IN THE NATIONAL COMPANY LAW TRIBUNAL, SPECIAL BENCH - II, CHENNAI

CP/IB/260(CHE)/2022

(filed under Section 9 of the Insolvency & Bankruptcy Code, 2016)

*In the matter of **M/s. VA Tech Wabag Limited***

Xicon International Limited
Unit No.5, 283 – 287, Solaris I,
Opposite L&T Gate No.7,
Saki Vihar Road, Andheri (East)
Mumbai

… Petitioner/Operational Creditor

-Vs-

VA Tech Wabag Limited
Wabag House No.17,
200 Feet Thoraipakkam,
Pallavaram Main Road,
Sunnambu Kolathur,
Chennai – 600 117

… Respondent / Corporate Debtor

*Order Pronounced on **27th September, 2023***

CORAM

SANJIV JAIN, MEMBER (JUDICIAL)
RAVICHANDRAN RAMASAMY, MEMBER (TECHNICAL)

For Petitioner : *R. Sankaranarayanan, Senior Advocate*
For Ramasamy Meyappan, Advocate

For Respondent: *Thriyambak Kannan, Advocate*

ORDER

(Hearing conducted through VC)

Per: SANJIV JAIN, MEMBER (JUDICIAL)

This application has been filed by the Operational Creditor viz. *Xicon International Limited* against the Corporate Debtor viz. *VA Tech Wabag Limited* under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC', 2016) seeking thereof to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

2. In Part – I of the Application it is stated that the Operational Creditor is a Limited Company. Part – II of the Application sets out the details of the Corporate Debtor, that the Corporate Debtor was incorporated on 17.02.1995 and the Registered office address of the Corporate Debtor is situated at 200 Feet Thoraipakkam, Pallavaram Main Road, Sunnambu Kolathur, Chennai – 600 117

3. In Part – III of the Application, it is stated that the Operational Creditor has not proposed the 'Insolvency Resolution Professional' and left it to the discretion of this Tribunal to appoint the IRP.

4. In Part – IV of the Application, the Corporate Debtor has claimed a sum of Rs.1,63,96,590/- (Rupees One Crore Sixty-Three Lakhs Ninety-Six Thousand Five Hundred and Ninety Only), comprising of Rs.1,51,00,817/- being the principal amount along with Rs.12,95,773/- towards interest at the rate of 18% p.a. from 20.05.2022 till 09.11.2022.

5. It is stated that the Corporate Debtor had approached the Operational Creditor for erection and supply of heavy oil storage tanks and for several other works and had accordingly placed the purchase orders upon the Operational Creditor, as enumerated herein below:

(i) P.O. No. MBG-PO-16806/10P84 dated 22.01.2015, subsequently amended on 09.04.2015, wherein the revised purchase order amount was INR 11,06,10,000/- (Rupees Eleven Crore Six Lakhs Ten Thousand only);

(ii) P.O No. MBG-PO-16807/10P84, dated 22.01.2015 subsequently amended on 09.04.2015 and 27.01.2016 wherein the revised purchase order amount was INR 2,02,88,437/- (Rupees Two Crore Two Lakhs Eighty-eight Thousand Four Hundred and Thirty-Seven only);

(iii) P.O. No. MBG-PO-16937/10P6(M) dated 31.01.2015, subsequently amended on 12.03.2015 and 25.01.2016 wherein the revised purchase order amount was INR

35,16,712/- (Rupees Thirty-Six Lakhs Sixteen Thousand Seven Hundred and Twelve only);

(iv) P.O. No. EPC-PO-28200/10P131, dated 04.09.2018 wherein the revised purchase order amount was INR 6,44,566/- (Rupees Six Lakh Forty- Four Thousand Five Hundred and Sixty-Six only):

(v) P.O. No. EPC-PO-20734/10 P 84 dated 16.08.2018 amounting to INR 14,95,000/- (Rupees Fourteen Lakhs Ninety – Five Thousand only)

6. It is stated that upon receipt of the above Purchase Orders, the Operational Creditor duly completed its scope of work, and raised several invoices as per work completion. The Purchase Orders recorded the payment terms from the Corporate Debtor to the Operational Creditor. It is stated that subsequent to the invoices raised, the retention money under the Purchase Orders became due and payable as of March 2018.

