

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
31-08-2023 AT 10:30 AM

IA(IBC) 20/2023 & IA(IBC) 1028/2022 in CP(IB) No.221/9/HDB/2022
u/s. 9 of IBC, 2016

IN THE MATTER OF:

M/s Tata International Ltd

...Operational Creditor

VS

M/s Trident Sugars Ltd

...Corporate Debtor

C O R A M:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

ORDER

Orders pronounced. Recorded vide separate sheets. In the result, the Company Petition is rejected.

IA.No.1028/2022, since Company Petition itself is rejected, no orders are required in this Application. Accordingly, IA is disposed of.

IA.No.20/2023, is taken on record and accordingly IA stands disposed of.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD
COURT No.I**

CP (IB) No. 221/9/HDB/2022

(Under section 9 of the Insolvency and
Bankruptcy Code, 2016 read with Rule 6 of
the Insolvency and Bankruptcy (AAA)
Rules, 2016)

In the matter between:

M/s Tata International Limited
Registered Office at
Lodha Excelus, 24th Floor, New Cuffe Parade,
Off Eastern freeway, Sweri-Chembur Road,
Wadala, Mumbai, Maharashtra- 400 037.

... **Applicant/Operational Creditor**

And

M/s Trident Sugars Ltd
Registered Office at
III Floor, Plot no.22, Survey No.90/1,
Trendz Eternity, Green Land Colony,
Gachibowli, Hyderabad, Telangana- 500 032.

... **Respondent/Corporate Debtor**

Date of order : 31.08.2023

Coram:

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
HON'BLE MEMBER (JUDICIAL)**

**SHRI CHARAN SINGH
HON'BLE MEMBER (TECHNICAL)**

Parties / counsels present:

For petitioner : Shri. Y Suryanarayana Ld. Counsel for Mrs.Mano Ranjani, Advocate for Petitioner

For respondent: Sri. P. Sri Raghuram, Ld. Sr. Counsel for Shri. P.Sastry, Advocate for Respondent

ORDER

1. This Company Petition is filed under Section 9 of IBC read with Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, by M/s Tata International Limited/operational Creditor (OC) against M/s. Trident Sugars Limited/ Corporate debtor claiming a sum of **Rs. 21,67,10,677/-** (Twenty One Crores, Sixty Seven Lakhs only) as on 31.10.2021. The operational Creditor seeks admission of this petition, initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.
2. **The averments in brief as made in the application are:**
 - a. It is averred that the corporate debtor had approached the operational creditor and offered to supply sugar produced from the crop of 2019-20. Thereafter both parties had entered into a Trade agreement on

30.09.2019. With regard to this operational creditor had agreed to pay an advance of Rs.15,00,00,000/- to the corporate debtor with a commitment to perform the entire contract on or before 31.03.2020.

- b. However, corporate debtor breached the contract and did not supply the sugar at all, as per the terms of the trade agreement. Subsequently an addendum was executed to the said Trade Agreement which was signed on 14.04.2020. The agreement was extended till 30.11.2020. Based on the agreement the corporate debtor agreed to pay the Operational Creditor an interest @30% p.a on a monthly basis per month i.e Rs.37,50,000/-+ GST within 5 working days from the end of every month failing which operational creditor will charge a penal interest of Rs. 36% on the outstanding amount for that month.
- c. Accordingly, Credit notes were also raised by corporate debtor in favour of the operational creditor for a total amount of Rs.6,66,98,631/- for the period 11.10.2019 to 31.03.2021.
- d. Though the operational creditor has made several requests, payments have not been received. Thus, operational creditor issued demand notice in Form 3 on 15.11.2021 claiming the outstanding amount of Rs.21,67,10,677/- (Principal of Rs.14,95,57,500/- and interest of

Rs.6,71,53,177/-) which was received by corporate debtor on 16.11.2021.

- e. It is averred that though notice has been delivered operational creditor has not received any payment or notice of dispute regarding the pending amount from the corporate debtor. Further it is stated that in pursuance of the sale agreement Mr.R N Ramnath, one of the Directors of the Corporate debtor, had executed a guarantee agreement dated 30.09.2019 with the Applicant wherein he agreed to pay the Applicant, in case the corporate debtor fails in making payment under the sale agreement.
- f. Thus, this Application is filed for initiating the CIRP against the corporate debtor M/s.Trident Sugars Limited, U/S.9 of IBC, 2016.

