

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1457 of 2023

[Arising out of the Impugned Order dated 17.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Court-V in C.P. (IB) No. 533/MB/2022]

In the matter of:

Pravin Electricals Private Ltd.

E-S/2, First Floor, Highland Park,
Jai Shastri Nagar, Mulund (West),
Mumbai – 400 082, Maharashtra
Through Its Director
Ms. Rechel Philip Sajesh

...Appellant

Versus

Akshaya Engineering Works Private Ltd.

602 B, Vaibhav Giri, Siddhanchal Phase I,
Off. Pokhran Road, Near Vasant Vihar,
Thane – 400 601, Maharashtra

...Respondent

Present:

For Appellant : Mr. Gaurav Mitra with Ms. Poorva Garg, Ms. Lavanya Pathak, Mr. Abhay Sinha and Mr. Saswat Patnaik, Advocates.

For Respondent : Mr. Pragyan Pradip Sharma, Sr. Advocate with Mr. Manish Sarkar, Mr. Hardik Jain, Mr. Rustam Chaudhuri and Mr. Kushagra Goyal, Advocates.

J U D G M E N T
(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 17.10.2023 (hereinafter referred to as '**Impugned Order**') passed by the

Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V) in C.P. (IB) No. 533/MB/2022. By the impugned order, the Adjudicating Authority has admitted the Section 9 application filed by the Appellant-Operational Creditor and admitted the Corporate Debtor the rigours of Corporate Insolvency Resolution Process (“**CIRP**” in short). Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

2. Coming to the brief factual matrix of the case at hand, we notice that the Corporate Debtor-Pravin Electricals Pvt. Ltd. had been awarded two contracts by the Maharashtra State Electricity Distribution Company Ltd. (“**MSEDCL**” in short) on 07.03.2018. While one contract was for supply of equipment and material for which an Agreement for Supply was entered into for an amount of Rs 33.33 Cr., the second contract was for installation of plant and equipment for which an Agreement for Services was entered into for an amount of Rs 9 Cr. In terms of the two contracts, the project was to be completed within a span of 18 months. The contracts allowed the Corporate Debtor to sub-contract the works to another party. The Appellant-Corporate Debtor sub-contracted the work to Akshaya Engineering Works Pvt. Ltd.–Operational Creditor. The Appellant had awarded two Letters of Award (“**LoA**” in short) in favour of the Operational Creditor-Respondent on 07.7.2018 which culminated into two contracts viz. Contract Agreement for Services and Contract Agreement for Supply which were both dated 07.07.2018. Prior to subcontracting the work by the Corporate Debtor, the MSEDCL had issued two Notices to Correct on 09.04.2018 and 19.05.2018 on the Corporate Debtor for delay in execution of work. Pursuant to the sub-contract, the Operational Creditor claimed to have provided the services/supplies in terms

of the Contract Agreements and thereafter raised 17 invoices against which the Corporate Debtor purportedly made only partial payment. As the residual payments were not forthcoming, the Operational Creditor sent a Demand Notice dated 14.12.2021 under Section 8 of the IBC to the Corporate Debtor. The Corporate Debtor replied to the Demand Notice on 25.02.2022. Since the default continued, the Operational Creditor filed the Section 9 application on 16.03.2022 for an outstanding debt of Rs 1.54 Cr. including interest. Holding that the Operational Creditor had successfully demonstrated the existence of debt and default with no pre-existing dispute between the parties, the Adjudicating Authority admitted the Section 9 application vide impugned order dated 17.10.2023. Aggrieved by the impugned order, the present appeal has been preferred by the Authorised Representative of the Corporate Debtor

3. Making his submissions, Shri Gaurav Mitra, Ld. Counsel for the Appellant vehemently contended that the outstanding dues claimed by the Operational Creditor of Rs 1.54 Cr. is disputed being neither due nor payable. It was submitted that the Contract Agreements for supply and services which was entered into by the Appellant with the Respondent mirrored corresponding terms as in the contract awarded to the Corporate Debtor by MSEDCL including the payment terms which were back-to-back as per contract of the Corporate Debtor with the MSEDCL. The Corporate Debtor had already paid 60% of the material supply invoices and 90% of the service/installation invoices as stipulated in the terms of payment. The balance amount was payable only on final reconciliation and closure of the project by the MSEDCL. Mere raising of invoices did not entitle the Respondent to receive payment. The Respondent never produced any