7. It is stated that substantial payments have remained due and outstanding from the Corporate Debtor. Despite such defaults, the Operational Creditor extended its support to the Corporate Debtor in reconciling the issues.

8. It is stated that the project was undertaken by a consortium of three entities i.e. Techpro Systems Limited and Gammon India Limited. Certain Purchase Orders were also executed between Techpro Systems Limited and the Operational Creditor. However, the same were subsequently taken over by the Corporate Debtor and accordingly revised purchase orders were executed and issued by the Operational Creditor. It is stated that despite all efforts and support extended by the Operational Creditor, the Corporate Debtor deliberately defaulted in releasing the outstanding amounts.

9. It is stated that the Operational Creditor had sent a Demand Notice under Section 8 of IBC, 2016 dated 03.02.2020 and the Corporate Debtor sent a Reply notice dated 13.02.2020. Thereafter, the Operational Creditor filed the Application under Section 9 of IBC, 2016 in IBA/608/2020 claiming a sum of Rs.2,57,00,817/-.

10. It is stated that pursuant to the same, the parties agreed to settle the matter amicably and consequently a settlement agreement dated 02.10.2021 was executed between the parties, whereby the Corporate

Debtor agreed to pay a sum of Rs.1,60,94,701/- towards full and final settlement of all the outstanding dues. The amount was to be paid in six instalments between 04.10.2021 and 20.05.2022.

11. It is stated that as per the Settlement Agreement, on default of the agreed terms of payment, the Corporate Debtor was to pay the entire amount of INR 2,57,00,817/- along with interest @ 18% p.a. from the date of default. It is stated that the Corporate Debtor has made the following payments as follows;

S. No.	DATE	AMOUNT PAID (INR)
1	04.10.2021	21,00,000/-
2	19.01.2022	30,00,000/-
3	03.02.2022	30,00,000/-
4	05.05.2022	25,00,000/-
TOTAL		**1,06,00,000/-**

12. It is stated that the above-mentioned payments were also delayed from the Schedule mentioned in the Settlement Agreement, however the Operational Creditor cooperated with the Corporate Debtor and accepted the delayed tranches of payment. Despite the cooperation extended by the Operational Creditor, the Corporate Debtor stopped making further payments which is due and payable under the Settlement Agreement. Therefore, it is stated that as agreed, the entire

sum of INR 1,60,94,701/- was not paid by the Corporate Debtor on or before 20.05.2022 thus breached the terms of the Settlement Agreement. It is stated that the Operational Creditor then sent a Demand notice to the Corporate Debtor under Section 8 of IBC, 2016 on 30.09.2022 and the Corporate Debtor sent a reply to the Demand notice on 08.10.2022.

13. Under such circumstances, the present Application has been filed before this Tribunal.

REPLY OF THE RESPONDENT / CORPORATE DEBTOR

14. It is stated that the Corporate Debtor had engaged the services of the Operational Creditor for the purpose of provision of materials – Fuel Oil Handling System, to be used in the Rayalseema Thermal Power Project. The Purchase Orders were issued to the Operational Creditor, with amendments from time to time, that were communicated, in early 2015. While the Operational Creditor undertook the obligations contained therein, there were several issues that were raised from time to time in relation to the performance of the Operational Creditor.

15. It is stated that owing to the continuous relationship between the Parties, despite there being certain setbacks owing to the performance of the Operational Creditor, the Corporate Debtor continued to support the Operational Creditor. While this was the case, the Operational Creditor, while still in non-completion of all the work under the Purchase Order and in breach of quality obligations, initiated proceedings as against the Corporate Debtor, under section 9 of IBC, 2016 by way of IBA/608/2020, seeking an amount of Rs.2,57,00,817/- (Rupees Two Crore, Fifty-Seven Lakh. Eight Hundred and Seventeen Only).