3. The averments as made Reply in brief are:

- a. Corporate debtor denied the averments made by the operational creditor. It is stated that the application is not maintainable due to the following reasons:
- Defective in Demand notice.
 - Existence of dispute and facts not disclosed.
 - Non-operational debt.

- Arbitration clause ignored.
- b. It is averred that notice has not been received/ nor delivered to the respondent since the Corporate debtor office was closed due to pandemic Covid-19(2nd phase). Even the notice by way of mail was not received. It is averred that email was available with the Applicant in the Trade Advance Agreement and could have easily been served during the Covid Pandemic. Further stated that the first mail was received from the Applicant on 16.07.2022.
- c. It is further averred that some of the facts has not been disclosed by the Applicant i.e
- In terms of Trade advance agreement, the sugar amounting to Rs.7,04,61,825/- was supplied after the due date of the notice.
 - The computation table at page no.49 is not correct.
 - Regarding the MOU signed by the Applicant on 18.02.2022.
- d. It is averred that the Applicant has not disclosed the facts
- That in addition to the supply of 3000 MTs of Sugar, further 2074 MTs of Sugar was delivered as per the Trade Advance agreement.

- Further after failing to meet the commitment to extend the loan on Mortgage, the Applicant has further negotiated and entered into an agreement, MOU in settlement of the delays and dues under the Trade Advance Agreement on the 18.02.2022. Further Corporate debtor has filed an Application before this Tribunal for referring this matter to Arbitration as per the terms of MOU.
- e. Further corporate debtor has stated that it is non-operational debt. It is averred that the amounts which are under the settlement agreement do not fall under the category of operational creditor as per the ruling of Hon'ble NCLT New Delhi in the matter of Ahuliwalia Contracts India Ltd Vs Logix Infratech Pvt Ltd. It is submitted that the amount which has paid in advance for supply of sugar and not for the specified purposes envisaged in 5(2) &5(21) of IBC.
- f. It is averred that the clause for arbitration both in the trade agreement dated 30.09.2019 vide Clause No.25 and in the MOU vide Clause no.09. The respondent stated that he has issued notice regarding the dispute vide email dated 01.06.2022 and further vide letter dated 23.06.2022. Notice under Section 21 of the Arbitration and

Conciliation Act has been sent to appoint Arbitrator for deciding the dispute between the parties.

g. Thus, corporate debtor has submitted that the present application is liable to be dismissed as the Applicant has not disclosed all the information and data relating to the case as on date of filing this Application.

4. Both sides filed written submissions reiterating their contentions.

The Petitioner relied on the following rulings;

- (i) Consolidated Construction Consortium Limited Vs Hitro Energy Solutions Private Limited, Civil Appeal No.2839 of 2020 by Hon'ble Supreme Court.
- (ii) Chipson Aviation P Ltd Vs Punj Lloyd Aviation Ltd, CA(AT)(INS) 261 of 2022 by Hon'ble NCLAT, Principal Bench, New Delhi.
- (iii) 5Indus Biotech Private Ltd Vs Kotak India Venture (Offshore) Fund, CA#1070/2021 @SLP©#8120/2020
- (iv) Hasan Shafiq Vs CT-Technologies ApS & Anr, CA(AT)(INS) 802 of 2020 by Hon'ble NCLAT, Principal Bench, New Delhi,

5. The respondent relied on the following case law.
 - (i) Hon'ble NCLT New Delhi in the matter of Ahuliwalia Contracts India Ltd Vs Logix Infratech Pvt Ltd.

6. Therefore, in the light of the above facts and circumstances, points that arise for consideration in this matter are:
 1. Whether the demand notice dated 15.11.2021 claimed to have been served by Petitioner on the Respondent demanding payment of the operational debt said to have been *defaulted on* 31/03/2020 by the respondent, is not enforceable under law and on facts of this case? if so, whether the company petition is maintainable?
 2. Whether the demand notice dated 15.11.2021 by Petitioner to the Respondent demanding payment of the operational debt is **not served** in such **form and manner prescribed under the IB Code**?
 3. Whether the dispute raised by the respondent can be described as 'a **pre-existing dispute**' as explained in the decision in Mobilox Innovations Private Limited v. Kirusa Software Private Limited? If so, whether the Petition is maintainable?

