The debt is Operational Debt as per section 5(20) of IBC
- i. As per the business arrangement between the parties' CD used to purchase and OC used to supply the material, thereby raising invoices against CD. Therefore, OC gave "goods and services to CD" which in turn CD supplied to the Third-Party. Hence, it is an operational debt well within the contours of Section 5(20) of the Code.
- ii. The debt has fallen due to non-payment for the goods under the invoices which have been raised on the CD, the same is acknowledged by the CD in its Financial Reports as well, without any qualification or remark of the Auditor
- 3.3 No Pre-Existing dispute
- i. The CD has cited a Criminal Complaint, trying to attribute a pre-existing dispute which never really existed. Moreover, in order to constitute a pre-existing dispute, the same must be prior to Section 8 notice. In the instant case, Criminal Complaint was instituted post-CIRP. Pertinently, the said proceedings were quashed by the Guwahati High Court *vide* its Judgment dated 20.07.2023.
- ii. The undisputed facts are
- a. The supply of goods;
- b. The invoices were raised qua the supply of goods;
- c. The receipt of Invoices by the CD;



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- d. No deficiency in the supply of goods ever raised even till date;
- iii. The Notices/Show-Cause Notices are regarding the ancillary issues qua the execution of the JVA which do not pertain to the supply of the goods made by the OC to the CD. The CD is trying to mislead this Tribunal by bringing up issues which are irrelevant to the present controversy. Hence, it can be safely concluded that there is no pre-existing disputes between the parties.
- iv. The CD, despite being fully aware of the CIRP of the OC, neither approached the IRP/ RP of the OC for any performance of the contract nor was any claim filed by the CD until the present Petition was already *sub-judice* before this Tribunal. It is thus clear that any alleged pre-existing dispute is merely orchestrated by the CD with the view to evade it liabilities towards the OC on account of the commencement of the OC's CIRP. Furthermore, the last payment was made by the CD to the OC on 30.04.2021 and thus, the dispute is nothing but an after-thought.
- 3.4 Thus, the petition deserves to be admitted.
4. On the other hand the Corporate Debtor *vide* its reply dated 09.09.2023 and written submissions dated 18.12.2023 submits that:
- 4.1 Section 9 petition filed is not maintainable.
- i. The OC is neither an operational creditor nor there is any operational debt due in respect of provision of goods or services hence, the OC does not fall within the definition of "Petitioner" under Sec 5(20) of the IBC. Consequently, the debt does not satisfy the definition of "Operational Debt" under Sec 5(21) of the IBC. Reliance is placed on the Supreme Court decision in *Phoenix ARC v. Spade Financial Services (Civil Appeal 2842/2020 with 3063/2020)* wherein the bench held that: "*The IBC recognises that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit on its provisions to the detriment of the rights of legitimate creditors.*" Furthermore, reliance is also placed on order dated 07.06.2023 passed by the NCLT Chennai, in *M/s SFO Technologies Pvt. Ltd. v. M/s Vanu India*



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- Pvt. Ltd.* wherein the bench held that “an application under Sec 9 requires 'strict proof of 'debt and default'. ”
- ii. The Hon'ble NCLAT in the matter of *M/s Sree Sankeshwara Foundation and Investments Vs. M/s Dugar Housing Limited (CA (AT) (Ins) No. 515 of 2019)* vide order dated 25.11.2019 held that: “The Appellant along with Respondent (Corporate Debtor) had executed Joint Development Agreement in the year 2012 for construction of structure and allotment to allottees. Both of them being parties to a joint venture project, we hold that the Appellant cannot claim to be ‘Operational Creditor’ as it does not relate to supply of goods nor service rendered by the Appellant. If joint venture rendered any service to the allottees and for that to pay service tax it does not mean that the parties of the joint venture will render service to each other.” Similar view in *M/s. Vipul Limited v. M/s. Solitaire Buildmart Pvt. Ltd. (CA (AT) (Ins) No. 550 of 2020)* at Para 19-26, *Mukesh N. Desai v. Piyush Patel & Ors. (CA (AT) (Ins) No. 780 of 2020)* at Para 14-16.
- iii. The Balance Sheet of the Corporate Debtor cannot be relied on to prove the nature of the debt as to whether the same is Operational or not. The Hon'ble Supreme Court vide order dated 26.03.2021 has under para 37 in the matter of *Laxmi Pat Surana v. Union Bank of India, Civil Appeal No. 2734 of 2020*, observed that “Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt Such acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgement must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code.” Thus, the OC cannot prove existence of an operational debt by placing reliance on books of the CD. Furthermore, the reason for inclusion of debts in the books of the CD is for the purpose of calculation of final profit after deduction of all actual costs