authentic HOTO Certificate before the Adjudicating Authority to show that work was completed as per terms of the contract but relied on an undated and unsigned extract of this certificate which was not even issued on letterhead of MSEDCL. In any event, the Respondent could not have obtained HOTO certificate as they had failed to erect, test and commission all the materials supplied up to the standards of satisfaction as set out by MSEDCL. Since reconciliation of running accounts was still pending with MSEDCL and financial account statement was yet to be received from MSEDCL, the balance payments of 40% and 10% amounts have been legally withheld. It has been the consistent stand of the Appellant including in their reply to the Demand Notice that they did not owe any debt to the Operational Creditor. Reliance has been placed on the judgment of ***Sabarmati Gas Ltd. VS Shah Alloys Ltd. (2023) 3 SCC 229*** to contend that in case reconciliation has not taken place, the dues payable are liable to become a subject of pre-existing dispute.

4. Elaborating further it was submitted that it was incumbent for the Operational Creditor to meet the satisfaction of MSEDCL which it failed to fulfil. Various problems had cropped up in installation and supply including quality of services and consequently MSEDCL had claimed certain amounts towards material return, unexecuted work penalty and risk and cost etc. It was submitted that these deficiencies in work execution had arisen on account of negligence and incompetence of the Operational Creditor. Several e-mail communications were also sent by the Corporate Debtor to the Operational Creditor from 17.11.2018 to 16.03.2020 regarding their slipshod performance. It was strenuously contended that these communications testify the presence of pre-existing disputes between the parties. It is contended by

the Corporate Debtor that the Adjudicating Authority erroneously relied on the misplaced submission made by the Operational Creditor that the quality and time of work executed by them had met the satisfaction of both the end user innumerable copious exchange of communications which substantiated the presence of pre-existing disputes.

5. It is also the contention of the Appellant that the Respondent has wrongfully claimed interest in terms of the MSME Act though the Operational Creditor did not have MSME registration during the period that they had raised invoices. Submission was made by the Appellant that it is a profit-making company which is financially solvent having large number of employees on its rolls. It was also contended that the Appellant has never defaulted on any loans from any financial institution. The IBC proceedings not being debt recovery proceedings, present Section 9 application being a recovery attempt in the guise of insolvency should not have been allowed by the Adjudicating Authority.

6. Refuting the contentions made by the Appellant, submissions were made by Shri Pragyan Pradip Sharma, Ld. Sr. Counsel for the Respondent-Operational Creditor that is undisputed that the Operational Creditor had raised 17 invoices totalling Rs 4.43 Cr. from 31.10.2018 to 18.10.2019. As per Clause 8.3 of the General Conditions of Contract ('GCC' in short), payments against invoices became due within 21 days and the same not having been paid, debt had become due and payable. The absence of any protest or objection to the invoices establish a clear admission of debt being due and payable towards the Operational Creditor, making it a fit case for

admission of Section 9. Further partial payment of Rs 3.28 Cr. was already made without protest which also constitutes a tacit acceptance of the invoices.

7. It has also been stated that in the e-mail dated 02.05.2019, the Corporate Debtor had acknowledged their liability to pay Rs 1.70 Cr. towards 7 invoices. Further, the Corporate Debtor in their own reply dated 25.02.2022 to the Demand Notice received from the Operational Creditor has admitted that they were unable to pay the Operational Creditor since they had not received payment from MSEDCL. This goes to show that the Corporate Debtor had not only admitted their liability but also conceded that their inability to pay was not on account of any dispute with the Operational Creditor but on account of non-receipt of payment from MSEDCL. It was asserted that inability on the part of the Corporate Debtor to receive payment from MSEDCL does not confer any right upon them to withhold payments due to the Operational Creditor under the sub-contract. The liabilities which arose under sub-contract was independent of the happenings in the contract between Corporate Debtor and MSEDCL. It was vehemently contended that the stand taken by the Corporate Debtor that payment to the Operational Creditor was contingent upon receipt of payment from MSEDCL under a “pay when paid” model is misconceived. It was submitted that the Adjudicating Authority has correctly relied on the judgment of the Hon’ble Supreme Court in ***Zonal General Manager, IRCON International Ltd. Vs Vinay Heavy Equipment’s (2015) 13 SCC 680*** and the judgment of Hon’ble Delhi High Court in ***National Projects Construction Corporation Ltd. Vs Harvinder Singh & Company 2018 SCC OnLine Del 9573*** in holding that the principle of “pay when paid” is not fit to be applied in the present matter.