16. It is stated that the Corporate Debtor having issued several communications to the Operational Creditor to act in compliance with the terms of the Purchase Orders, was inclined to take necessary action as against the Operational Creditor. In furtherance thereof the Corporate Debtor, through legal counsel, issued notices seeking invocation of arbitration in relation to disputes arising out of each of the Purchase Orders. The notices were duly addressed and received by the

Operational Creditor. The Operational Creditor also responded to the same by way of communication dated 04.08.2020.

17. It is stated that the Corporate Debtor contested the matter on merits on the grounds that there were pre- existing disputes and it was clearly set out that there was no interest clause in the Purchase Orders for the belated payments nor in the invoices. However, during the course of the proceedings, both the parties, upon mutual discussion thought it fit to refrain from precipitating issues. It was mutually decided that since the parties continued to have a cordial working relationship and ongoing projects, it would be more suited to arrive at a settlement whereby the obligations of each of the parties would be set out.

18. It is stated that, based on mutual discussion and negotiations, the Corporate Debtor and the Operational Creditor entered into a Settlement agreement on 02.10.2021 and in the settlement agreement, the Corporate Debtor agreed to pay a sum of Rs.1,60,94,701/- (Rupees One Crore Sixty Lakhs Ninety-Four Thousand Seven Hundred and One Only) as full and final settlement of all outstanding dues of the

Operational Creditor, subject to the completion of pending jobs and handing over process, in line with contractual terms of the purchase Orders. This is evinced in Clause 6 of the Settlement Agreement where it is stated *"Xicon agrees to complete the pending jobs and assist in commissioning, as per the Purchase Orders and co-operate in handing over the Project information and documents"*. In light of this, the settlement amount of Rs.1,60,94,701/- (Rupees One Crore Sixty Lakhs Ninety-Four Thousand Seven Hundred and One Only) was agreed to be paid in Six instalments. The timeline envisaged a break of two months (February 2022 and March 2022) to accommodate the payments to complete the pending jobs that were to be performed by the Operational Creditor.

19. It is stated that pursuant to the execution of the Settlement Agreement, the said decision was brought to the attention of this Tribunal and thereby IBA/608/2020 was closed, taking cognizance of the settlement agreement executed between the parties.

20. Thereafter, the Corporate Debtor remitted a sum of Rs.1,06,00,000/- and the Corporate Debtor had repeatedly sought the Operational Creditor to complete the works that were pending at site

and was calling to carry out the obligations as per the terms of the Contract and the Settlement Agreement. However, despite several reminders, the Operational Creditor chose to be evasive and failed to honor the commitment and it was contended by the Operational Creditor that they were only required to render assistance and nothing more.

21. It is stated that as on date of filing the present Application, as per the terms of the Settlement Agreement, only a sum of Rs.49,94,701/- (Rupees Forty – Nine Lakh, Ninety – Four Thousand, Seven Hundred and One only), is outstanding. However, the present Application has been filed claiming a sum of Rs.1,63,96,590/-.

22. It is stated that the present Petition is not maintainable since the Operational Creditor has sought to claim a due under the terms of a Settlement Agreement to amount to an operational debt, warranting action under Section 9 of the Insolvency and Bankruptcy Code,2016. Reliance is placed upon the decisions of Hon'ble NCLAT in *Company Appeal (AT)(Insolvency) No. 742 of 2020* in the matter of **Trafigura India Private Limited v. TDT Copper Limited** wherein the Learned Appellate

Tribunal upheld the decision of the Adjudicating Authority holding that default of instalments under a Settlement Agreement does not come within the definition of an 'operational debt' as defined under the Code. This was on the grounds that a default of a debt that is payable in praesenti, is only one which can be said to be in default.

23. Reliance is also placed upon the decision of the Hon'ble NCLAT in the matter of **Ahluwalia Contracts (India) Limited v. Logix Infratech Private Limited** *(2022 SCC Online NCLT 169)*, where it was held that in accordance with the definition of operational debt under the Code, the claim made is required to be in respect of provision of goods and services and not based on the breach of the terms of a settlement agreement between the Parties.