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- in terms of Clause 3 (ii) of the JV Agreement. Copy of the Balance Sheet has been annexed.
- iv. Prior to commencement of CIRP of OC, the Petitioner and the Respondent executed a Consortium Agreement dated 12.10.2016 for the submission of a joint bid for design, manufacture, supply, erection, testing and commissioning of 10,000 nos. of Standalone Off Grid Solar Led Street Lights in 05 states namely, Assam, Bihar, Jharkhand, Odisha and Uttar Pradesh including complete system warranty and AMC for 5 years to Energy Efficiency Services Limited. Copy of the Consortium Agreement has been annexed.
- v. Pursuant to the Consortium Agreement, the Petitioner and the Respondent had successfully secured tender contracts from other government departments namely, UPNEDA, AVVNL and PEDDA. The OC intentionally suppressed the execution of the other collaboration agreements to create a perception of separate transactions in the invoices submitted by them. Yet, as evidenced, they are intrinsically interlinked. The Corporate Debtor has also submitted Performance Bank Guarantor to the other three departments, detailed table has been annexed. Furthermore, the Corporate Debtor submits that, none of the aforesaid projects are complete nor has there been any reconciliation of the accounts. The CD being the lead bidder is still carrying out its obligations under the JV Agreement, LoAs and LoA Amendments. As per Clause 8 of the JV Agreement, CD has also furnished performance bank guarantees of INR 24,48,000.00 and INR 82,13,000.00 to EESL, which is still being renewed on an annual basis. Copies of the bank guarantees have been annexed.
- vi. The JV Agreement executed on 01.05.2017 laid down the detailed mutual obligations and responsibilities of both parties. The CD draws attention to certain clauses of the JVA pertaining to financial obligations, Clause 3(1) states that the net profits or loss in ratio of 50:50 shall only be distributed after receipt of last payment from EESL towards completion of the project, after securing amounts paid by the CD towards securities/guarantees.



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Furthermore, Clause 3(ii) – “*Division of project cost will be on actual basis.*” All project cost to be borne by consortium and payments to be made by CD.

- vii. Pursuant to the JVA, the CD was defined as the lead partner (financial partner) whereas the OC was defined as the technical partner (operating and implementing partner). Accordingly, reliance is placed on Clause 4(v) of the JVA, which details out the responsibilities of the OC and the consequences in the event any of the parties fails to perform its obligations under the JV Agreement, commits a breach or is declared insolvent/NPA. In case a party is declared insolvent/NPA, the losses shall be recovered by the suffering partner from the other partner’s share of the money.

4.2 OC'S non-performance *qua* Joint Venture Agreement

- i. The Operational Creditor had been failing in performing its obligations under the Contract with EESL and LoAs issued by EESL. The Department was constrained to issue a letter dated 10.12.2018 (EESL First Letter) stating that it was getting regular complaints from various sources such as DRDA office, Hon'ble MP's office and public representative offices for non- glowing lights while highlighting the issue of poor performance in various constituencies of Bihar and Odisha under the Atal Jyoti Yojana project. Copy of the EESL First Letter has been annexed. *Vide* letter dated 03.02.2020, EESL further highlighted continuous deficiency in service as maintenance teams have not been available on ground, toll-free numbers are not operational etc. EESL also stated that documentation provided to the Department are mainly related to processing of invoices submitted by the OC on behalf of the CD. Copy of EESL's Second Letter has been annexed.
- ii. The CD wrote an email dated 07.05.2020 to the OC seeking clarification as to why the OC has raised invoices on behalf of the CD, directly on EESL without the CD's permission. Further, the CD strictly asked the OC to abstain from such activities in the future. Copy of the CD's email dated 07.05.2020 has been annexed. Despite the letters received from EESL, the OC failed to resolve the issues and therefore, EESL was constrained to issue a Show- Cause Notice dated 02.09.2021. EESL categorically mentioned that



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in case the maintenance and rectification of works was not carried out by the OC, then EESL would complete such maintenance and rectification by a third party at the cost of the CD. Copy of the Show Cause Notice has been annexed.