8. Submission was also made that as regards the e-mails referred to by the Appellant to establish disputes, none of these letters preceded the Contractual Agreement or Demand Notice and therefore do not constitute a pre-existing dispute under IBC. These disputes were raised only in the written submissions after final arguments before the Adjudicating Authority. The bogey of pre-existing dispute surrounding the claim has been raised by the Appellant as a calculated afterthought to escape contractual obligations. The GCC provided for resolution procedure clause to be followed in the event of a dispute. The Appellant not having invoked this clause testifies the absence of any pre-existing dispute. Hence the defence of pre-existing dispute is vague and untenable.

9. Further, the performance of the Operational Creditor has been wrongly questioned by the Corporate Debtor. The satisfactory performance of the Operational Creditor stands confirmed by the issue of HOTO certificate received from MSEDCL. The Notice of MSEDCL dated 09.04.2018 and 19.05.2018 and Show Cause Notice dated 07.06.2018 pre-dated the engagement of the Operational Creditor which happened on 07.07.2018, Hence, delay, if any, was clearly attributable to the Corporate Debtor. The Notices issued from MSEDCL regarding delay or non-performance of the project work never fixed any liability on the Operational Creditor. The upshot is that there was no infirmity in the impugned order admitting the Section 9 application.

10. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

11. The short point for consideration is whether there was any discernible pre-existing dispute surrounding the debt claimed to be due and payable by the Operational Creditor. This examination would be in line with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353**.

12. At the outset it will be both useful and relevant to refer to paras 33, 51 and 56 of **Mobilox judgment supra** which is extracted as hereunder: -

“33.....What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case maybe. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days sent and attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that an operational creditor has encashed a cheque or otherwise received payment from the corporate debt [Section 8(2) (b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2).....”

51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the

defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

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

13. Coming to the issue of whether the debt was due and payable, it is the case of the Appellant that the outstanding dues claimed by the Operational Creditor of Rs 1.54 Cr. is neither due nor payable. It is also the contention that payment as stipulated under the contract had already been made and balance was payable only after reconciliation of running accounts which exercise was still pending. Per contra, it has been contended by the Operational Creditor that since there was no protest or demur by the Corporate Debtor at the time of acceptance of the 17 bills submitted by them, it shows that the Corporate Debtor had unequivocally admitted their liability and non-payment thereof led to default on the part of the Corporate Debtor. Submission was pressed that correct finding has been returned by the Adjudicating Authority in that the Corporate Debtor had accepted their liability in their e-mail dated 02.05.2019 containing the Ledger Statement of the Operational Creditor in their own books for an outstanding balance of Rs 1.70 Cr. No contest or protest was raised on the residual amount to be paid to the Operational Creditor.

14. Coming to our findings, we notice that both the Operational Creditor and the Adjudicating Authority have primarily relied on the e-mail dated 02.05.2019 to conclude that the Corporate Debtor had acknowledged their liability to pay Rs 1.70 Cr. towards 7 invoices. Subsequent emails exchanged between the two parties have been lost sight of by the Adjudicating Authority. It would be pertinent to point out that the Operational Creditor in their e-mail dated 27.07.2021 had sought balance confirmation of their ledger as was appearing in the books of accounts of the Corporate Debtor as maybe seen at page 129 of Appeal Paper Book ('**APB**' in short). This was replied to by the Corporate Debtor on 08.08.2021 categorically stating that the Respondent's ledger cannot be confirmed until final closure of the project by MSEDCL. The said emails appearing at page 128 of APB is extracted below:

From: Priya Sajesh

Sent: 08th August 2021 10:47

To: Akshaya Account; Pravin Electricals Pvt. Ltd.

Subject: Re: LEDGR CONFIRMATION

Dear Ajay,

Your ledger cannot be confirmed until the final closure MSCEDL project.

