



IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 2/KB/2021

*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.*

IN THE MATTER OF:

Ahluwalia Contracts (India) Limited

... Operational Creditor/ Applicant.

Versus

Shristi Infrastructure Development Corporation Limited

... Corporate Debtor/ Respondent.

Date of Pronouncement: April 26, 2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

APPEARANCE:

**For the Applicant/
Operational Creditor:**

**Mr. Ishaan Saha, Adv.
Mr. Tanish Ganeriwala, Adv.
Ms. R. Goyal, Adv.**

**For the Respondent/
Corporate Debtor:**

**Mr. Rishav Banerjee, Adv.
Mr. Rajarshi Banerjee, Adv.**

ORDER

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Per: Bidisha Banerjee, Member (Judicial):

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1. The Court congregated through a hybrid mode.
2. The Learned Counsel, Mr. Ishaan Saha appearing on behalf of the Applicant and Mr. Rishav Banerjee appearing on behalf of the Respondent were heard at length.
3. The instant applicant has been preferred by **Ahluwalia Contracts (India) Limited**, hereinafter referred to as the “Applicant”/ “Operational Creditor” under Section 9 of the

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Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" against **Shristi Infrastructure Development Corporation Limited**, hereinafter referred to as the "Respondent"/ "Corporate Debtor" seeking the commencement of the Corporate Insolvency Resolution process (for brevity "CIR Process") in respect of the Corporate Debtor, herein.

4. The amount claimed to be in default is as under:
- a. **Principal Amount = Rs. 3,62,67,257/-** as on 28.01.2018.
 - b. **Interest** accrued on principal amount = **Rs. 1,87,61,599/-** from 28.01.2018 to 11.12.2020.
 - c. **Total amount** claimed to be in default = **Rs. 5,50,28,856/-**

Facts in a nutshell:

5. The Operational Creditor entered into a contract on 25.04.2012 with the Corporate Debtor for constructing a five-star hotel at New Town in Rajarhat at the contract value of Rs. 85 Crore, which was completed by the Applicant on 31.08.2015, within the stipulated extended time.
6. The Corporate Debtor issued the competition certificate on 07.11.2016 and 13.11.2017, the Corporate Debtor certified the entire amount of work done by the Operational Creditor at Rs. 91,70,78,214/- excluding Security Deposit and held amounts.
7. On 25.07.2019, the Operational Creditor called upon the Corporate Debtor to make payment of the said outstanding amount against which, the Corporate Debtor admitted its

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liabilities towards the Operational Creditor amounting to Rs. 2,87,44,710/-.

8. On 30.06.2020, the Operational Creditor by its letter raised a demand for Rs. 3,62,67,257/- as an outstanding for the works completed by the applicant on 31.08.2015.
9. The Operational Creditor issued a statutory notice of demand under Section 8 of the I&B Code and under Form 3 of the Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 to the Corporate Debtor on 26.09.2020.
10. The Corporate Debtor issued a reply to the demand notice dated 26.09.2020, on 08.10.2020.

Applicant's submissions:

11. The Learned Counsel, Mr. Ishaan Saha appearing on behalf of the applicant would submit that the applicant entered into an agreement on 25.04.2012 annexed at Pages 28 to 32 to the application with the respondent for the execution of balance civil work for piling, RCC Basement, superstructure, and associated works for construction of a five-star hotel. The contract value was Rs. 85 Crore.
12. The Learned Counsel for the applicant further submits that the work was completed by the applicant within the stipulated time i.e., by 31.08.2015 to the satisfaction of the corporate debtor. However, the Corporate Debtor issued the completion certificate on 07.11.2016 which certified the work done at Rs.

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91,70,78,214/- on 13.11.2017 excluding Security Deposit and withheld amounts. The certified amount of work as calculated by the Corporate Debtor is annexed at Page 36 to the application.

- 13.** It is further submitted that through a letter dated 25.07.2019, annexed at Page 37 to the application, the applicant called upon the respondent to make a partial payment. However, the respondent after a long year gave a reply through a letter dated 19.06.2020, annexed at Page 40 to the application, wherein the corporate debtor admitted its liability towards the applicant to the tune of Rs. 2,87,44,710/-.
- 14.** It is contended that not limiting its claim to the admitted amount of Rs. 2,87,44,710/-, the applicant issued a letter on 30.06.2020, annexed at Page 41 to the application claiming the total outstanding of Rs. 3,62,67,257/-.
- 15.** The Learned Counsel for the applicant took us to clause 60.7 of the agreement dated 25.04.2012, which provides that:

“FINAL BILL:

Not later than 45 (Forty Five) days after the issue of the Taking-Over Certificate in respect of the whole of the Works pursuant to Sub-Clause 48.1, the Contractor shall submit to the Engineer a Draft Final Bill along with detail measurement of work done, account of the materials, plant and machinery issued by the Engineer/ Owner with supporting documents showing in detail, in the form approved by the Engineer,

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- a) *the final value of all work done in accordance with the Contract up to the date stated in such Taking-Over Certificate*
- b) *any further sums which the Contractor considers to be due and*
- c) *an estimate of amounts which the Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in such Draft Final Bill.”*

16. Further, he has drawn our attention to clause 60.11 of the agreement dated 25.04.2012 which provides that:

“Time for Payment:

The amount due to the Contractor under final certificate issued by the Engineer pursuant to this Clause and the 60% of the retention money, shall subject to Clause 47, be paid by the Owner to the Contractor within 75 (Seventy Five) days after date of submission of Final Bill by the Contractor.”

17. The Learned Counsel for the applicant further claims that the corporate debtor has acknowledged the debt and its liability as under:

- a. The Operational Creditor in terms of the agreement dated 25.04.2012, issued a draft final bill dated 13.07.2016 for Rs. 3,61,18,255/- (at Page 85 to the Reply Affidavit, Vol. I). The Corporate Debtor at para 4.15 in its Reply to the Section 8 Demand Notice, admits

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that they have received such final bills (annexed at Page 72 to the application).