- iii. Despite the Show Cause Notice, the Petitioner was unable to perform its obligations under the JVA and therefore, EESL issued another Show Cause Notice dated 06.10.2021. EESL stated that it had no option but to complete the works through third parties. Copy of another Show Cause Notice has been annexed. On 08.09.2021, a meeting was held in EESL's office to deliberate upon the financial crisis of the OC and the consequent non-performance of its obligations under the JVA. Copy of the Minutes sent in email dated 09.09.2021 has been annexed.
- iv. Due to the persistent non compliances and failure to fulfil its obligations, the CD was forced to send an email dated 20.09.2021 wherein it sought an explanation from the OC for the continuous breach of its obligations under the JVA. Copy of the CD's email dated 20.09.2021 containing Notice of Non-Performance has been annexed. Several email correspondences were exchanged between the OC, CD and KESL OC replied to the Show Cause Notice dated 06.10.2021 *vide* email dated 22.10.2021 wherein it falsely reassured EESL that the relevant support will be provided while admitting that there are short- comings in the services rendered by the Operational Creditor and apologising for the same. Copy of the email dated 22.10.2021 has been annexed.
- v. In pursuance of the Consortium Agreement for EESL dated 01.05.2017, the Petitioner and the Respondent, on the same understanding, had successfully secured Tender Contracts from other government departments namely:
  - a. Uttar Pradesh New and Renewable Energy Development Agency/ UPNEDA (for the state of Uttar Pradesh);
  - b. Ajmer Vidyut Vitran Nigam Limited/AVVNL (for the state of Rajasthan); and



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c. Punjab Energy Development Agency/PEDA (for the state of Punjab).

Complaints were received, and several emails were exchanged by the OC, CD and EESL. Copy of the other emails/correspondence relating to EESL have been annexed. Not only did the OC not adhere to its obligations, but it also abandoned the projects, despite the fact that installation, maintenance, and repairs were the sole and exclusive responsibility of the OC. Reference is drawn to Clause 4(V) of the JVA Similarly, the OC failed to adhere to its obligations under the other three Agreements and innumerable complaints were received from the other three Government agencies. Table containing a list of such emails along with list of emails/correspondence/complaints relating to UPNEDA, AVVNL and PEDA have been annexed. It is reiterated that any claims made by the OC under the JV Agreement could only arise if the OC had fulfilled its obligations under the same JV Agreement. It is evident that the OC has not only breached all the terms of the JV Agreement) but has gone a step further to abandon all the projects

4.3 Proceedings before the Guwahati HC and existence of dispute

- i. The OC was continuously, failing to honour its contractual obligations, the CD was convinced that the OC had indulged in conduct that was criminally offensive in nature. Therefore, CD filed a criminal complaint under Sec 406, 419 and 420 of the IPC. The case was registered as CR. Case 12/2021 on 15.11.2021 before the CJM, Dimapur Nagaland. Copy of CR Case 12/2021 has been annexed. Recognising the monetary claim of the CD against the OC, the Balance Sheet and Independent Auditor's Report of the CD for FY 21-22 categorically captured the fact that legal notices have been sent to the OC and claims may arise in this regard. Copy of Balance Sheet has been annexed.
- ii. On 15.12.2021, CJM was pleased to direct and seek an enquiry report from the officer in charge. Dimapur (West) P.S., Nagaland. While the report from the police station was awaited, the CD issued two legal notices dated 24.12.2021 (Legal Notices) to the OC, thereby terminating all rights in



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relation to all four projects. One notice was in relation to the EESL JV while the second notice was in relation to PEDDA, AVVNL and UPNEDA. Copy of the Legal Notices have been annexed.

- iii. On 09.03.2022, the Officer-in-Charge of the police station shared his enquiry report and stated that complaint seems genuine. Taking cognizance of the enquiry report, the CJM issued summons and directed appearance of the promoter and director of the OC (Mr. Gaurav Mamik). *Vide* order dated 10.10.2022, the CJM distinguished insolvency proceedings from criminal proceedings and held that moratorium would not be a bar for continuance of criminal proceedings. Copy of the order dated 10.10.2022 has been annexed. The OC then filed a Criminal Revision Petition 04/2023 before the Guwahati HC. An interim order suspending criminal proceedings before the CJM, has been passed by the Guwahati High Court. *Vide* judgement dated 20.07.2023, the Guwahati High Court allowed the revision petition and quashed CR. Case 12/2021 on grounds that the dispute is civil in nature and criminal color cannot be applied to such dispute. Copy of the judgement has been annexed.
- iv. National Company Law Tribunal, Chennai Bench in the matter of ***M/s. SFO Technologies Pvt. Ltd. Vs. M/s. Vanu India Pvt. Ltd. bearing IA No. 1106/2022 in Comp. App (AT) (CH) (INS) No. 436/2022*** *vide* its order dated 07.06.2023 in Para 39 of the Judgement has held that “*It cannot be forgotten that an Application under Section 9 of the Code, requires a strict proof of Debt and Default. An existence of a Pre-existing Dispute, is a bar to the initiation of the Corporate Insolvency Resolution Process, at the instance of the Petitioner. If there is a Pre-existing Dispute, between the Parties, the main CP (IB) No.49/BB /2021, under Section 9 of the Code, against the Respondent filed by the Appellant/Petitioner, per se is not maintainable.*” Similar view in Para 25 ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. bearing Civil Appeal No. 9405 of 2017*** *vide* its judgement dated 21.09.2017.