24. It is stated that the Settlement Agreement has to be read as a whole to interpret the same. The Settlement refers to the amount claimed in the previous insolvency proceedings. It also refers to the disputes between the Parties, then it proceeds to record that the settlement amount shall be Rs. 1,60,094,701/- It is therefore evident that the settlement amount is the above said figure and the same has been paid albeit with some delay.

25. It is stated that the first instalment was paid on the due date. The second instalment was paid on 19.01.2022 instead of 20.11.2021. The third instalment was paid on 03.02.2022 instead of 20.12.2021. An amount of Rs. 25,00,000/- was paid on 05.05.2022 and should represent the 5th instalment. The 4th instalment was not paid at that time. It is stated that the Operational Creditor has received all these amounts without protest and continued to receive the balance amounts as well, subsequent to the initiation of the present litigation as well.

26. It is stated that the Operational Creditor had consciously extended the time for such performance and accepted the performance without any protest. This conscious decision of the Operational Creditor constitutes a waiver of the time of performance. It is not the case of the Operational Creditor that the obligations have not been performed but it was performed after the date of its due performance and acceptance of the performance of the contract by the Operational Creditor without any protest constitutes a waiver by the Operational Creditor.

27. Under such circumstances, the Learned Senior Counsel for the Corporate Debtor has prayed for dismissal of the present Application.

<u>**DISPOSITIVE REASONINGS OF THIS TRIBUNAL**</u>

28. Heard the submissions made by the Learned Counsel for both the parties and perused the record.

29. From the arguments made by the Learned Counsel for the parties and in the attendant facts and circumstances of the present case, the following issues arise for consideration;

> *(i) Whether the Operational Creditor is entitled to receive the amount under the Settlement Agreement without performing their obligation under Clause 6 of the Settlement Agreement dated 02.10.2021?*
>
> *(ii) Whether the Operational Creditor can invoke Clause 9 of the Settlement Agreement at this stage, after accepting the 2nd, 3rd and 4th installment amount with considerable delay?*

30. In order to better understand the issue, it is imperative to read the settlement agreement dated 02.10.2021 entered into between both the parties. The said settlement agreement dated 02.10.2021 is extracted hereunder;

SETTLEMENT AGREEMENT

This Settlement Agreement is entered and executed on this the 2nd October, 2021 in Chennai. BY AND BETWEEN

XICON International Limited, a company incorporated under the Companies Act 1956, having its registered office at Opposite L&T Gate No. 7, Saki Vihar Road, Andheri (East), Mumbai 400 072., hereinafter referred to as "XICON" (which expression shall unless repugnant to the context or meaning thereof, be deemed to include, its successors and permitted assigns) and represented by Mr. G. S. Venkatraman, the authorized representative of the First Part.

AND

VA Tech Wabag Limited, a company incorporated under the Companies Act 1956, having its registered office at No.17, 200 ft. Thoraipakkam - Pallavaram Main Road, Sunnambu Kolathur, Chennai - 600 117 hereinafter referred to as "WABAG" (which expression shall unless repugnant to the context or meaning thereof, be deemed to include, its successors and permitted assigns) and represented by Mr. S. Varadarajan, the authorized representative of the Second Part.

XICON" and "WABAG" are collectively referred to as the "Parties".

WHEREAS WABAG had placed the following "Purchase Orders" and the parties shall remain bound by these Purchase Orders i) P.O. No. MBG-PO 16806/10184 dated 22.01.2015, subsequently amended on 09.04.2015; ii) P.O. No. MBG-PO-16807/10PS4, dated 22.01.2015, subsequently amended on 09.04.2015 and 27.01.2016; ii) P.O. No. MBG-PO-16937/10P6, dated 31.01.2015, subsequently amended on 12.03.2015 and 25.01.2016; iv) P.O. No. EPC-PO-28200/10P131, dated 04.09.2018; v) PO.No. EPC-PO-20734/10 P 84, dated 16.08.2018 respectively.