7. We have heard Shri Y. Suryanarayana, Ld. Counsel for the Petitioner and Shri P. Sri Raghuram, Ld. Senior Counsel for the Corporate Debtor, perused the record, written submissions and the case law.

Point. 1

Whether the demand notice dated 15.11.2021 claimed to have been served by Petitioner on the Respondent demanding payment of the operational debt said to have been *defaulted* on 31/03/2020 by the respondent, is not enforceable under law and on facts of this case? if so, whether the company petition is maintainable?

8. Shri. Y Suryanarayana Ld. Counsel for the petitioner would contend before us, that both parties herein had entered into a Trade agreement on 30.09.2019 for supply of sugar, whereunder the Petitioner/ operational creditor had agreed to pay an advance of Rs.15,00,00,000/- to the respondent/ corporate debtor with a commitment to perform the entire contract of supply of sugar to the petitioner of a quantity of 20,000 Mts on or before 31.03.2020.
9. According to the Ld. Counsel the respondent/ corporate debtor breached the contract and did not supply the sugar as per the terms of the trade agreement and subsequently an *addendum* was executed to the said Trade Agreement which was signed on 14.04.2020 and the same was later extended till 30.11.2020 where under the corporate debtor agreed to pay the Petitioner/ operational creditor an interest @30% p.a on a monthly basis per month i.e Rs.37,50,000/-+ GST within 5 working days from the end of every month failing

which operational creditor will charge a penal interest of Rs. 36% on the outstanding amount for that month. Ld. Counsel further submits that; accordingly, credit notes were raised for a total amount of Rs.6,66,98,631/- for the period 11.10.2019 to 31.03.2021 however, no payments have not been received. Hence the Petitioner/operational creditor on 15.11.2021 issued the demand notice in Form 3 claiming an outstanding amount of Rs.21,67,10,677/- (Principal of Rs.14,95,57,500/- and interest of Rs.6,71,53,177/-) for which though has been served on the corporate debtor on 16.11.2021 the petitioner/operational creditor has not received any payment or notice of dispute regarding the pending amount from the corporate debtor. Hence the present proceedings have been initiated. Relying on the rejoinder filed , Ld. Counsel strongly refuted the contentions of the respondent that the demand not has not been served on the respondent in the manner prescribed under rules hence there is no service of demand notice on the respondent , besides the other contentions of the respondent, *namely*, that the petitioner intentionally suppressed the MOU dated 18.02.2022, entered by the petitioner with the respondent *post*

issuance of the demand notice dated 15.11.2021 whereunder the payment has been rescheduled and that there is a *pre-existing dispute* between the parties in terms of sub rule 2 of Section 8 of the IB Code.

10. Sri. P. Sri Raghuram, Ld. Sr. Counsel for the respondent/corporate debtor while refuting the afore stated submission of the Ld. Counsel for the Petitioner, at the very outset, submitted that present petition is liable to be dismissed as the Applicant has suppressed the following material information despite being in knowledge of the same at the time of filing this company petition.

- Supply of sugar amounting to Rs.7,04,61,825/- after the due date of the notice.
- The MOU signed by the Applicant on 18.02.2022, i.e. post issuance of the demand notice dated 15/11/2021 and prior to filing of the present company petition where under payment schedule has been revised and to commence from February 2022.
 - Supply of 3000 MTs of Sugar, besides further quantity of 2074 MTs of Sugar as per the Trade Advance agreement.
 - Failure in honouring the commitment to extend the loan on Mortgage, the Applicant has further negotiated and entered into an agreement, MOU in settlement of the delays and dues under the Trade Advance Agreement on the 18.02.2022.

11. Ld. Sr. Counsel further submitted that, the petition is not maintainable as the demand notice dated 15/11/2021 has not been

received or delivered to the respondent, since the Corporate debtor office was closed due to Covid-19(2nd phase) pandemic by the date of alleged delivery. Ld. Sr. Counsel further submitted that even assuming that the demand notice dated 15/1//2021 has been duly served yet the date of default alleged in the said notice stood whiped of consequent to the entering into the MOU dated 18.02.2022 where by a fresh repayment schedule has been agreed as below by the parties, hence default if any can be on or after February 2022 and the present petition having been filed on the basis of the demand notice issued on 15/11/2021 is not sustainable consequently the petition is liable to be dismissed as not maintainable.