- b.** Further, upon receiving such draft Final Bill dated 13.07.2016, the Corporate Debtor issued a Completion Certificate on 07.11.2016, in favour of the Operational Creditor, annexed at Page 35 to the application and also issued balance confirmation annexed at Page 36 to the application. During the course of the argument, no demur has been pleaded or placed to the said Completion Certificate dated 07.11.2016 by the Corporate Debtor.
- c.** Further, by way of a letter dated 19.06.2020, the corporate debtor acknowledged the amount of Rs. 2,87,44,710/- due and owing to the Operational Creditor and the letter dated 19.06.2020, has been admitted by the Corporate Debtor at para 7 of the Reply to the Section 8 Demand Notice, annexed at Page 86 to the application.

Respondent's submissions per contra:

- 18.** The Learned Counsel, Mr. Rishav Banerjee, appearing on behalf of the Corporate Debtor would submit that the amount claimed by the applicant as a purported unpaid operational debt is not payable in fact and/or law and no default has been committed by the Respondent.

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- 19.** It is claimed that the Applicant as per its own statements has admittedly received at least 96.05% of the alleged certified value of work done by it from the Respondent. It is further claimed that the total outstanding amount was Rs. 3,62,67,257/- whereas the entire amount of work (gross value) executed by the applicant was to the tune of Rs. 91,70,78,214/-.
- 20.** Further, the Learned Counsel for the Corporate Debtor has claimed that nothing remains due and payable by the respondent to the applicant as per the terms of the contract that mandate the imposition of liquidated damages and deductions for defective/incomplete works. It is submitted that the admitted final Contract Value is Rs. 95,98,44,943/-, as per para 2 of Applicant's Letter dated 25.07.2019. A Liquidated Damages (LD) amounting to around 5% of Contract Value has been levied on the Applicant, which should amount to at least Rs. 4,79,92,247/- (5% of Rs. 95,98,44,943/-). Such liquidated damages have been levied (deducted) on the Applicant as per explicit terms of the Contract mandating that time is of the essence and liquidated damages are payable by the Operational Creditor for delays. The Learned Counsel for the Respondent has drawn our attention to Article 2.1 of the Agreement dated 25.04.2012, which mandates that **time is of essence**, and Articles 2.2 and 2.3 of the Agreement dated 25.04.2012, mandate that **liquidated damages is to be paid** by the applicant for delay.
- 21.** It is contended that the Contracted works were admittedly required to be completed within 01.03.2013, i.e., within 12

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months from 01.03.2012 (effective date of contract), as admitted by Applicant in Letter dated 25.07.2019. the last extension of time was only till 31.03.2015 as admitted by applicant in its Letter dated 25.07.2019, annexed at pages 303-308 to the Reply Affidavit requesting extension of time. The contract was admittedly completed only on 31.08.2015.

22. Further, vide letter dated 23.12.2014 annexed at page 344 to the Reply Affidavit, the Respondent wrote the Applicant that *“notwithstanding grant of provisional extension of time under any of the sub-clauses mentioned here in (sic) time shall continue to be treated as the essence of the contract on the part of the contractor.”* Further, vide email dated 18.07.2019, annexed at page 292 to the Reply Affidavit, the Respondent a liquidated damages amounting to 5% of the contract value was imposed on the applicant due to delay in completion of work as agreed between the parties. The Learned Counsel for the Respondent has referred the judgment rendered by the Hon’ble NCLAT in ***ABC India Limited vs. Oriental EPC Pvt Ltd. [CA(AT)(Ins.) No. 1128 of 2020, judgment dated 31.01.2022, paragraphs 7 c. 7d. , 7 e. and 7f.]***

23. It is further submitted that multiple other deductions have been made against the alleged work value performed by the applicant, prime among them being sum of Rs. 1,18,75,745/- for *“Deduction against quality & improper work”* and other sums for labour charges payments by Respondent to third parties to rectify/ complete works left defective/ incomplete by Applicant etc. To substantiate the contention, the Learned Counsel for the

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Corporate Debtor has drawn our attention to the Final RA -41 Bill annexed at Page 363 to the Reply Affidavit. Further, attention has been drawn to Clause 3.2 of the Agreement dated 25.04.2012 which says that *“In consideration of the payment of the Contract Value by the Owner, the **Contractor hereby agrees to execute and complete the work and remedy all defects therein** in accordance with the terms of the Contract.”*

- 24.** Thus, the Learned Counsel for the Respondent would submit that Principal amount claimed by applicant to be in default is only Rs. 3,62,67,257/- whereas the deduction that have to be made by Respondent on account of liquidated damaged (LD) amounting to Rs.4,79,92,247/- and improper work/ quality issues amounting to Rs.1,18,75,745/- alone amount to around Rs. 5,98,67,992/-. It is claimed that in fact, the deduction on account of liquidated damages alone exceeds the principal amount of the operational debt claimed by Applicant.
- 25.** Further, it is asserted that imposition of liquidated damaged for delay and deductions for defective/incomplete works cannot be a spurious, frivolous, or illusory dispute as such impositions/ deductions flow from breach of contractual provisions by the applicant. It is submitted that a third-party cost assessor Currie & Brown, a globally renowned organization of chartered surveyors engaged in techno-commercial audit, cost management etc, **whereby aforesaid liquidated damages amounting to 5% of contract value was imposed on applicant by such third-party cost assessor after affording multiple opportunities to the applicant to avert such**

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imposition. However, failing such, vide an email dated 18.07.2019 annexed at Page 292 to the Reply Affidavit, the Currie & Brown imposed 5% liquidated damages on the applicant.