Best Regards,

15. The above e-mail of 08.08.2021 was followed by another e-mail on 04.09.2021 in which the Corporate Debtor again denied that they had confirmed any outstanding payment. This e-mail is as extracted below:

From: Rahul N Patil [mailto:billing@pronettechnologies.com]

Sent: 04/09/2021 5:47 PM

To: 'Sadanand Deshmane'; 'priya.sajesh@pronettechnologies.com'; 'Pravin Electricals Pvt Ltd';

Subject: RE: Billing status of DD-125 between PEPL & AEWPL

Dear Sadanand sir

We had discussion to have clarity on the bills that are booked in line with bills as per MSEDCL & we did not confirm any outstanding payment.

We will update you after our closure of bill with MSEDCL.

As you are well aware the bill of DD-29 & DD-125 are not booked in MSEDCL system

16. It is clear therefore from the above two e-mails which were both issued prior to receipt of Demand Notice, that the Corporate Debtor had categorically disputed the debt claimed by the Operational Creditor and contended that the balance amount was to be paid only on final reconciliation and closure of the project which reconciliation was still pending with MSEDCL as running accounts statement was yet to be received from MSEDCL.

17. Since reconciliation adjustment was yet to be done by MSEDCL, the debt due and payable had not yet crystallized. Since the project was yet to see the final closure, the debt amount if any was not yet firmed and final and hence not due and payable. We are therefore inclined to agree with the Corporate Debtor that the Adjudicating Authority had failed to take notice of the fact that there existed dispute between the parties regarding the fact whether the debt claimed by the Operational Creditor was accepted by the Corporate Debtor as due and payable or not.

18. Be that as it may, we now address the argument canvassed by the Operational Creditor that the inability of the Corporate Debtor to pay was not on account of any dispute with the Operational Creditor but on account of non-receipt of payment from MSEDCL. Thus, this is not a case that the debt was not due but one wherein the Corporate Debtor was unable to pay the Operational Creditor since they had not received payment from MSEDCL as is clearly manifested in the Reply to the Demand Notice sent by the Corporate

Debtor on 25.02.2022. It was further contended that the contract between the Corporate Debtor and Operational Creditor created separate privity of contracts and independent obligations and cannot be enmeshed with the liabilities and obligations arising out of the contractual arrangement between Corporate Debtor and MSEDCL. Both these contracts being separate contracts in the eyes of law, parties were entitled take recourse against each other to enforce their rights under the contract in which they have privity. Hence the Operational Creditor was well within its rights to file a Section 9 application against the Corporate Debtor as the latter had failed to discharge its obligations of clearing their outstanding liability.

19. At this stage it may be useful to first notice the relevant paragraphs of the Notice of Dispute dated 25.02.2022 as raised by the Corporate Debtor in the context of terms of payment before we return our finding as to whether the contract between the Corporate Debtor and MSEDCL, on the one hand, and the contract between the Corporate Debtor and Operational Creditor, on the other hand had any *inter-se* bearing on each other. The relevant paragraphs from the Notice of Dispute are as reproduced below:

“6. As per the Contract/Agreement, the payment terms and conditions has been clearly stipulated in the said agreement dated 07.07.2018 at Appendix 1-terms and procedures of payment. The said terms and conditions of procedures of payment has been clearly confirmed by you at the signing of the contract wherein the terms of payment stipulates payment on back to back work order.

7. As a result thereof, since all payment terms are back to back as per our contract with MSEDCL and on receipt of payments from MSEDCL the said payments would have been released to you. Apparently, vide letter dated 01.03.2019 which is to your knowledge and information due to poor progress the scope of tender was limited to only touched work and the contract was partially terminated vide letter under ref No. 5 in respect to Tender No. DD-125.

11. On one hand there are several emails issued by you to M/s. Pravin Electricals Pvt. Ltd., demanding payment of outstanding amount which you have categorized as operational debt and on the other hand M/s Pravin Electricals Pvt. Ltd. is facing the brunt of MSEDCL primarily because of the negligence at your end. It be noted that the payment terms was clear right at the beginning. In fact the contract was executed with the clear condition that your clients would receive payments only on payment received from MSEDCL. In fact, M/s Pravin Electricals Pvt. Ltd., has not received the sum of Rs.1.88 Crores and therefore, the liability as alleged by you and claimed by you to the extent of Rs. 1.54 crores is bad in law and is an attempt to usurp money out of our clients and so is the Notice issued under form-3 on our clients. The entire story as set out in the Demand Notice, clearly has left out core issue of payment terms and the said payment terms is the moot question and crux of the said dispute as and by way of demand in the Notice under form-3 dated 14.12.2021.