SNo	Date	Amount in Rs.
1.	Feb 2022	4,50,00,000/-
2.	Mar 2022	6,00,00,000/-
3.	Oct 2022	2,00,00,000/-
4.	Nov 2022	2,50,00,000/-
5.	Dec 2022	2,50,00,000/- + quarterly interest & GST as applicable
6.	Jan 2023	2,50,00,000/-
7.	Feb 2023	2,29,08,894/- + balance interest & GST as applicable

12. Before we proceed to decide the point above, we feel it useful to refer to sections 8 & 9 of IB Code, which are as below.

Section 8 IB Code.

- (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
- (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section
 - (1) bring to the notice of the operational creditor –
 - (a) existence of a dispute, 1 [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
 - (b) the 2 [payment] of unpaid operational debt-
 - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding 3 [payment] of the operational debt in respect of which the default has occurred.

Section 9 IB Code.

Application for initiation of corporate insolvency resolution process by operational creditor. –

- (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

- (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.
- (3) The operational creditor shall, along with the application furnish-
 - (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
 - (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
 - (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt 1 [by the corporate debtor, if available;] 2
 - (d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
 - (e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]
- (4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.
- (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—
 - (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,
 - (a) the application made under sub-section (2) is complete;
 - (b) there is no 3 [payment] of the unpaid operational debt;
 - (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
 - (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

- (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.
- (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –
 - (a) the application made under sub-section (2) is incomplete;
 - (b) there has been 4 [payment] of the unpaid operational debt;
 - (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;
 - (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
 - (e) any disciplinary proceeding is pending against any proposed resolution professional: Provided that Adjudicating Authority, shall before rejecting an application under subclause
 - (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.
- (6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section

13. It is trite law to say that service of demand notice in the form and the manner as prescribed under the Code, and the rules made thereunder is the *sine qua non*, for *initiation* of corporate insolvency resolution process against the corporate debtor by any operational creditor. As per the Explanation, provided in Section 8 of the IB Code, a “demand notice” means a notice served by an operational creditor to the corporate debtor **demanding [payment] of the operational debt in respect of which the default has occurred.**

14. In terms of section 9(5) (ii) (c) of IB Code, the Adjudicating Authority *shall* reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

15. Therefore, in the light of the law and the *factual matrix* of this case as narrated above, we now proceed to decide this point.

16. A perusal of the company petitions which was filed on 16/07/2022 discloses that the date of default of the subject operational debt has been mentioned by the petitioner as 31/03/2020. Under the demand notice dated 15/11/2021 the petitioner claimed an amount of Rs. 21,67,10,677 being the total sum due with interest as on 31.03.2021. Admittedly, on 18.02.2022 the parties herein have entered into an MOU, whereunder the dues payable by the respondent under the Trade Advance Agreement have been rescheduled as below.

SNo	Date	Amount in Rs.
8.	Feb 2022	4,50,00,000/-
9.	Mar 2022	6,00,00,000/-
10.	Oct 2022	2,00,00,000/-
11.	Nov 2022	2,50,00,000/-
12.	Dec 2022	2,50,00,000/- + quarterly interest & GST as applicable
13.	Jan 2023	2,50,00,000/-

14.	Feb 2023	2,29,08,894/- + balance interest & GST as applicable
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That apart, the said MOU also provides for creation of equitable mortgage over certain immovable properties of the corporate debtor in favour of the petitioner as security for release of a sum of Rs.9 crores by the petitioner of which Rs.4.5 crores to be adjusted towards the outstanding dues under the Trade Agreement dated 30.09.2023.