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- 4.4 Therefore, it is reiterated that the parties are bound by the JVA wherein final accounts of the parties are yet to be reconciled and that there exists a crystal-clear “pre-existing dispute” between the parties which has been prolonging prior to the issuance of Section 8 Demand Notice served upon the Corporate Debtor, as mentioned in the reply and the submissions therein. The Hon'ble Guwahati HC has further categorically crystallized that there exists a civil dispute between the parties in their judgment dated 20.07.2023, considering this the Section 9 application should be dismissed on the grounds as follows:
- a. There exists no default qua the JV Agreements;
  - b. Pre-existing dispute between the parties; and
  - c. IBC proceedings are not a recovery mechanism
5. Heard Mr. S. Fernandes, Counsel appearing for the RP/OC and Mr. G. Mitra appearing for the Corporate Debtor and perused the records.
6. Mr. Fernandes, Ld. Counsel for the RP/OC submits that the Operational Creditor and the Corporate Debtor in and around the year 2017 entered into an agreement of consortium for submission of a joint bid for design manufacture, supply, erection, testing and commissioning of 10,000 nos. of Standalone off Grid Solar LED Street Lights to Energy Efficiency Services Limited (EESL).
7. He further submits that the Consortium of Parties were awarded tender by EESL *vide* the Letter of Award dated 10.02.2017. The said LOA was subsequently amended *vide* Amendment No. 1 in Letter of Award dated 14.09.2017 and subsequently, the Consortium of the Parties bid on and were awarded another similar tender by EESL *vide* Letter of Award dated 13.09.2017.
8. He further submits that the records of the Operational Creditor shows the default of certain payments by the Corporate Debtor under the consortium agreement as well as under the invoices of the Operational Creditor. He also submits that the Corporate Debtor also acknowledged an aggregate amount of Rs. 7,15,34,438.21 as due and payable to the Operational Creditor as on 31.03.2021.



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9. He further submits that the Operational Creditor has issued a demand notice demanding the Operational Debt from the Corporate Debtor for which the Corporate Debtor has sent a contentious reply dated 13.06.2023. Thus, he submits that Corporate Debtor has committed default of an Operational Debt of Rs. 9,35,97,426.00 and also acknowledge their liability in their books of account and prayed for admission of the above Company Petition against the Corporate Debtor. Thus, Mr. Fernandes argued as if it is a simple Section 9 application which deserves to be admitted.
10. Mr. Mitra, the Ld. Counsel appearing for Corporate Debtor vehemently opposed the above submissions of Mr. Fernandes contending that the Petitioner herein is claiming to be an “Operational Creditor” which is not correct. It is his submissions that the present Petitioner along with the Corporate Debtor have entered into a Consortium/Joint Venture Agreement dated 01.05.2017 under certain terms & conditions for supply of grid solar led streetlights to Energy Efficiency Services Limited (EESL) which is a Government of India undertaking in the states of Assam, Bihar, Jharkhand, Odisha and Uttar Pradesh. Therefore, the present Petitioner herein is not an Operational Creditor and the amount claimed by him under the Consortium/ Joint Venture Agreement does not fall within the definition of “Operational Debt”. In support of his contention, he has relied upon the rulings of Hon’ble NCLAT in *M/s Sree Sankeshwara Foundation and Investments Vs. M/s Dugar Housing Limited* (CA (AT) (Ins) No. 515 of 2019); *M/s. Vipul Limited v. M/s. Solitaire Buildmart Pvt. Ltd.* (CA (AT) (Ins) No. 550 of 2020), *Mukesh N. Desai v. Piyush Patel & Ors.* (CA (AT) (Ins) No. 780 of 2020)
11. Mr. Mitra further contends that as per the terms and conditions of the Consortium/Joint Venture Agreement, the Operational Creditor is entitled to claim their dues, if any, only after completion of the work and after finalisation of accounts. He further submits that the Operational Creditor has not carried out the works within the time frame fixed by the Energy Efficient Services Ltd, as a result of which EESL issued show cause notice to both the Operational Creditor and the Corporate Debtor and consequently the Corporate Debtor has terminated the