- 26.** The Learned Counsel for the Respondent further submits that the alleged operational debt is not payable in law on account of duly notified pre-existing disputes and connected impositions/deductions that were made much prior to receipt of statutory demand notice on 26.09.2020. The list of pre-existing disputes raised prior to receipt of statutory demand notice dated 26.09.2020 along with the disputes raised post-issuance of completion certificate dated 07.11.2016 as under:

Sl. No.	Dates of E-mail sent by SIDCL to ACIL [Defect/dispute notifications post-issuance of completion certificate dated 07.11.2016 highlighted in bold]:	Defect in the said works performed by ACIL communicated by corresponding E-mail	Pages nos. in Reply Affidavit of relevant pre-existing dispute Emails issued after issuance of completion certificate
1.	23.08.2017 23.08.2017	Shaft is not plastered in multiple places. TMT bars are projected, painting not done at all places;	141 – 142 of reply affidavit

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Sl. No.	Dates of E-mail sent by SIDCL to ACIL [Defect/dispute notifications post-issuance of completion certificate dated 07.11.2016 highlighted in bold]:	Defect in the said works performed by ACIL communicated by corresponding E-mail	Pages nos. in Reply Affidavit of relevant pre-existing dispute Emails issued after issuance of completion certificate
2.	20.07.2017 02.08.2016 19.08.2015	LBF- water accumulation all around Lower Basement Floor above VDF, improperly made slopes; slopes not properly guided towards surface drain.	171
3.	27.03.2017 27.03.2017 10.07.2015 02.09.2014 02.09.2014	Incomplete bore packing -failure of UBF BOH bore packing; damages in false ceiling; water leakage observed from drainpipe bore packing at LB BOH kitchen	180



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		cafeteria due to improper bore packing activity.	

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4.	24.05.2017 29.12.2015 11.04.2015 30.09.2015 12.08.2015 12.06.2015 23.07.2015 28.07.2015 03.08.2015 09.04.2015 11.04.2015 29.12.2015	Window glazing commercial floor; no manpower engaged for window side wall plastering job from 3rd floor - 11th floor in Tower 1, Gap of 5th 6th Floor Bay-B grid no. (01-02)	Pg. 185 of Reply Affidavit

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	03.08.2015 09.04.2015 11.04.2015 29.12.2015	and (06-07) not being closed; hindrances in silicone at periphery of windows; no masonry gang employed by ACIL in T1 windows side gap filling.	
5.	24.08.2017 19.08.2017 27.07.2017 18.01.2017 22.08.2016 22.08.2016 22.08.2016 09.08.2016	Failure of expansion joint Banquet area, UBF etc; water leakage damaged camera of SIDCL; water leakage at UB BOH	Pg. 229 – 230 of Reply Affidavit

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	06.07.2016 15.06.2016 10.06.2016 06.06.2016 06.06.2016 06.06.2016 03.06.2016 03.06.2016 01.06.2016 01.06.2016 01.06.2016 21.05.2016 20.06.2016 17.05.2016	Chocolate Room damages the that False Ceiling; leakage observed at LB BOH cafeteria area; water leakage from 2nd floor meeting room, LB BOH service lobby 24, HK office etc leading to damage of false ceiling, lights and detectors, water leakage observed through true ceiling at liquor	



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		store, water leakage in various other areas; failure expansion joint of at various areas; SIDCL forced to use its own	

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	14.05.2016 14.05.2016 14.05.2016, 13.05.2016, 21.05.2016, 25.02.2016, 09.09.2015, 02.09.2015, 18.08.2015, 11.08.2015, 05.08.2015, 20.07.2015, 10.07.2015	housekeeping gang to clear area at risk and cost of ACIL due to lack of timely action by ACIL.	
6.	28.06.2017 27.07.2017, 13.06.2017, 19.06.2017	T2 Lift Shift Verticality Test	Pg. 243 of reply affidavit
7.	17.08.2017	Helipad slab reinforcement exposed	Pg. 249 of reply affidavit

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27. Further, it is submitted that issuance of a work completion certificate does not ipso facto bar the respondent from raising any pre-existing dispute regarding quality of services. Attention drawn to The COMPLETION CERTIFICATE DATED 07.11.2016 annexed at pg. 35 of Application that the certificate is not a blanket certificate but an explicitly conditional one and grave pre-existing disputes after issuance as it also stated that “4. You (i.e., Applicant) ***shall be bound to rectify all the defect liabilities to our satisfaction*** within the Defect Liability Period (DLP), failing which we shall get removed all such defects at your costs and expenses.”

28. Further, the Learned Counsel has claimed that the application filed by the Operational Creditor is not maintainable as the same is ex-facie barred by limitation.

Response of the Applicant to the allegation of the Respondent:

29. **On the pre-existing dispute between the parties (at para 8(ii), page 5 to the Reply Affidavit):**

- i. That, the Corporate Debtor issued a plethora of correspondences between 18.09.2013 to 17.08.2017 alleging various defects in the work executed by the Operational Creditor. However, vide Completion Certificate dated 07.11.2016 and the letter dated 19.06.2020, an amount of Rs. 2,87,44,710/- was admitted to be due and owing to the Operational Creditor. Thus, all the defects in the execution of the contract

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works raised by the Corporate Debtor were rectified before 19.06.2020. Thus, there is no dispute prior to the issuance of the demand notice dated 26.09.2020 under Section 8 of the Code.

- ii. The Learned Counsel for the applicant has placed the reliance on the judgment of the Hon'ble NCLAT in ***Kuntal Contraction Pvt. Ltd. v. Bharat Hotels Ltd., Barakhamba Lane***, reported in **(2020) SCC OnLine NCLAT 631 (at para 20 and 21)** and has submitted that a 'dispute' must not be spurious, hypothetical or illusory and that the same must not be a patently feeble legal argument or an assertion of fact unsupported by evidence.

30. On the delay in execution of contract work (at para 10.1, page 7 of the Reply Affidavit):

- i. The Corporate Debtor has alleged that time was the essence of the contract and that in terms of the Letter of Acceptance (LoA) issued by the Corporate Debtor in favour of the Operational Creditor, work was to be completed by March 2023, i.e., within 12 months on and from March 2012. Thus, the Operational Creditor is liable to pay liquidated damages to the Corporate Debtor to the tune of Rs. 4,79,92,247/- for its inability to complete the work within the stipulated time frame. In counter, the Learned Counsel for the applicant submits that the Corporate Debtor vide a letter dated 22.10.2023,

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unconditionally extended the tenure for competition of the contract up to 30.06.2014 sans imposition of liquidated damages, which itself constitutes an admission that any delay in execution of contract works was not attributable to the Operational Creditor.