WHEREAS XICON issued a Demand Notice under the Insolvency and Bankruptcy Code to WABAG dated 03.02.2020; to which Wabag had responded to the Demand Notice by its Reply dated 13.02.2020,

WHEREAS, XICON had initiated proceedings before the National Company Law Tribunal, Chennai under Section 9 of the Insolvency and Bankruptcy Code, 2016 against VA TECH WABAG and the said proceedings was numbered IBA No. 608 of 2020 ("Legal Proceedings) for a claims amount of 2,57,00,817/- (Rupees Two Crores Fifty Seven Lakhs Eight Hundred and Seventeen) including Interests.

WHERAS, XICON and WABAG principally agreed to sort the differences and thereby exchanged proposals to settle the matter ateicably.

WHEREAS XICON made a claim against the invoices that were outstanding from WABAG, including the Retention amounts. WABAG on the other hand states that there are few contractual obligations that are supposed to be met XICON

WHERAS, the representatives of the Top Management of both XICON and WABAG principally agreed to sort the differences and thereby exchanged proposals to settle the matter amicably.

WHEREAS, the Parties have hereby agreed that all the disputes and differences of any nature of whatsoever nature in connection to the referred Legal proceedings arising of the various Purchaser orders between the XICON and WABAG have been for an amount of INR RS. 160.94.701 - (One Crore Sixty Lakhs Ninety Four Thousand Seven Hundred and One only) (Settlement Amount")

WHEREAS XICON agrees to receive the said amount and agree to mutually resolve the dispute between them and settle the same to put a quietus

WHEREAS both the Parties, out of their own free will and volition are entering into this Settlement Agreement without waiving off any their respective claims and rights against each other as per the Purchase Orders and this agreement:

NOW THEREFORE, in consideration of the premises and mutual promises contained herein, the Parties agree as follows:

1. Pursuant to the settlement agreed upon by Parties, XICON has agreed to cancel and withdraw the Legal Proceedings filed by XICON against WABAG in terms of this Settlement Agreement with liberty to seek restoration on default of payment of the Settlement Amount, PROVIDED the terms of this agreement are compiled without default by WABAG

2. WABAG will pay the agreed sum of Rs. 1,60,94,701 - (One Crore Sixty Lakhs Ninety Four Thousand Seven Hundred and One only) towards full and final settlement of all outstanding dues to XICON in the manner described in Table A below. This agreement shall not be contingent upon the obligation of Xicon as provided in clause 6 of the agreement.

TABLE A

S. No.	Date (on or before)	Amount
1	4th October 2021	INR 21,00,000/-
2	20th November 2021	INR 30,00,000/-
3	20th December 2021	INR30,00,000/-
4	20th January 2022	INR 30,00,000/-
5	20th April 2022	INR 25,00,000/-
6	20th May 2022	INR 24,94,701/-
	TOTAL	**INR 1,60,94,701/-**

3. WABAG shall pay the above instalments by way of RTGS/NEFT/Cheque to the designated account of XICON.

Account Details:
XICON International Limited Bank Account No. 9712426511 Bank Name: Kotak Mahindra Bank Ltd
IFSC Code:- KKBK0000681.
Branch Name: Satellite Silver Andheri Kurla Road, Andheri (East).

4. XICON and WABAG agree that there shall be a cure period of 10 days in case of default by WABAG in making payment, within which time the respective instalment, shall be paid by WABAG. Notwithstanding anything contrary, WABAG undertakes to honour its payment obligations, as per the timeline specified in Table - A without any further delay/default.

5. In the interest of reaching an amicable solution, Wabag agreed to Xicon's request of not providing the Performance Bank Guarantees

6. WABAC confirms that all the supplies are complete and further XICON agrees to complete the pending jobs and assist in commissioning, as per the Purchase Orders and co-operate in handing over the Project information and documents

7. This settlement terms agreed upon in this Agreement shall be the settlement of all dues/disputes referred herein above and she receipt of the final payment of the Settlement Amount, XICON shall not have any further claim or demand whatsoever against WABAC in regard to the said Project, provided the terms of this Agreement are complied without any default by WABAG.