12. You M/s Akshaya Engineering Work Pvt. Ltd. was issued contract by our clients M/s Pravin Electricals Pvt. Ltd. for supply installation plant and machinery as the sites of MSEDCL and you have not fulfilled the contract as a result thereof MSEDCL has penalized M/s Pravin Electricals Pvt. Ltd. and therefore, the sum of Rs. 1,54,41,823 as demanded by you being outstanding is not tenable in law primarily because of the fact that our clients has not received money against the said invoice and that MSEDCL has themselves penalized our clients to the extent of Rs. 1.88 crores for the reason of negligence and poor performance and mishandling, pertaining to the work assigned to you and the said penalty could be only attributed to your negligence and poor work progress as described and mentioned in the letter dated 01.03.2019.”

(Emphasis supplied)

20. When we read the above Notice of Dispute it is clear that Corporate Debtor has stated loud and clear that the payment terms is the crux of the dispute. It is contended by the Appellant that in terms of the Supply and Service Contract, the payment terms with the Operational Creditor was back-to-back corresponding with the contract between the Appellant and MSEDCL as elaborated in Appendix-I therein. Per contra, it is the contention of the Respondent that the agreement between the Appellant and MSEDCL was

distinct from the contractual agreement between the Corporate Debtor and Operational Creditor and the two contracts not being interdependent would have no bearing on each other. Submission was also pressed that the doctrine of privity of a contract under the common law principle implies that only parties to a contract are allowed to sue each other to enforce their rights and liabilities and no stranger is allowed to confer obligations upon any person who is not a party to contract.

21. To weigh the force of the rival contentions, we may now take notice of the Contract Agreements for supply of material and for installation and services and the LoAs entered into by the Appellant with the Respondent. The LoA for Supply is placed at page 71 of APB and LoA for Services is placed at page 76 of APB. Clause 9 of both LoAs stipulate that the milestone chart and construction schedule finalized by the Project Manager of MSEDCL will form part of the agreement to be signed by the Respondent-Operational Creditor with MSEDCL. More significantly, Clause 12 of Supply LoA and Clause 11.1 of Service LoA specifically mentions that all payment terms to the Respondent-Operational Creditor are back-to-back in terms of the contract between the Appellant and MSEDCL as elaborated in Terms and Procedure of Payments at Appendix-I. The LoAs therefore mirrored corresponding terms as in the contract awarded to the Appellant by MSEDCL. When we run our eyes through the terms and procedure for payment in Appendix-I at page 108 of APB, it lays down that for contract for supply, in terms of Clause 2.1 thereof, the first instalment of 60% would be mobilization advance for adjusting payments made against supplies subject to submission of certificate by Project Manager of MSEDCL that materials have been supplied. The second

instalment of 30% as envisaged under Clause 2.2 was payable subject to submission of certificate on measurement book by Project Manager of MSEDCL. Clause 2.3 specified that the balance 10% was to be reimbursed on successful testing and commissioning of the project and issue of HOTO certificate. For contract of service, in terms of Clause 3.1, the first instalment would be 90% paid on erection, testing and commissioning subject to material reconciliation statement and final instalment of 10% on submission of certificate by Project Manager of MSEDCL that installation and commissioning has been completed successfully and that assets are created and taken over by MSEDCL.

22. It is the case of the Appellant that in terms of Clause 2.3 of the Appendix-1, only 60% payment had to be made for material supply which has already been done. The remaining 30% and 10% was payable upon submission of Certificate on Measurement Book by MSEDCL Project Manager and issue of HOTO Certificate by the Employer. Similarly for erection and installation work, as per Clause 3.1 of the Appendix-1, only 90% was to be paid which has been done while 10% was paid upon issue of HOTO Certificate. Thus, the payments having already been made in accordance with terms of payment as outlined in Appendix-1, debt and default has been disputed by the Appellant.

23. This brings us to the issue whether the MSEDCL had given their certification on the material supplied and successful installation and commissioning.