17. Indisputably, despite receipt of some payments and also supplies post 31/03/2020 (the alleged date of default) the petitioner choose not to mention the said MOU dated 18.02.2022 in the present company petition. But for the mention of entering into the MOU dated 18.02.2022 by the respondent in its counter, the fact of execution of the said MOU would not have seen the light of the day in this proceeding. Though, the Ld. Counsel for the petitioner, by filing a *rejoinder* endeavoured to plead that non-mention of entering into the MOU is not intentional and there is no intentional suppression of facts by the petitioner, having regard gravity of the consequences of admitting a respondent into CIRP in a petition filed *either* under section 7 or 9 of IB Code, besides considering the impact that the

above MOU it *may* make on the present proceedings, we are not inclined to accept the above submission of the Ld. Counsel for the petitioner since suppression of material information which is in the knowledge of the petitioner is *ex facie*, clear and unambiguous. Thus, petitioner's approach is *unclean*.

18. Here we usefully refer to the ruling of Hon'ble Supreme court of India, in re, Ramjas Foundation & Ors., supra, wherein it was held that;

“The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution **but also to the cases instituted in others courts and Judicial forums**” (Emphasis is ours).

19. Moreover, the purpose of *rejoinder* being only to explain/ clarify the correctness of the fact pleaded with respect to the *new pleas raised* by the other party in its pleadings but not to bring to light the facts which are already been in the knowledge of the party but the party failed to plead the said facts.

20. Therefore, it as *clear as crystal*, that consequent upon entering into the undisputed MOU dated 18/02/2022, whereunder the repayment of dues under the Trade Agreement dated 30.09.2023 have been rescheduled, *the date of default relied on for the purpose of the present proceeds is factually incorrect and a deliberate factual misquote by the petitioner.* As already stated, *supra*, as per the Explanation, provided in Section 8 of the IB Code, a “demand notice” means *a notice served by an operational creditor to the corporate debtor demanding [payment] of the operational debt in respect of which the default has occurred.* In the case on hand the demand notice dated 15/11/2021 admittedly was in respect of the default claimed to have occurred on 31/03/2020 which default indisputably *whipped of* consequent upon the petitioner and the respondent entering into the MOU date 18/02/2022, *supra*, whereunder the *first rescheduled payment* to commence from February 2022. The demand notice dated 15/11/2020 being prior to February 2022, and as there is no pleading as to the date of default *if any, ‘in presente’* or post entering of the MOU, *supra*, the purported default dated 15/11/2022 *cannot be treated as the date of*

occurrence of default for the purpose of the notice demanding [payment] of the operational debt in terms of the explanation provided to section 8 of the IB Code. Therefore, the present initiation of Corporate Insolvency Resolution Process against the respondent by the petitioner is nothing but a sheer abuse of IB Code, violative of Section 9(5) (ii) (C) of IB Code, besides an exercise of chasing of payment or building pressure for releasing the payment.

Hon'ble Supreme Court in Civil Appeal No.9597 of 2018, in Transmission Corporation of Andhra Pradesh limited Vs. Equipment Conductors and Cables Limited" vide para 15 has held that;

'IBC is not intended to be a substitute to a recovery forum and also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The Code cannot be used whenever there is existence of real dispute and also whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments. rejected in terms of section 9 (II) (c) of the IB Code.

The point is answered accordingly.

Point II.

Whether the demand notice dated 15.11.2021 by Petitioner to the Respondent demanding payment of the operational debt is served in such **form and manner prescribed under the IB Code?**

21. In the light of our finding on point one *supra*, discussion and finding whatsoever on this point is in significant on the outcome of this petition and therefore academic. Nevertheless, we proceed to discuss the same as the respondent not only denied service of demand notice but also contended that the even if service of notice is assumed, yet the same was not done in the manner provided under the code and rules the compliance of which is mandatory. We, therefore, for the purpose of effectively answering this Point, refer & rely on the Rule 5 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which is as below;

- (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely. -
 - (a) a demand notice in Form 3; or
 - (b) a copy of an invoice attached with a notice in Form 4.
- (2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,
 - (a) at the registered office by hand, **registered post or speed post with acknowledgement due**; or
 - (b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

22. According to the Ld. Counsel for the petitioner the demand notice dated 15/11/2021, has been served on the respondent on 16.11.2021 as per the postal track report and the said service is as per the form and manner prescribed under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 rules. A copy of postal track report also has been filed.