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Consortium/Joint Venture Agreement between the parties. He has invited the attention of this tribunal to the show-cause notices dated 02.09.2021 and 06.10.2021 issued by EESL to both the Operational Creditor and the Corporate Debtor annexed at Annexure- R/8 & R/9 of the reply filed by the CD and termination notice dated 24.12.2021 annexed at Annexure- R/17 of the reply filed by the CD. Therefore, he submits all the above events have taken place before issuing demand notice dated 05.06.2023 by the Operational Creditor and the Operational Creditor has purposefully issued a demand notice to cover up his latches. Thus, it is the submission of Mr. Mitra that there are “prior existing disputes” between the parties and therefore the above Petition has to be dismissed on that score also.

12. He further submits that the Corporate Debtor has also lodged an FIR against the Operational Creditor before the concerned Police Authorities basing on which a Case No. 12/2021 is registered against the Operational Creditor under sec. 406, 419, 420 of IPC which was pending before the court of Chief Judicial Magistrate Dimapur Nagaland. The Operational Creditor aggrieved against the lodging of the above FIR by the Corporate Debtor, preferred a Criminal Revision Petition bearing CRP No. 4/2023 before the Hon’ble Guwahati High Court, Kohima Bench, which was allowed by the High Court *vide* its order dated 20.07.2023 with the following observations at para 66 of the order:

*“ ..Para 66. Upon careful examination of the facts and circumstances in the present case, this Court is of the view that the issue appears to be pure breach of contract, if any, as the allegation, inter alia is of discontinuation and abandoning of responsibility on the part of the petitioner Company which is purely a civil dispute.”*

13. Thus, Mr. Mitra contends that the existence of dispute between the parties was also established through the judicial findings of the Hon’ble Guwahati High Court. Of course, Mr. Fernandes strongly objected for relying on the above findings by Mr. Mitra contending that how can the Corporate Debtor rely on the above findings when the FIR was quashed by the Hon’ble High Court.



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14. After hearing the above submission of both sides and after carefully going through the records and the above referred citations of Hon'ble NCLAT relied by Mr. Mitra, this bench is in complete agreement with the submissions of the Ld. Counsel of the Corporate Debtor to the effect that the Operational Creditor being a party to a Consortium/Joint Venture agreement cannot file the present application under Section 9 against the Corporate Debtor who is also a party to the above agreement and the amount does not fall within the definition of operational debt as laid down by Hon'ble NCLAT in the above referred citation relied by the Corporate Debtor.
15. This bench further observes that as rightly contented by Mr. Mitra, the present Petitioner i.e., the Operational Creditor has purposefully not filed the above referred earlier correspondence exchanged between the parties prior to issuing Section 8 notice and the careful perusal of the above documents clearly establishes that there are pre-existing disputes between the parties.
16. This bench further observes that the Petitioner is "approbating" and "reprobating" in claiming the amount by selectively relying under certain terms of contract while denying the liabilities under the same agreement which is impermissible in law. The Operational Creditor cannot invoke IBC proceedings through the above application unless the Petitioner qualifies himself as an "Operational Creditor" and the amount claimed shall be an "Operational Debt". As rightly contented by Mr. Mitra, the Petitioner does not qualify himself as the "Operational Creditor" nor is the amount claimed by them an "Operational Debt" under the Code.
17. For the aforesaid reasons, viewing from any angle, this bench is of the considered opinion that there is no merit in the above Application and the above Application is liable to be rejected on both counts. This Bench is also of the considered opinion that the present Company Petition is nothing but an attempt to enforce the terms and conditions of the Consortium/Joint Venture Agreement that does not fall within the realm of IBC proceedings.
18. Accordingly, with the above observations, CP (IB) No. 11/GB/2023 is dismissed.



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19. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
20. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
21. File be consigned to records.

Sd/-  
**Satya Ranjan Prasad**  
Member (Technical)

Sd/-  
**H.V. Subba Rao**  
Member (Judicial)

Signed this on 10<sup>th</sup> day of January 2024