8. The Parties mutually agree that on the next date of hearing in the Legal Proceedings before NCLT Chennai, this Settlement Agreement shall be filed by the Parties before NCLT, Chennai to record the terms of the settlement between the Parties vide a Joint memo of withdrawal/compromise, through their authorized representatives or by their respective counsels with a joint prayer by the Parties before NCLT, Chennai to have the Legal proceedings disposed off after giving liberty to XICON to revive the Legal proceedings in the event of any delay and / or default under the Settlement Agreement by WABAG.

9. In the event of any default / delay in the payment in accordance with Clause (b) above, the following consequences will follow:

a. The entire amount of 2,57,00,817/- (Rupees Two Crores Fifty Seven Lakhs Eight Hundred and Seventeen) (after adjusting the advance amount) would be payable with interest at 18% p.a. from the date of default of payment Xicon shall be at liberty to seek restoration of Legal Proceedings (Insolvency Petition No. IBA No. 608 of 2020), status quo as of the date of signing will be reinstated and this Settlement Terms will be treated as null and void;

b. Xicon shall be at liberty to seek restoration of Legal Proceedings (Insolvency Petition No. IBA No. 608 of 2020), status quo as of the date of signing will be reinstated and this Settlement Terms will be treated as null and void;

10. The Settlement terms are voluntary and fully accepted by both the Parties. Accordingly, for all purposes, this Settlement Agreement shall be deemed to have been drafted jointly by the Parties.

11. Each person signing this Settlement Agreement hereby represents and warrants that he or they have the authority to bind the entity on behalf of which he or it has signed.

12. Notwithstanding anything contrary to the terms of the Purchase Orders, the Courts at Chennai shall have exclusive Jurisdiction over all dispute(s) arising out of or in connection with this Agreement.

13. This Settlement Agreement limited to the settlement terms / amount, supersedes any prior agreements, understandings, or negotiations, whether written or oral. This Agreement constitutes the legal, valid, and binding obligation of each such Party, enforceable against such Party in accordance with its settlement terms.

14. The Parties agree to perform any lawful additional acts, including the execution of additional agreements, if any, as are reasonably necessary to effectuate the purpose of this Agreement.

15. This Agreement has been drafted by both the Parties and thus shall not be construed against any Party

IN WITNESS WHEREOF the parties hereto have executed this Settlement Agreement on the date written above.

For XICON INTERNATIONAL LTD For VA TECH WABAG LTD.

Issue No. (i) and (ii)

31. In so far as the issue no. (i) and (ii) are concerned, a perusal of the aforesaid agreement entered into between the parties more particularly Clause 6 of the Settlement Agreement would state that *"WABAC confirms that all the supplies are complete and further XICON agrees to complete the pending jobs and assist in commissioning, as per the Purchase Orders and co-operate in handing over the Project information and documents."* However, Clause 2 of the said Settlement Agreement states that *"WABAG will pay the agreed sum of Rs. 1,60,94,701 - (One Crore Sixty Lakhs Ninety Four Thousand Seven Hundred and One only) towards full and final settlement of all outstanding dues to XICON in the manner described in Table A below. This agreement shall not be contingent upon the obligation of Xicon as provided in clause 6 of the agreement.*

32. Clause 2 of the Settlement Agreement categorically states that the agreement shall not be contingent upon the obligation of Xicon as provided in Clause 6. This would mean that Xicon is entitled to the payment of a sum of Rs.1,60,94,701/- irrespective of the fact whether they perform their obligation as mentioned in Clause 6 of the Agreement. However, the Learned Senior Counsel for the Corporate Debtor referred to Section 51 and Section 52 of the Contract Act, 1872, which states as follows;

> **51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.**—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.
>
> **52. Order of performance of reciprocal promises.**—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

33. It was submitted by the Learned Senior Counsel for the Corporate Debtor that Settlement Agreement consists of a reciprocal promise (Clause 6) to be simultaneously performed, such rights can be exercised by the Operational Creditor only upon fulfilment of his promise and if

the Operational Creditor has not fulfilled his promise the Corporate Debtor is also not obliged to perform his reciprocal promise. It was submitted that the Operational Creditor, has not fulfilled his promise of completion of the pending works, however in turn is asking for the entire money to be paid. In this regard, the Learned Senior Counsel for the Corporate Debtor referred to the Page 40 of their counter, which is the list of pending works for M/s. Xicon (Operational Creditor) dated 11.05.2022.