- ii.** The Learned Counsel, Mr. Saha, for the applicant has referred **Section 55 of the Indian Contract Act, 1872** which envisages as under:

Effect of acceptance of performance at time other than that agreed upon.— If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

- iii.** It is contended that having unconditionally agreed to accept the performance of the contract works beyond the time originally envisaged in the said agreement, without imposition of liquidated damages at the time of such extension granted by express communication and conduct, the Corporate Debtor is not only estopped but also statutorily barred from claiming liquidated damages against the Operational Creditor. Further, it is contended

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that by way of an email dated 25.03.2019 issued by the Respondent, a summary of accounts was furnished, wherein no liquidated damages were imposed by the Corporate Debtor upon the Operational Creditor. By way of the records furnished by the Corporate Debtor, no liquidated damages were imposed upon the applicant up to 25.03.2019. Thus, it is contended that any imposition of liquidated damages thereafter by the Corporate Debtor is an afterthought and a malafide attempt to deny and deprive the Operational Creditor of its legitimate dues.

- iv.** Further, it is asserted that the bank guarantee furnished by the Operational Creditor to the Corporate Debtor in terms of the agreement has been discharged by the Corporate Debtor, annexed at page 298 to the Reply Affidavit (vol. II), where it is evident that the Corporate Debtor has no claims against the Operational Creditor. It is further asserted that upon perusal of the summary of accounts prepared and sent by the Corporate Debtor to the Operational Creditor by way of a mail dated 25.03.2019, the Corporate Debtor has released Security Deposit to the tune of Rs. 2,90,04,920/- which certifies that work was completed by the Operational Creditor and that the Corporate Debtor has no claim against the Operational Creditor.

31. On the Setting off the admitted claim of the Operational Creditor against the Corporate Debtor's claim of liquidated damages (at para 10.20, Page 34 to the Reply Affidavit):

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- i.** The Corporate Debtor has alleged that upon reconciliation of accounts and adjustment of the debit notes along with imposition of Liquidated Damages upon the Operational Creditor, nothing remains due and owing by the Corporate Debtor to the Operational Creditor, rather, the Corporate Debtor is entitled to a sum of Rs. 2,34,60,761/- from the Operational Creditor after adjustment of liquidated damages, The Corporate Debtor purports to adjust such claim of liquidated damages against the Operational Creditor's admitted dues for contract works duly executed by it. In counter, the applicant contends that no liquidated damages have been or can be levied by the Operational Creditor to the Corporate Debtor. It is settled even in the case where liquidated damages for breach are stipulated in the contract, such damage cannot be claimed and or adjusted against admitted dues owed, merely on allegation of breach.
- ii.** Further, it is submitted that it is a settled position of law that even assuming any breach is committed, that does not *ipso facto* result in liquidated damages being payable. Under Section 74 of the Indian Contract Act, 1872, the party claiming liquidated damages is required to plead and prove that he has suffered loss and damage as a consequence of the breach and to further prove the quantum of loss and damage suffered, which cannot exceed the rate of liquidated damages stipulated in the

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contract. It is only once there is an adjudication by a competent Civil Court that there are:

- (a) a breach of contract,
- (b) that the breach has resulted in damages being caused,
- (c) that the claimant has proved the quantum of loss suffered by it and that damages of an ascertained sum are payable to the claimant, that the claim for liquidated damages becomes a crystallized debt.

Reliance in this regard is placed on the following decisions: - ***Kailash Nath Associates v. Delhi Development Authority*** reported in **(2015) 4 SCC 136 at paras 36 to 46**; and ***Union of India v. Rampur Distillery and Chemical Co. Ltd.***, reported in **AIR 1973 SC 1098**.

- iii. Further, it is submitted that without such adjudication by a competent Civil Court, the Corporate Debtor's claim for damages does not constitute a crystallised debt payable at present, which can be set off against the admitted dues owed to the Operational Creditor. Further would submit that the agreement does not entitle the Corporate Debtor to set off its claim of liquidated damages against the dues owed to the Operational Creditor for execution of contract works.
- iv. The Learned Counsel for the applicant has referred to **Order VIII Rule 6** of the **Code of Civil Procedure 1908**

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which envisages that the set-off can only be sought in respect of an ascertained sum of money. It is submitted that in the absence of adjudication by a Civil Court, the Corporate Debtor's claim for liquidated damages if at all raised, cannot constitute a demand for an ascertained sum of money.

- v.** Further, the Learned Counsel for the applicant would submit that set off is envisaged only as a suit for recovery of money. It is well settled that proceedings for initiation of the corporate insolvency resolution process under the I&B Code, 2016 are not proceedings for recovery of money. It is accordingly submitted that the Corporate Debtor cannot seek set off its unascertained claim against the admitted dues of the Operational Creditor.

- vi.** Further, he contends that the Corporate Debtor has waived its right, if any, to impose liquidated damages upon the Operational Creditor and such will be evident from the mail dated 25.03.2019 issued by the Corporate Debtor furnishing a summary of accounts to the Operational Creditor wherein no liquidated damages were imposed by the Corporate Debtor upon the Operational Creditor.

32. On limitation (Para 8(iii), Pg. 6 of Reply Affidavit):

- i.** The Respondent claims that the instant application is barred by limitation and thus not maintainable. In counter, the Learned Counsel has submitted that on a

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reading of clauses 60.7 and 60.11 of the agreement, the payment terms of the contract would appear to be as follows:

- a. Clause 60.7:** Draft final bill to be submitted by the Operational Creditor within 45 days of the issuance of the Take-Over Certificate.
 - b. Clause 60.11:** Final certificate to be issued by the Corporate Debtor.
 - c. Clause 60.11:** Amount due to the contractor under the final certificate, to be paid within 75 days of issuance of the final bill.
- ii.** In terms of Clauses 60.7 and 60.11 of the agreement, the Draft final bill dated 13.07.2016 was issued by the applicant for Rs. 3,61,18, 255/-.
 - iii.** The Completion certificate was issued by Corporate Debtor on 07.11. 2016 in terms of Clause 60.11.
 - iv.** Thereafter, on 13.11.2017, the Corporate Debtor certified the execution of contract works by the Operational Creditor in terms of Clause 60.11. In its letter dated 25.07.2019, the applicant stated that the completion of work was certified on 13.11.2017. Such a statement has not been denied by the Respondent in any contemporaneous document. Thus, the payment became due within 75 days from 13.11.2017 ending on 28.11.2018, which is stated to be the date of default in

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the petition. The instant application being filed on 22.12.2020, is accordingly within limitation.

- v. Further, it is submitted that vide a letter dated 19.06.2020, issued by the Respondent to the Applicant has acknowledged a debt of Rs. 2,87,44,710/- due and owing to the Operational Creditor and the Corporate Debtor has failed to make payment of such admitted amount till date.

- vi. Further, it is contended that the Operational Creditor in its section 8 demand notice dated 26.09.2020, inadvertently stated 31.08.2015 to be the date on which the debt fell due and payable. However, the correct date on which the debt fell due and payable as enumerated in the applicant is 28.01.2018, being 75 days from 13.11.2017, i.e., the date on which the Corporate Debtor certified the draft Final Bill of the Applicant. A reliance has been placed on the judgment in ***Rajendra Bhai Panchal v. Jay Manak Steel*** reported in **2020 SCC online NCLAT 730 (at Paras 41 and 42)**, the Hon'ble NCLAT observed that a mistake in a 'Demand Notice' does not necessarily mean that it is defective. If a Corporate Debtor wants to question the validity of the demand, it is for it to show that the prejudice was suffered by it as a result of the defect. Similarly, if there is a mistake in the demand but the creditor is owed the statutory minimum figure or more, such mistake shall not automatically invalidate the demand as per the decision ***Cardiff***

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Preserved Coal & Coke Co. v. Norton, reported in **36 LJ Ch 451**. Also, refer to ***Credberg Advisors India Private Limited v. Platinum Holdings Private Limited*** reported in **(2023) SCC OnLine NCLT 12 at Paras 14 and 15**).

- vii.** It is further contended that even assuming the date of default to be 31.08.2015 as inadvertently stated in the section 8 notice, the Corporate Debtor has by issuing a completion certificate on 07.11.2016 and certifying the execution of contract works and the final bill on 13.07.2017, has at all material times acknowledged the existence of a jural relationship with the Operational Creditor. There can as such be no question of the Corporate Debtor suffering any prejudice as a result of the inadvertent mistake in the section 8 demand notice.
- viii.** Further, the Corporate Debtor on 19.06.2020, has admitted a sum of Rs. 2,87,44,710/- to be due and owing to the Operational Creditor, thus, there can be no question of any prejudice being caused to the Corporate Debtor and further such acknowledgement constitutes a written promise upon the Corporate Debtor to pay the debt due and owed to the Operational Creditor under Section 25(3) of the Indian Contract Act, 1872. Reliance in this regard is placed on the decision of the Hon'ble Apex Court in **Kotak Mahindra Bank Ltd. v. Kew Precision Parts Pvt. Ltd.** bearing Civil Appeal No. **2176 of 2020 at Paras. 31 and 32**.

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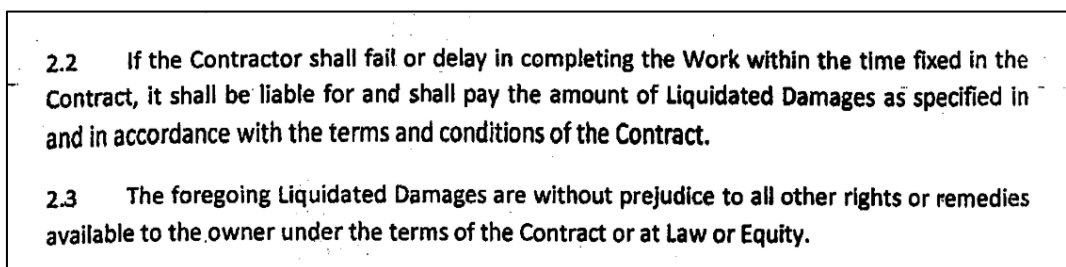
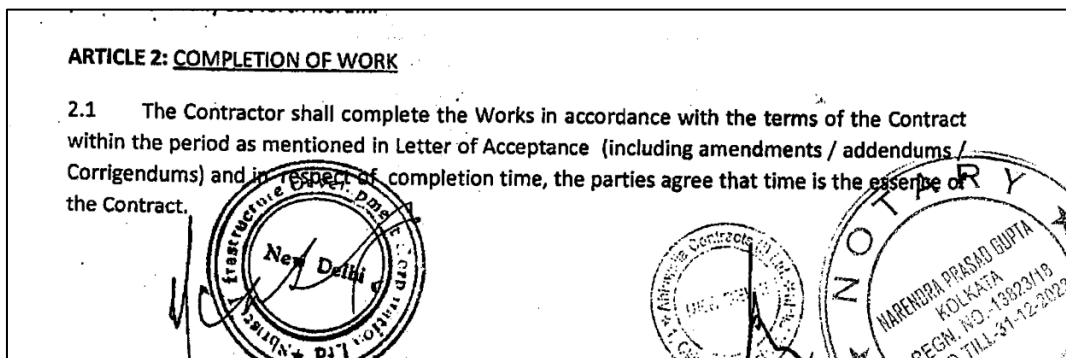
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ix. Thus, it is submitted that the application is not barred by limitation and deserves to be admitted.

33. We have duly considered the submissions made by the Learned Counsel for the parties and perused the documents placed before us.

Analysis and Findings:

34. Before considering the merits of the case herein, we would discern that both parties had entered into an agreement on 25.04.2012 for constructing a five-star hotel at Rajarhat. Articles 2, 3 and 4 of the Agreement dated 25.04.2012 envisaged the particulars of “completion of work”, “contract value” and “effective date and Binding force of contract” reproducing as under:



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ARTICLE-3: CONTRACT VALUE

3.1 As full and complete compensation to the Contractor for all Works and other services or activities to be performed by it under the Contract, the Owner shall pay to the Contractor a total amount of **Rs.85,00,00,000.00 (Rupees Eighty Five Crore Only)** payable as provided in the Contract and subject to the terms and conditions of the Contract.

3.2 In consideration of the payment of the Contract Value by the Owner, the Contractor hereby agrees to execute and complete the works and remedy all defects therein in accordance with the terms of the Contract.

ARTICLE-4: EFFECTIVE DATE AND BINDING FORCE OF CONTRACT

4.1 Owner and Contractor agree that the Effective date of this Agreement shall be as first written above and effective date of the contract shall be 1st March, 2012 and the contract shall be executed by the parties formally on or before 25th April, 2012 and in the event for any reason, whether within or beyond the Contractor's ability to control, the contractor should fail or refuse to execute the contract formally on or before such date, then this Agreement shall survive and remain in effect and be enforceable according to its terms and conditions. The contractor shall be responsible for and indemnify the Owner against all losses, damages and expenses incurred by it as a result of the contractor's breach, failure or refusal to execute the contract as agreed hereinabove.

4.2 Pending execution of the Contract, this agreement shall be and is intended to be a legally binding contract and commitment defining the rights and obligations of the parties with respect to the subject matter herein, until the Contract which will set forth in detail the terms and conditions for the works is executed as of the date agreed above, and this agreement shall constitute the entire understanding and agreement between the Parties regarding the subject matter hereof pending execution of the Contract.

35. Further, Article 5 of the Agreement dated 25.04.2012 envisages the provision of settlement of the disputes and says that for any dispute raised under the agreement work between the parties, the parties first would attempt a mutual settlement or discussion for resolving the dispute and if it fails then it would be referred to conciliation or arbitration. From Clause 5.4 of the Agreement, it would be evident that no dispute shall be referred to Arbitration after the expiry of 30 days from the notification of failure of such mutual settlement or discussion. The

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Conciliation/Arbitration proceedings shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules framed thereunder and for the time being in force. The extract of the Article is reproduced hereunder:

ARTICLE-5: SETTLEMENT OF DISPUTES

5.1 It is a term of this Contract/Agreement that conciliation/arbitration of disputes of any kind whatsoever arising out of this contract shall not be commenced unless an attempt has first been made by the parties to settle such disputes through mutual settlement/discussion.

5.2 If any such disputes as mentioned hereinabove are not satisfactorily settled at middle level management of the parties, the parties shall seek to resolve such disputes by way of reference to the Managing Directors or Chief Executives of the parties.

5.3 In the event parties fail to arrive at any amicable solution as referred to hereinabove, the said disputes arising thereof between the parties shall be referred to arbitration of three arbitrators, one arbitrator to be appointed by each of the parties. The two arbitrators so appointed shall appoint the third arbitrator who shall act as the presiding arbitrator. The arbitrators shall make their award within six months from the date of entering upon the reference. The award of the Arbitrators shall be final and binding on the parties and the parties, their executors and administrators shall on their respective parts obey and abide by the award.

5.4 No such disputes shall be referred to the Arbitration after expiry of 30 days from the notification of failure of such mutual settlement/discussion.

5.4 The Conciliation/Arbitration proceedings shall be governed by the provisions of The Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules framed thereunder and for the time being in force.

5.5 The language of proceedings, documents or communications shall be in English and the award shall be made in English in writing.

5.6 The Conciliation/ Arbitration proceedings shall be held at Kolkata.

5.7 The fees and other charges of the Arbitrators shall be as per the mutual agreement by and between the Parties and shall be shared equally between the Owner and the Contractor.

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36. We would note that the Respondent has issued the competition certificate along with the certified amount of work annexed at pages 35-36 to the application. There are several letters demanding outstanding along with replies that have been communicated between the parties. We find that neither any constructive settlement nor any amicable solution has been proposed by any party. Further, we find that in terms of Clause 5.1 and 5.3 of the Agreement, neither arbitration nor conciliation proceedings have been invoked by either party.

**Issue Relating to delay in execution of work as per agreement
and imposition of Liquidated Damages**

37. It is a settled position of law that upon infringing the terms and conditions of a contract agreed between the parties and enforceable by law, the erring party shall be subjugated to pay an amount as liquidated damages, as mentioned in the contract in case of such breach. The concept of liquidated damages is recognised under Section 74 of the Indian Contract Act, 1872, which says that:

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

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38. It is evident that upon the evaluation made by a third-party cost assessor, Currie & Brown, the Corporate Debtor imposed liquidated damages at the rate of 5% of the contract value on the applicant due to delay in completion of work as agreed upon between the parties and such was intimated to the applicant through a letter dated 18.07.2019. It is admitted that the final contract value is Rs. 95,98,44,943/-. Liquidated damages amounting to 5% of the contracted work levied on the Applicant would be Rs. 4,79,92,247/- which is more than the principal amount claimed to be in default by the Applicant.

39. We are of the view that this is not the proper forum to adjudicate the merit of the liquidated damages as whether it is properly imposed. We would rely on the judgment rendered by the Hon'ble NCLAT in **ABC India Ltd. v. Oriental EPC Pvt. Ltd.** reported at **(2022) ibclaw.in 106 NCLAT** wherein it was held that:

“7. We have gone through the submissions made by the Ld. counsels for the parties, order passed by the Adjudicating Authority and available input on record and are observing as follows:

xxx

xxx

xxx

d. Deduction on account of LD and Performance bank guarantee is a part of contractual terms and hence the Code is being a summary proceeding, the voracity of the statement cannot be examined like a trial court.

e. Pre-existing dispute and chasing for payment also cannot be ruled out in this instant case.

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

(Emphasis Added)

Thus, we are of the considered opinion that the veracity of statement that there has been deduction on account of Liquidated Damages as per the terms of the contract executed between the parties cannot be tried by this Adjudicating Authority as the I&B Code only contemplates a summary proceeding.

On Pre-existing Disputes

40. Mr. Rishav Banerjee, Ld. Counsel for the Respondent has brought to our notice that there is a plethora of disputes which have been raised prior to receipt of the statutory notice of demand under Section 8 of the Code on 26.09.2020. he has furnished a list mentioned in Para 26 of this Order, concerning those disputes raised prior to receipt of statutory demand notice dated 26.09.2020 as well as the disputes raised post-issuance of completion certificate dated 07.11.2016. We have perused the corresponding communications and emails from which it would be evident that since 2015, the Respondent has raised several defects in the contractual work of the Applicant.

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41. It is a settled position of law that this forum is not a forum for recovery and the existence of “pre-existing disputes” duly notified by the Operational Creditor prior to the receipt of the statutory notice of demand under Section 8 of the I&B Code, the operational creditor wriggles out of the grip of the Code. We would refer the judgment of the Apex Court in ***Innoventive Industries Ltd. vs. ICICI Bank and Ors.*** reported in MANU/SC/1063/2017: (2018) 1 SCC 407 that:

“29. [...] Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

(Emphasis Added)

42. Further, we would rely upon the judgment rendered by the Hon’ble NCLAT in ***Umesh Saraf vs. Tech India Engineers Pvt. Ltd.*** reported in **MANU/NL/0385/2020: (2020) ibclaw.in 307 NCLAT** wherein it has held that:

*“23. **Exchange of e-mails/correspondences, as referred above, clearly establishes that there is a pre-existing dispute between the parties regarding completion of the work** and the Appellant/Corporate Debtor continuously made complaints regarding non-completion of work and deficiency in services, thereby loss caused to the Appellant/Corporate Debtor.*

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24. Therefore, it is quite clear that **there is pre-existing of dispute regarding completion of the work and the learned Adjudicating Authority ought not to have admitted the Application under Section 9 of IBC** filed by the Respondent/ Operational Creditor. Even in the Reply filed by the Appellant/ Corporate Debtor before the learned Adjudicating Authority pursuant to Section 9 Application, it is quite clear that there was sufficient material produced before the learned Adjudicating Authority and the learned Adjudicating Authority ought to have considered the materials placed before it.

25. We are of the considered view that the learned Adjudicating Authority should have considered the substantial material placed before it in its correct perspective and law laid down by the Hon'ble Supreme Court in this regard, before passing the Impugned Order dated 04.06.2020 thus committed error.

26. It is re-iterated that the Code is a beneficial legislation intended to put the Corporate Debtor on its feet and it is not a mere money recovery legislation for the Creditors.”

(Emphasis added)

43. Further, we would rely on the judgement rendered in **M/s Kuntal Construction Pvt. Ltd. Vs. M/s Bharat Hotels Ltd.**, reported in [2020] ibclaw.in 69 NCLAT, wherein the Hon'ble NCLAT held that:

“19. [...] The intent of Legislature is very vital for interpreting any law, which can be well deduced from the words of Section 8(2)(a) of I&B Code ‘existence of a dispute if any’. It can be easily inferred that dispute shall not be limited to instances specified in the definition as provided under Section 5(6), as it has far arms, apart from pending Suit or

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Arbitration as provided Under Section 5(6) of IBC. The IBC is not a substitute for a recovery forum.

xxx

xxx

xxx

20. From the above we can conclude that since there was a dispute existing prior to the issuance of Section 8 notice, the insolvency provisions cannot be invoked. The email communication of the Operational creditor dated 23.01.2016 states about operational creditor having knowledge of retention money being adjusted. Whether the corporate debtor was entitled to adjust the retention amount are disputed question of law and fact and shall be decided by the appropriate forum.”

(Emphasis Added)

- 44.** Thus, from the factual position and decisions enumerated supra, it would be apparent that there existed a pre-existing dispute concerning the contractual work between the parties prior to the receipt of the statutory notice of demand under Section 8 of the Code. Thus, being a non-recovery forum, this Adjudicating Authority having the legislative intent not to prosecute the debtor rather to resolute it's business by putting it into corporate insolvency resolution process when the “debt” and “default” is established.

Whether issuance of work completion certificate creates bar the Corporate Debtor from raising any pre-existing disputes

- 45.** According to Mr. Ishaan Saha, Learned Counsel for the Applicant, issuance of the Work Completion Certificate on 07.11.2016 by the Corporate Debtor, would absolve the creditor of all liability under pending disputes prior to the issuance of statutory notice of demand under Section 8 of the Code on



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26.09.2020. We have perused the Work Completion Certificate dated 07.11.2016, annexed at page 35 to the application. Clause 4 of the said Work Completion Certificate, explicates that the work completion certificate is subject to abiding by all the contractual obligations that emanates from the Work Order concomitantly Agreement, including but not limited to rectification of all the defect liabilities within the Defect Liability Period (DLP) to the satisfaction of the Corporate Debtor. Further, failing which such defects shall get removed at the cost and expenses of the Operational Creditor. We would reproduce the Work Completion Certificate dated 07.11.2016 hereunder:

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Dated: 07.11.2016



M/S. Ahluwalia Contracts (India) Ltd.,
Regd. & Corporate Office: A-177, Okhla Industrial Area Phase -I,
New Delhi-110020
Email: mail@acilnet.com.

Dear Sirs,

SUB: Completion Certificate for Work Under Work Order No. SIDCL/11-12/WO/LOI/HO/0048 dated 07.02.2012 (Hereinafter referred to as Work Order). Subsequent to which an Agreement dated 25.04.2012, Executed (Hereinafter referred to as Agreement).

The Agreement was executed for Work Order, to complete the construction work within the scope defined therein, at Mouza Jatragachi, AA-II/CBD/2, Action Area -II, New Town, Rajarhat (West Bengal) (hereinafter referred to as "Site").

In response to your request for the completion certificate, we hereby issue the completion certificate subject to the following terms & conditions, for having successfully completed the scope of the work enshrined under the Work Order & Agreement. The work was started w.e.f 01.03.2012 and completed on 31.08.2015.

The completion certificate is subject to your abiding by all the contractual obligations emanated from the Work Order concomitantly Agreement, including but not limited to following:-

1. You shall renew all the bank guarantees, bonds, corporate guarantees and personal guarantees etc., as per agreed schedule with us, but prior to expiry thereof and its advance intimation to us.
2. You shall be responsible for the payment and settlement of all subcontractors and/or vendors and the applicable taxes, if, unpaid and/ or radiate in future.
3. You shall be wholly liable for all the workmen cases, compensation, claims or anything else, if arises in future.
4. You shall be bound to rectify all the defect liabilities to our satisfaction within the Defect Liability Period (DLP), failing which we shall get removed all such defects at your cost and expenses, which shall be paid by you on demand, for which you agree unequivocally.
5. You shall be liable and responsible for all the litigations & cases, if emit out from any of your deeds/ acts, negligence thereof.

This completion certificate is issued without prejudice to our rights and contentions

Thanks & Regards,

For Shristi Infrastructure Development Corporation Ltd.,

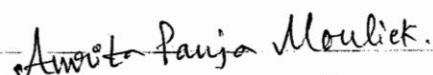

Authorized Signatory



Shristi Infrastructure Development Corporation Ltd.

Corporate Office : D-2, 5th Floor, Southern Park, Saket Place, Saket, New Delhi - 110 017, India, T : +91 11-6602 5600 F : +91 11 6602 5818
Registered Office : Plot No X - 1, 2 & 3, Block-EP, Sector-V, Salt Lake City, Kolkata-700 091, T : +91 33 4020 2020/4015 4646 F : +91 33 4020 2099
E : contact@shristicorp.com www.shristicorp.com CIN - L65922WB1990PLC049541




Advocate.

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46. We would rely on the judgment of the NCLAT in **Vinod Mittal v. Rays Power Experts Private Limited** reported at **2019 SCC OnLine NCLAT 1278**, wherein it is held that:

“11. Having gone through the matter and on considering record, there remains hardly any doubt that the earlier correspondence shows that between the parties there were disputes regarding installation of the project as well as functioning of the same. Although the project had been commissioned for which Completion Certificate had been issued, still if disputes had arisen between the parties regarding the installation and functioning of the project, the Operational Creditor merely pointed out Certificate of Appreciation dated 19th April, 2015 issued and claims that once Completion Certificate had been issued, Corporate Debtor could not raise issues with regard to the quality of the work done. In fact, the record shows that there had been even a review meeting between Operational Creditor and Corporate Debtor and excerpts of which minutes have been placed on record by the Corporate Debtor at Page - 187 which showed that full installation was yet to be completed (see Page - 188). There was also discussion regarding Sag Structure Correction Action Plan. In fact, there is Annexure - 24 showing the Experts enquiry on 5th May, 2015 as to when the plant would be declared fully commissioned so that they could start electrical review of the project. Looking to such material on record, it is quite clear that there was pre-existing dispute regarding installation as well as operation of the project. When this is so, the Section 9 Application could not have been admitted. In fact, when e-mail dated 20th October, 2016 (Page - 431) was already before the Adjudicating Authority and it had also noticed the same, the Adjudicating Authority should have found pre-existing dispute and the Section 9 Application should have been rejected. Only by observing that the Respondent -

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Corporate Debtor have not come forward to dispute the Application would not be sufficient to initiate CIRP, if the record already showed existence of dispute.”

(Emphasis Added)

47. Further, in ***Raunaq EPC International Ltd. v. Hiranmaye Energy Ltd.*** reported in **2022 SCC OnLine NCLAT 1550**, at para 23-25, wherein the ratio of the ***Vinod Mittal (Supra)*** is submitted and discussed that the issuance of a Completion Certificate in its favour ipso facto bars the Corporate Debtor from raising any dispute regarding quality of services, while holding that there were pre-existing disputes with both installation as well as operation of the pertinent project. Further, in ***Raunaq EPC (Supra)***, there is the delay of more than 3 years from scheduled date of completion under the contract, so issuance of completion certificate will **not** prohibit them from raising the dispute, this fact has also been taken note by the Adjudicating Authority. The Hon’ble NCLAT allowed this view and dismissed the appeal holding that:

“26 [...] • The Appellant neither denied these facts nor doubted these emails corresponded between the parties. These facts show that there was preexisting dispute between the parties.

• The Ld. Adjudicating Authority has rightly taken note of these emails and come to the conclusion that there is pre-existing dispute between the parties and rejected the Application under Section 9 of the IBC filed by the Appellant herein.”

(Emphasis Added)

48. Thus, we are of the view that the issuance of Work Completion Certificate would not bar the Corporate Debtor

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from raising any genuine disputes relating to the services rendered by the Operational Creditor, when, the Work Completion Certificate itself provides a specific clause that the issuance of Work Completion Certificate does not exempt the Operational Creditor its liability to rectify its defect and failing such, the defect would be removed at the cost and expenses of the Operational Creditor.

Our Inference

- 49.** Hence, in terms of the forgoing discussion and decisions cited supra, we are of the considered opinion that:
- a.** There existed a dispute on the services provided to the Corporate Debtor by the Operational Creditor herein, since prior to issuance of the statutory notice of demand under Section 8 of the I&B Code.
 - b.** Issuance of the Work Completion Certificate would not bar the Corporate Debtor from raising any cogent pre-existing disputes on the services rendered by the Operational Creditor when the certificate itself does not provide such exemption.
 - c.** The veracity of statement that there has been deduction on account of Liquidated Damages as per the terms of the contract executed between the parties cannot be considered by this Adjudicating Authority as the I&B Code only contemplates a summary proceeding.

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- 50.** Thus, sans further probe into the merits of the dispute, as there existed multiple pre-existing disputes prior to receipt of the statutory notice of demand under Section 8 of the I&B Code, this application is liable to be rejected.
- 51.** Accordingly, **C.P. (IB) No. 2/KB/2023** is **dismissed**. Liberty is however granted to the Applicant to seek other remedies as may be available to it under any other law.
- 52.** The **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), to whom the company(ies) are registered with, by all available means.
- 53.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 26th Day of April, 2024.

Bose, R. K. [LRA]