23. However, the Ld. Sr. Counsel's submissions on the service of demand notice is twofold. *Firstly*, Ld. Sr. Counsel contends that, service on the security guard deployed at the corporate debtor's office during Covid 2019 pandemic is not a proper service in terms of mandatory rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, herein after referred to as 'rules' for short . *Nextly*, it is contended that since the petitioner is relying on the postal track report, which is not 'acknowledgement due' as mandated under sub rule 2 (a) of Rule 5, the service if any is invalid.

24. On the issue of reliance on the postal track report, we rely on the ruling of Hon'ble High Court of Telangana in T Surva Satish vs The State Of Telangana And Another CRIMINAL PETITION No.2461 OF 2020 Decided on 9 November, 2020, wherein it was held that;

“The learned counsel for the petitioner has relied upon a Division Bench judgment of High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Ramakotaiah Vs. Assistant Commissioner, Central Excise and Service Tax, Div-IB (Ser. Tax), Visakhapatnam1, wherein the Division Bench, by relying upon Section 27 of the General Clauses Act, held as under:

"10. In this regard, it will be relevant to take note of Section 27 of the General Clauses Act, 1897, which reads as follows:

'27. Meaning of service by post:- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

11. By producing the printout of the online tracking system, the Revenue has proved in this case that they addressed, pre-paid and posted by registered speed post, the letter containing the Order-in-Original. Once these requirements of Section 27 of the General Clauses Act, 1897, are satisfied, the requirements of Section 37C of the Central Excise Act, 1944, would also stand satisfied. In view of the

above, we do not accept that the petitioner was ignorant of the order. Hence, the writ petition fails and is dismissed."

Learned counsel for the petitioner has also relied upon the office report of Apex Court in Contempt Petition (Civil) No.466 of 2020 in Civil Appeal No.262 of 2020 dated 07.08.2020, wherein the Apex Court held that the service of notice is complete in the contempt petition relying upon the postal tracking report filed by the learned counsel for the petitioner therein. By referring the same, learned counsel for the petitioner would submit that service in respect of the second respondent is completed and the second respondent has received the notice sent by him as well as this Court. He would further submit that the second respondent, despite receiving the notice, did not choose to appear before this Court.

Thus, online tracking system/report is sufficient to prove the service of notice. In the present case also, learned counsel for the petitioner has filed postal tracking report in proof of service of notice on the second respondent. Likewise, the Registry of this Court also placed postal tracking report in proof of service of notice on the second respondent. Therefore, service of notice on the second respondent is completed."

25. Thus, reliance on postal track record for the purpose of drawing a presumption in terms of section 27 of the General Clause Act, as to delivery of the demand notice dated 15//11/2021 at the office of the respondent can be drawn.
26. For better appreciation of this contention, we usefully refer to, sub-section (1) of section 8 of IB *Code specifically* says that, "an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the

corporate debtor in such form and manner as may be prescribed”. Rule 5(2) (a) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 Rules, which prescribes the form and the manner of service of demand notice, states that

“The demand notice or the copy of the invoice demanding payment referred to in sub- section (2) of section 8 of the Code, may be delivered to the corporate debtor,

- (a) at the registered office by hand, **registered post or speed post with acknowledgement due**; or*
- (b) by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor, unless the above stated procedure in complied with by the Petitioner herein, compliance procedure remain breached.*

27. Hon’ble Co-ordinate Bench in the matter of ‘Ven Infra Projects Vs Srichaitanya Chloridest Pvt Ltd’, relying on the ruling of Hon’ble NCLAT in Company Appeal(AT) (Insolvency) No.39 of 2017 between Uttam Galva Steels Vs. DF Deutsche Forfait AG and Ors. held that :- before filing an application under Section 9 of Insolvency & Bankruptcy Code, 2016 the requirements under Section 8 of Insolvency & Bankruptcy Code, 2016 are required to be fulfilled. Section 8 of IBC, 2016 is extracted hereunder:

"Section 8-Insolvency resolution by operational creditor:-

- (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. Persons who may initiate Corporate Insolvency Resolution Process by financial creditor. Insolvency Resolution by Operational Creditor.(2) The Corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor-(a) existence of a dispute, If any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;(b) the repayment of unpaid operational debt-(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or (ii) by sending an attested copy of the record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation :- For the purposes of this Section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred".