ANNEXURE - B 40

Date: 11.05.2022

Pending works of M/s.Xicon

Fuel oil unloading pump house:-

1. Electrical Operated Valves commissioning work pending.
2. C&I Commissioning work pending.
3. Electrical heat tracing system commissioning pending.
4. 13 no's of Pumps to be commissioned
5. PLC system Commissioning pending.
6. UPS system commissioning pending.
7. 4 no's control valves commissioning pending.
8. Operation of all valves and instrument to be checked during commissioning if found defective to be changed/Rectified.
9. FO Cable Terminations and Dressing Pending from FOUPH to Forwarding Pump House .

Fuel oil Forwarding pump house:-

1. Electrical Operated Valves commissioning work pending.
2. C&I Commissioning work pending.
3. Electrical heat tracing system commissioning pending.
4. 3 no's control valves commissioning pending.
5. Operation of all valves and instrument to be checked during commissioning if found defective to be changed/Rectified.

11/5/22
M/s VATech Wabag
K. Atchi Reddy
11/05/22
(Atchi Reddy.K)

M/s XICON

34. Learned Counsel has contended that the Operational Creditor has not placed on record any proof to show that they have completed the pending works and hence they are entitled for payment of the amount. However, in the present case, the Operational Creditor is claiming the entire sum of Rs. 2,57,00,817/- along with interest @ 18% p.a., without completing the pending works. This itself would amount to a 'dispute' between the parties.

35. Clause 9 of the Agreement states as follows;

> *"9. In the event of any default / delay in the payment in accordance with Clause (b) above, the following consequences will follow:*
>
> > *a. The entire amount of 2,57,00,817/- (Rupees Two Crores Fifty Seven Lakhs Eight Hundred and Seventeen) (after adjusting the advance amount) would be payable with interest at 18% p.a. from the date of default of payment Xicon shall be at liberty to seek restoration of Legal Proceedings (Insolvency Petition No. IBA No. 608 of 2020), **status quo as of the date of signing will be reinstated** and **this Settlement Terms will be treated as null and void**;*
> >
> > *b. Xicon shall be at liberty to seek restoration of Legal Proceedings (Insolvency Petition No. IBA No. 608 of 2020), **status quo as of the date of signing will be reinstated and this Settlement Terms will be treated as null and void**;"*

36. In the present case, the Corporate Debtor as against the amount arrived in the settlement agreement for a sum of Rs.1,60,94,701/-has paid only a sum of Rs.1,06,00,000/-. The details of the due date as per the settlement agreement and the date of payment made by the Corporate Debtor are tabulated hereunder;

S. No.	Amount Due	Due Date	Amount Paid	Paid on Date
1	21,00,000/-	04.10.2021	21,00,000/-	04.10.2021
2	30,00,000/-	20.11.2021	30,00,000/-	19.01.2022
3	30,00,000/-	20.12.2021	30,00,000/-	03.02.2022
4	30,00,000/-	20.01.2022	25,00,000/-	05.05.2022

37. It could be seen from the above table that except the 1st installment, the remaining installments were paid to the Operational Creditor after the due date i.e. after a delay of more than 2 months. The present Application has been moved by the Operational Creditor only on 16.11.2022. Thus, the Operational Creditor, *de hors* Clause 9 of the Settlement Agreement has accepted the payment made by the Corporate Debtor after certain delays. This conscious decision of the Operational Creditor to receive payments in derogation of Clause 9 of the Settlement Agreement would constitute acquiescence. After receiving the 2nd, 3rd

and 4th installments from the Corporate Debtor with considerable delay, the Operational Creditor is now invoking Clause 9 of the Settlement Agreement to state that there is a breach in the settlement agreement and as such the entire amount of Rs.2,57,00,817/- is due and payable by the Corporate Debtor. This stance of the Operational Creditor does not hold merit in view of the fact that in derogation of Clause 9 of the Settlement Agreement, the Operational Creditor has received the 2nd, 3rd and 4th installments from the Corporate Debtor with considerable delays.