24. It is the case of the Operational Creditor that they have placed on record by way of additional documents at pages 8-247 the various HOTO certificates

issued to them by MSEDCL which clearly shows that there was no deficiency or disability on behalf of the Operational Creditor with respect to the quality of work or timely execution of work. The issue of HOTO certificates validates their claim as rightful claim. The “Notices to Correct” of MSEDCL dated 09.04.2018 and 19.05.2018 and Show Cause Notice dated 07.06.2018 predated the engagement of the Operational Creditor. Much emphasis was also laid that delay in the execution of the project work was not attributable to them but had arisen before their joining. It was further pointed out that the Operational Creditor cannot be blamed for any delay since they had been engaged nearly 10 months after the contract between the Corporate Debtor and MSEDCL had commenced.

25. This argument has been repelled by the Corporate Debtor stating that mere submission of abstract sheet or HOTO Certificate will not render the account reconciliation complete between the parties. It is also contended that the Respondent has conveniently not mentioned the activity/work for which material has been supplied but has not been installed, tested and commissioned and that much credence cannot be given to these HOTO certificates. Further if the HOTO certificates from MSEDCL were already in place it remains unexplained why till date reconciliation of accounts has remained standstill and full payments were not released by MSEDCL. It was submitted that if the HOTO certificates are to be believed then it is inexplicable that MSEDCL would issue a Notice penalizing the Corporate Debtor for a sum of Rs 1.88 Cr. because of the poor and dismal performance of the project work. MSEDCL has also levied certain amounts for recovery as a result of shoddy and delayed work as below:

- (i) Material Return Deliveries- Rs 62,43,542.40/- i.e. material which was not installed by Respondent which ought to have been delivered to MSEDCL since Respondent was paid for the same.*
- (ii) Recovery for dismantling Old Poles- Rs 3,93,000/-*
- (iii) Unexecuted work penalty- Rs 38,55,000/- for the touched work, execution of which was not completed by the Respondent.*
- (iv) Risk & Cost- Rs 3,10,63,000/- levied due to partial termination of the contract due to very slow progress and poor performance by the Respondent.*

26. Prima facie when we peruse the material on record, there is no material to support that MSEDCL had tendered its full satisfaction report with regard to work completion either to the Corporate Debtor or the Operational Creditor. Instead, we find that MSEDCL not only pointed out shortcomings in the work execution but also had to partially terminate the contract. We notice that MSEDCL had convened a meeting on 19.11.2018 to review work progress for timely completion. The Operational Creditor did not attend this meeting though invited by the Corporate Debtor over email on 17.11.2018 (page 115 of APB) to attend. On 27.11.2018, the Appellant forwarded the Minutes of the Meeting to the Respondent-Operational Creditor (page 116-118 of APB) wherein MSEDCL after review of activity wise work progress expressed extreme displeasure on the work progress. As the time stipulated for completion of the works was 28.02.2019 and timeliness was held to be the essence of the contract, we find a communication from MSEDCL dated 09.01.2019 (page 443 of APB) partially terminating the contract due to failure to execute the work as per agreed milestones. This partial termination was issued after reviewing the progress of work undertaken during 23.08.2018 to 14.11.2018 during which period the Operational Creditor had already been sub-contracted the work. The MSEDCL besides expressing their displeasure

also levied risk and cost of Rs 3.10 Cr. towards partial termination. Yet another letter was issued by MSEDCL to the Corporate Debtor on 28.06.2019 highlighting the poor work performance and calling upon to expedite the touched work of the partially terminated contract. This letter of MSEDCL was brought to the knowledge of the Operational Creditor on 01.07.2019 (page 539 of APB). The fourth e-mail was sent on 16.07.2019 by the Corporate Debtor to the Operational Creditor called upon them to improve their performance since the project stood delayed due to negligence of the Operational Creditor (page 122 of APB). The fifth e-mail sent by the Corporate Debtor to the Operational Creditor was on 26.07.2019 (page 123 of APB) requesting them to complete the touched work before 15.08.2019 since MSEDCL had threatened to short close the tender. The Operational Creditor was again reminded on 30.07.2019 to complete all the touched work before 15.08.2019 (page 124 of APB) by the Corporate Debtor and that on levy of penalty it will be recoverable from the Operational Creditor. On 03.07.2019, MSEDCL informed both the Corporate Debtor and Operational Creditor regarding non installation of bill boards by them (page 542 of APB). The MSEDCL again complained to both the Corporate Debtor and Operational Creditor even after expiry of the contractual deadline for completion of balance unexecuted works (page 543 of APB).

27. These disputes have also been echoed in the Notice for Dispute by the Appellant which is as extracted below:

8.The said contract by MSEDCL was re-assigned to you vide Contract/Agreement dated 07.07.2018. Apparently due to the bad progress and your client's negligence, MSEDCL has penalised M/s. Pravin Electricals Pvt. Ltd. As a result thereof letter dated 01.03.2019

was issued to M/s Pravin Electricals Pvt. Ltd., clearly stipulating the reasons for partial termination of Turnkey contract of such nature which was otherwise a very profitable venture to M/s Pravin Electricals Pvt. Ltd.

9. Infact, MSEDCL has informed our clients that huge material debits aggregating to Rs.1.88 crores is due from our clients. As a result thereof due to your mishandling the material debits of Rs.1.88 crores, our client has suffered monetarily.

10. Apparently under no circumstances can the Notice under Form-3 be issued to our clients M/s Pravin Electricals Pvt. Ltd. and MSEDCL has verge of issuing Notice penalizing our clients M/s. Pravin Electricals Pvt. Ltd for a sum of Rs. 1.88 Crores and the said penalization was primarily because of the poor performance of your clients and also the fact that the supply installation and commissioning and all other works was not up to the standards as set out by MSEDCL. Our clients M/s. Pravin Electricals Pvt. Ltd. had to bear the brunt of such poor performance and as a result thereof our clients, has lost market goodwill and contracts has been partially terminated only on account of your clients negligence and poor performance and since you have not bothered to adhere to timely stipulations as per the contract."

(Emphasis supplied)

28. When we look at the above emails and correspondences which find mention at para 23 above and the Notice of Dispute extracted above, it becomes clear that not only the Corporate Debtor but even MSEDCL had on occasions exchanged communications with the Operational Creditor highlighting their shoddy performance. All these emails and correspondences between 17.11.2018 to 16.03.2020 which eventually led to partial termination of the contract relates to the period when the work had already been sub-contracted to the Operational Creditor for which they cannot deny accountability. We therefore find substance in the contention of the Corporate Debtor that these communications which pre-date the issue of Section 8 Demand Notice clearly evidences pre-existing disputes between them and the

Operational Creditor. We have no hesitation in observing that the Adjudicating Authority has erroneously ignored this copious exchange of communications between the MSEDCL, Appellant and Respondent raising issues on the quality and timeliness of work including imposition of penalties, risk and cost. When MSEDCL never gave final closure of the project, the Adjudicating Authority grossly erred in accepting the unilateral submission made by the Respondent that the work executed by them was perfect in nature which met the satisfaction of both the End User as well as the Corporate Debtor.

29. We are therefore satisfied that there is sufficient foundation that genuine pre-existing disputes existed between the two parties not only on whether the debt had crystallised and was payable but also on the deficiencies and shortcomings of the work executed. These disputes though amply borne out by records have been glossed over by the Adjudicating Authority. In the present factual matrix, the defence raised by the Corporate Debtor is plausible, which to our minds, deserves further investigation. The ratio of judgment by the Hon'ble Supreme Court in ***Mobilox judgement supra*** is squarely applicable in the facts of the present case. It is not the remit of IBC to investigate such contractual disputes and the defence raised by the Corporate Debtor not found to be moonshine, Section 9 application could not have been initiated at the instance of the Operational Creditor.

30. For the foregoing reasons, we are of the considered opinion that the Adjudicating Authority committed serious error in admitting Section 9 application in the facts of the present case. We therefore, allow the Appeal. The impugned order dated 17.10.2023 initiating CIRP of the Corporate Debtor

and all other orders pursuant to impugned order are therefore set aside. The Corporate Debtor is released from the rigours of CIRP and is allowed to function independently through its board of directors with immediate effect. We are however not expressing any views on the merits of the disputes raised and in the event the Respondent-Operational Creditor is desirous of seeking alternative legal remedy, it shall remain open to agitate before the appropriate legal forum as permissible in law. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 30.07.2025

Harleen/Abdul