In this case, the notice was nevertheless sent as mandated by Section 8, but it is not in the prescribed format. Hence, as per the above cited judgement, the application has to fail due to non-compliance of the mandate of Rule 5 of the Insolvency & Bankruptcy Code(Application for Adjudicating Authority) Rules, 2016.

28. Reliance in this regard also can be placed on the well-recognized rule founded in Taylor vs Taylor I.L.R. [1960] 2 All. 488, which says that, *if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily*

prohibits the doing of the act in any other manner than that which has been prescribed. (Emphasis is ours)

The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

29. In the above legal frame, the factual aspects relating to the service of demand notice on the respondent when examined it is clear that the petitioner failed in placing any record before us to show that the demand notice that was claimed to have been sent to the respondent by speed post was, with ‘acknowledgement due’. Therefore, noncompliance of sub rule 2 (a) of rule 5, supra, glaringly stares at the petitioner. In so far as the email is concerned the receipt of which also has been denied by the respondent, in the absence of any proof of delivery of the said email on the director of the respondent it is not safe to conclude that the same has been delivered on the whole time director of the corporate debtor.

The point is answered accordingly.

Point III.

Whether the dispute raised by the respondent can be described as ‘a **pre-existing dispute**’ as explained in the decision in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*? If so, whether the petition is maintainable?

30. Here it may be stated that for the purpose of raising the plea of existence of a *pre-existing dispute*, failure to reply to the demand is not a bar in view of the ruling in “*Neeraj Jain Vs. Cloud walker Streaming Technologies Private Limited*” (*Company Appeal (AT) Ins. No. 1354 of 2019*) decided on 24th February, 2020 in paragraph 50, wherein it was held that,

“...Even otherwise, mere failure to reply to the demand notice does not extinguish the rights of the Operational Creditor to show the existence of a pre-existing dispute...”

31. However, in the light of our finding on points 1 & 2 above, we are of the view that it would be an exercise *in futile* to deal with this issue. We, therefore, leave this plea open, and refrain ourselves from entering in to a finding whether or not the dispute raised by the Respondent in its counter is a ‘pre-existing’ dispute.

The point is answered accordingly.

32. (i) Ld. Sr. Counsel also submitted that as the corporate debtor has filed an Application before this Tribunal for referring this matter to Arbitration as per the terms of MOU, the company petition is not maintainable. According to the Ld. Sr. Counsel the computation table at page no.49 is not correct. Ld. Sr. Counsel further submitted that the debt claimed *being* the amount payable under the settlement agreement is a *non-operational debt*, hence do not fall under the category of operational debt. In support of this plea Ld. Sr. Counsel relied on the ruling of Hon'ble NCLT New Delhi, in the matter of Ahuliwalia Contracts India Ltd Vs Logix Infratech Pvt Ltd, wherein it was held that,

“In terms of the definition, now we consider the submissions of the Applicant whether terms and conditions of the Settlement comes within the purview of Operational Debt or not? As per the definition, Operational Debt means a claim in respect of provision of goods or services including employment. Now we consider the case of the Applicant and we observe, the claim of the applicant do not fall either under the category of the supply of the goods or service rendered by the Corporate Debtor. Rather the claim of the Applicant is based on the breach of terms and conditions of the settlement agreement, on the basis of which the Applicant has claimed that there is default in payment of the amount as referred to part IV of the application. And the part of the Operational debt says a debt in respect of payment dues arising under any law for the time being enforce. Admittedly the claim of the Applicant also does not come under this part of the definition of the Operational debt.”

(ii) However, since we are rejecting this petition holding that the same is not maintainable it would be improper to go into the merits of contentions. Hence, we leave the above plea open.

33. Therefore, in the light of our discussion on points 1, 2 & 3 above, considering the submissions made by the Ld. Counsels for both sides, and the case law relied upon, we have no hesitation in holding that the Company Petition is not maintainable either under law or on facts and the same is liable to be rejected. We therefore, accordingly reject this petition. However, without costs.

34. In the result this company petition is hereby rejected, however without costs.

SD

CHARAN SINGH

MEMBER (TECHNICAL)

SD

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

MEMBER (JUDICIAL)

Pavani/Binnu