38. Further, it is also pertinent to note that Operational Creditor has received certain amount from the Corporate Debtor after filing of the present Application before this Tribunal. As a matter of fact, it was submitted during the course of hearing that the entire amount of Rs.1,60,94,701/- as per the Settlement Agreement dated 02.10.2021 has been paid by the Corporate Debtor to the Operational Creditor and the Corporate Debtor has also acknowledged the same in its written submissions, which is reproduced hereunder;

Cumulative amount to be paid on breach of Settlement Agreement	INR 2,57,00,817/-
Principal amount after deducting payments prior to initiation of the instant CP [A]	[2,57,00,817 – 1,06,00,000] = INR 1,51,00,817/-
Interest at the rate of 18% per annum from 20.05.2022 to 30.09.2022	INR 9,97,894/-
Interest @ 18% per annum on Rs. 1,51,00,817/- for 31 days i.e., from 01.10.2022 to 31.10.2022	INR 2,30,858/-
Sub-Total [B] = INR 12,28,752/-	
Total amount due as on 31.10.2022 [A + B]	**INR 1,63,29,569/-**
Payments made after initiation of the instant CP [C]	[15,18,005 + 15,00,000 + 24,76,696] = 54,94,701
Total outstanding [(A+B) – C]	**INR 1,08,34,868/-**

39. At this juncture, we wish to point out here that the entire amount under the Settlement Agreement has been paid by the Corporate Debtor and as such the present Application filed by the Operational Creditor is only for the recovery of the balance amount and not for resolution of insolvency of the Corporate Debtor. In this context, it is significant to refer to the Judgment of Hon'ble NCLAT in the matter of **Permali Wallace Pvt. Ltd. -Vs- Narbada Forest Industries Pvt. Ltd.** in *Company Appeal (AT) (Insolvency) No. 36 of 2023,* wherein para 4 and 5 it is observed as under;

> 4. Learned Counsel for the Appellant challenging the order contends that liberty was granted in the consent terms/settlement agreement that in event any breach is committed, the Application be revived. He further submits that post dated cheques were

bounced and Appellant filed Application under Section 9 was for recovery of the balance interest amount which was unpaid.

5. Having heard Learned Counsel for the parties, we are of the view that Adjudicating Authority did not commit any error in rejecting Section 9 Application. It has been laid down by the Hon'ble Supreme Court in *"Swiss Ribbon Pvt. Ltd. Vs. Union of India"* ***((2019) 4 SCC 17),*** **IBC is not a recovery proceeding and the Application which has been filed by the appellant in the present case is only the application for recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the Corporate Debtor.** We are of the view that no error has been committed by the Adjudicating Authority in rejecting Section 9 Application filed by the Appellant. There is no merit in the Appeal, the Appeal is dismissed.

(Emphasis supplied)

40. Thus, we are of the view that eventhough Clause 6 of the Settlement Agreement dated 02.10.2021 states that payment to the Operational Creditor shall not be contingent upon the obligation of Xicon, but the Operational Creditor has not fulfilled his promise of completion of pending works, eventhough the entire payment under the Settlement Agreement has been paid subsequently. Further, we are also of the view that the Operational Creditor cannot invoke Clause 9 of the Settlement Agreement at this stage, after accepting the 2nd, 3rd and 4th installment amount with considerable delay. Accordingly, issue nos. (i) and (ii) are answered.

41. In view of the observations made as above, the present Application CP(IB)/260(CHE)/2022 stands **dismissed.**

-sd-

RAVICHANDRAN RAMASAMY
MEMBER (TECHNICAL)

-sd-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond