

Sl. No. 60/2024

1

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 15/9/JPR/2020

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicatory Authority) Rules, 2016)

IN THE MATTER OF:

SHAILESH BHANDARI

...Operational Creditor

VERSUS

SOMI CONVEYOR BELTINGS LTD.

...Corporate Debtor

MEMO OF PARTIES

SHAILESH BHANDARI,
son of Shri V.C. Bhandari
Having its residence at D-
109, Shastri Nagar,
Jodhpur- 342003

**... Petitioner/
Operational Creditor**

VERSUS

SOMI CONVEYOR BELTINGS LTD.

R/o: 4F-15, Oliver House,
NPH Road, Jodhpur- 342001

**... Respondent/
Corporate Debtor**



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Assistant Registrar
National Company Law Tribunal
Jaipur

FOR THE APPLICANT(S) : Navneet Singh Brikh, Adv.
FOR THE RESPONDENT(S): Vishal J. Dave, Adv.
Pranjul Chopra, Adv.
Vedant, Adv.
Sameer Sharma, Adv.
Ankur Jain, Adv.

Order Pronounced On: 22.02.2024

ORDER

Per: Shri Rajeev Mehrotra, Technical Member

1. The present Application has been preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') by *Mr. Shailesh Bhandari* ('Operational Creditor') seeking Corporate Insolvency Resolution Process ('CIRP') of *Somi Conveyor Beltings Ltd.* ('Corporate Debtor'/ 'SCBL') on account of default in payment of Rs. 32,88,215/- (Rupees Thirty-Two Lakhs Eighty-Eight Thousand Two Hundred and Fifteen Only).
2. The Corporate Debtor is a company registered under the provisions of the Companies Act, 1956 having CIN L25192RJ2000TLC016480 and registered office at 4F-15, Oliver House, New Power House, Jodhpur. The Authorized Share Capital is Rs. 25,00,00,000/- (Rupees Twenty-Five Crores Only) and Paid-up Share Capital is Rs. 11,77,96,560/- (Rupees Eleven Crore Seventy-Seven Lakhs Ninety-Six Thousand Five Hundred and Sixty Only). The Corporate Debtor is involved in the business of manufacturing of rubber

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conveyor belts. The same has been verified from the website maintained by the Ministry of Corporate Affairs.

3. The Application has been filed on the basis of the following set of facts:

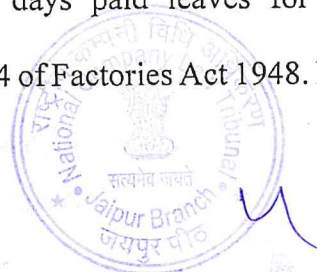
3.1. The Operational Creditor was working with Corporate Debtor since 03.04.2008 as Vice President, Technical till termination of his services on 07.10.2018. The 10.6 years of service of the Operational Creditor was terminated through a WhatsApp message with an immediate effect without giving any prior show cause notice or intimation of any kind.

3.2. The Operational Creditor has served the Corporate Debtor for more than 10.6 years and making him entitled to gratuity payment for 11 years taking into consideration the salary of Rs. 2,20,000/- (Rupees Two Lakhs Twenty Thousand Only) per month for 26 days as per the applicable act and rules. The total gratuity amount which Operational Creditor is entitled as per relevant act and rules is Rupees 13,96,154/- (Rupees Thirteen Lakhs Ninety-Six Thousand One Hundred and Fifty-Four Only) in addition to Interest Loss @18% p.a. on delayed period w.e.f. 01.11.2018 and penalty on the delay.

3.3. On account of completion of 10.6 years of service, the Operational Creditor is entitled for 15 days paid leaves for every year ending December 31 as per section 74 of Factories Act 1948. Due to accumulation

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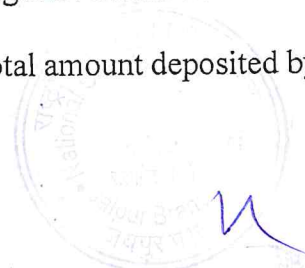
of leaves, the Operational Creditor is entitled for 15 days leave x 6.5 years = 97.5 days. These 97.5 days x Rs. 2,20,000/- (Rupees Two Lakhs Twenty Thousand Only) per month salary of 26 days normalizing for 30 days works out to Rs. 8,25,000 (Rupees Eight Lakhs Twenty-Five Thousand Only) in addition to Interest Loss @18% p.a. on delayed period w.e.f. 01.11.2018 and penalty on the delay.

3.4. It is submitted that, as per the Factories Act, 1948 and the Companies Act, 2013, every employee shall be given a prior notice of 90 (ninety) days before termination of his/her service; however, no such prior notice has been given. In the present matter, the Corporate Debtor is liable to compensation for 90 days of full working salary for the notice period, which amounts to Rs. 7,61,538/- (Rupees Seven Lakhs Sixty-One Thousand Five Hundred and Thirty-Eight Only), in addition to interest loss at 18% p.a. on the delayed period starting from 30.10.2018 and a penalty for the delay.

3.5. The Operational Creditor further alleged that since he is residing in his own house, the Corporate Debtor has deliberately designed the wrong salary bifurcation in order to prevent or minimize the liability of Employers contribution to 40% against actual 100% of gross salary and the same can be quantified. The total amount deposited by employer share

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@12% till October 2018 was bifurcated under EPF head as Rs. 1,15,106/- (Rupees One Lakh Fifteen Thousand One Hundred and Six Only) with Interest for 2018-19 and Rs. 78,792/- (Rupees Seventy-Eight Thousand Seven Hundred and Ninety-Two Only) under the pension contribution. As per PF law and the Hon'ble Supreme Court ruling, the deduction should be 2.5 times of the actual wrong deductions made by Corporate Debtor. Hence, the Operational Creditor is entitled for Rs. 3,05,523/- (Rupees Three Lakhs Five Thousand Five Hundred and Twenty-Three Only) in addition to Interest Loss @18% p.a. against inappropriate EPF deductions. It is also submitted that the Petitioner is approaching EPFO Tribunal and CVO to consider the present matter and make applicability to every employee.

3.6. The aforementioned details as reflected in PART IV of the Application are as below:

PARTICULARS OF OPERATIONAL DEBT

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1.	Total amount of debt granted. Date(s) of disbursement	<p>Total Amount of Debt: Rs. 32,88,215/- (Rupees Thirty-Two Lakhs Eighty-Eight Thousand Two Hundred and Fifteen Only).</p> <p>Details of transactions on account of which debt fell due:</p> <ol style="list-style-type: none"> Gratuity Payment: Rupees 13,96,154/- (Rupees Thirteen Lakhs Ninety-Six Thousand One Hundred and Fifty-Four Only) in addition to Interest Loss @18% p.a. on delayed period w.e.f. 01.11.2018 and penalty on the delay. Paid Leave (P/L 15 days per annum): Rs. 8,25,000 (Rupees Eight Lakhs Twenty-Five Thousand Only) in addition to Interest Loss @18% p.a. on delayed period w.e.f. 01.11.2018 and penalty on the delay. 90 days Compensation Salary: Rs. 7,61,538/- (Rupees Seven Lakhs Sixty-One Thousand Five Hundred and Thirty-Eight Only) in addition to Interest Loss @18% p.a. on delayed period w.e.f. 30.10.2018 and penalty on the delay. Inappropriate EPF Deduction: Rs. 3,05,523/- (Rupees Three Lakhs Five Thousand Five Hundred and Twenty-Three Only) in addition to Interest Loss @18% p.a. against inappropriate EPF deduction. 				
2.	Amount claimed to be in default and the date on which the default occurred.	<p>Rs. 32,88,215/- (Rupees Thirty-Two Lakhs Eighty-Eight Thousand Two Hundred and Fifteen Only).</p> <p><i>Details of Date of Defaults for each Defaulted Invoices is as under: -</i></p> <table border="1" data-bbox="686 1856 1386 1981"> <thead> <tr> <th>PARTICULAR</th> <th>DATE OF DEFAULT</th> </tr> </thead> <tbody> <tr> <td>Outstanding Gratuity payment</td> <td>From 03.04.2008 to 30.10.2018</td> </tr> </tbody> </table>	PARTICULAR	DATE OF DEFAULT	Outstanding Gratuity payment	From 03.04.2008 to 30.10.2018
PARTICULAR	DATE OF DEFAULT					
Outstanding Gratuity payment	From 03.04.2008 to 30.10.2018					

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	Outstanding Paid leave payment for 15 days every year	From 03.04.2008 to 30.10.2018
	Outstanding payment for 90 days salary	From 03.04.2008 to 30.10.2018

3.7. The Operational Creditor in order to get the dues cleared, has contacted the Corporate Debtor at multiple occasions through multiple modes of communication including emails and notices mentioning references under the Companies Act 2013 and other relevant labour laws. The Operational Creditor on 13.05.2019 sent a legal notice to the Corporate Debtor claiming his legal dues. Further on 13.09.2019, the Operational Creditor sent a notice to Corporate Debtor in accordance with Section 8 of the Code.

3.8. The Operational Creditor along with the Application has annexed various documentary proofs including a copy of calculation sheet detailing the calculations of the amount due, copy of ITR returns of Operational Creditor duly filed for different periods, copy of EPF contribution of Operational Creditor and copy of the final settlement of Operational Creditor along with relevant affidavits in support.

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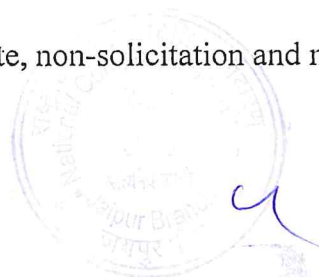
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4. The Respondent *vide* Dairy No. 2718/2022 dated 12.09.2022 has filed the reply delineating the following points:
- 4.1. The Respondent submitted that it is a going concern and a debt-free company, with profits and a good reputation in both domestic and international markets. Since there is no default and it concerns the livelihood of the Respondent's employees and workers, the present Application deserves to be dismissed.
- 4.2. Further it has been submitted that the Operational Creditor has no *locus standi* to file this present application as the Hon'ble NCLAT in the matter of *Kishore K. Lonkar Vs. Hindustan Antibiotics Ltd. (Company Appeal (AT) (Insolvency) No. 934/2021)* has settled the law that the CIRP cannot be initiated on the grounds of service benefits/ welfare benefits being due in terms of LTC, EL Encashment, Gratuity etc. Thus, the only remedy for Operational Creditor is to file claim under Form-D in Regulation 9 of the (Insolvency and Bankruptcy) CIRP Regulations, 2016 or approach the concerned Labour Court for any grievance.
- 4.3. Also, it is contended that the Operational Creditor has executed a Confidentiality and Non-Disclosure Agreement with the Respondent on 19.10.2011. This agreement bounds the Operational Creditor with covenants relating to non-compete, non-solicitation and non-disclosure of

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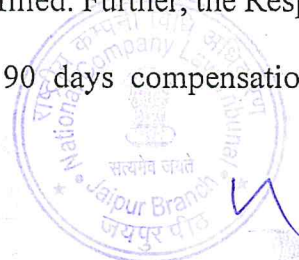
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information. A copy of the executed document has been attached with the reply. The Respondent further alleged that the Operational Creditor through his family members floated a company by the name of *M/s Solaris Paper World (I) Pvt. Ltd.* on 01.08.2018 and started selling similar products as that of the Respondent. In the said company *Solaris Paper*, the wife and daughter of the Operational Creditor are directors which can be verified from the information of the company available on the MCA website. By directly or indirectly involving in creation of a competing company, the Operational Creditor proves his *malafide* intentions and has violated the provisions of the said Agreement dated 19.10.2011. The Respondent had not taken any legal action considering the career of the Operational Creditor, however, without prejudice to the present case, the Respondent reserves the right to initiate legal proceedings against the Operational Creditor. Thus, due to violation of the said Agreement dated 19.10.2011, the Operational Creditor was validly removed from his post.

4.4. Further, the Respondent submitted the proof of Composite Claim Form of EPFO dated 30.10.2018, bearing signatures of the Operational Creditor and the Respondent. Thereby all obligations of the Respondent pertaining to 'Final PF Settlement' were fulfilled. Further, the Respondent submitted that the claim of paid leaves, 90 days compensation and gratuity is

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unsupported with any material evidence on record. Furthermore, there exists no agreement between the parties to this effect and therefore, the same cannot be unilaterally imposed on the Respondent.

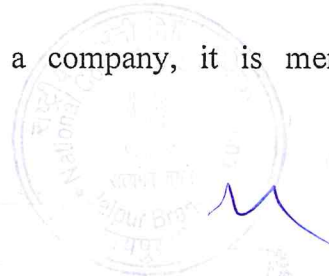
- 4.5. The present Application is an attempt to extort money from the Respondent. In view of the submissions above, the Respondent submitted that the present Application is not maintainable and liable to be dismissed on the ground of pre-existing disputes between the parties. Reliance has been placed regarding the intention of the Operational Creditor on the judgement of the Hon'ble Supreme Court in the case of *M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Limited and Ors.* (Civil Appeal No. 4583/2022) as under:

"The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor."

5. The Operational Creditor preferred a Rejoinder to the Reply of the Corporate Debtor in the present matter vide Diary No. 188/2023 dated 20.01.2023 stating the following points:

- 5.1. With regard to the contention stating that the Operational Creditor through his family members floated a company, it is mentioned that the

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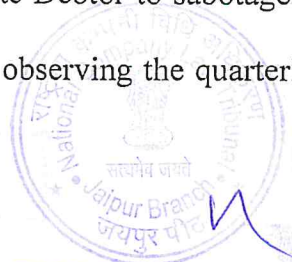
Operational Creditor is not remotely involved in the functioning and operations of the *Solaris Paper World (I) Pvt. Ltd.* and the company is registered in the name of *Smt. Anuja Bhandari* and *Yash Bhandari* being the Directors. The Respondent neither pointed out any collaboration or connection of *Solaris Paper World* with Respondent nor provided any details as to how *Solaris Paper World* is connected with the present controversy of the Application.

5.2. In addition, it is submitted that the Corporate Debtor had been duly served with a Demand Notice which clearly states that the Corporate Debtor/ Respondent must bring any pre-existing dispute to notice within 10 days, however, no such reply was received. The said contention of pre-existing dispute not being raised at any instance.

5.3. The Corporate Debtor in its reply submitted that the Respondent Company is a going concern, a solvent company, having no debts, earning profits and has good reputation in the market, whereas on the contrary, the Petitioner was terminated stating that the company is not in good position now and we cannot continue the service with immediate effect. The conflicting statements by the Respondent Company clearly depicts the malafide intention of the Corporate Debtor to sabotage the image of the Operational Creditor. Further, by observing the quarterly results of June

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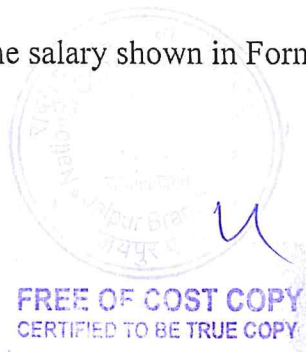
2022 supported with CA certificate, it is confirmed that the Company is solvent, operational and profit making. The Company has enough funds in place to address and make provisions for the payment of service claims/welfare benefits.

- 5.4. The Respondent has wrongly stated in its reply that no documentary proofs have been submitted regarding payment of paid leaves, i.e., leave encashment and termination payment of three months. This submission is falsified as all justifications and proofs have already been placed on record. For instance, Form-16 was submitted, which itself is a legal document depicting that the amount has been distributed under various heads and the payments were made by cheques or bank transfers. It covers only the basic salary part and does not include the leave encashment and termination payment of 3 months.
- 5.5. In relation to proof of gratuity claimed, the calculations were annexed in the Application derived from Form-16. Moreover, in Form-16, House Rent Allowance is shown as negligible, however, while calculating the Employer's Contribution under EPF, the Respondent Company used 60% of the HRA of the total salary. This can be confirmed from the EPF statement and correlated with the salary shown in Form-16.

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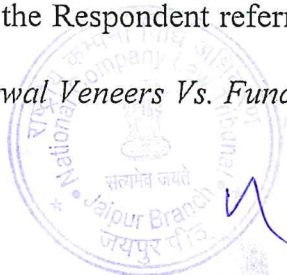
6. The Respondent has filed its Written Submission *vide* Dairy No. 2976/2023 dated 15.12.2023 along with a reference to the list of case laws submitted *vide* Dairy No. 2016/2023 dated 17.08.2023, which are being reiterated as below:

6.1. The Respondent Company relied on judgement passed by Hon'ble NCLAT in the case of *Tricolite Electrical Industries Limited Vs. WIPRO Ltd. (Transfer Appeal (AT) No. 227/2021 (Company Appeal (AT) (Ins) No. 326/2020)* wherein the Hon'ble NCLAT Chennai placed reliance on the judgement of the Hon'ble Supreme Court in the matter of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Anr.* reported in [(2019) 4 SCC 17] wherein it was held that " *the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.*"

6.2. The Respondent in support of their contention relating to pre-existing dispute cited the judgment of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405/2017)*. Further, the Respondent referred to the order of the Hon'ble NCLAT in *M/s Agarwal Veneers Vs. Fundtonic Service Pvt.*

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Ltd. (Company Appeal (AT) (Ins) No. 968/2020 wherein the following has been observed that "The Hon'ble Supreme court in 'Vidarbha Industries Power Ltd. vs. Axis Bank Ltd'. 2022 SCC Online SC 841 has observed that even if there is a 'debt' and 'default', the Adjudicating Authority should use its discretion in admitting/ rejecting an Application."

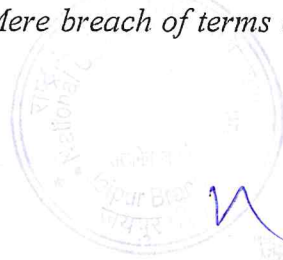
6.3. The Respondent has further relied upon the judgment of *Prism Johnson Ltd. Vs. Doosan Power Systems India Pvt. Ltd. (IB)-474(ND)2022* which observes that *"While examining an application under Section 9 of IBC, 2016, we may not be oblivious about the financial health of the Corporate Debtor. The object of the IBC is to ensure that the insolvent company is put back on its feet and not to disarray a solvent and financially sound company."*

6.4. Further, the Respondent referred *M/s Ahluwalia Contracts (India) Ltd. Vs. M/s Jasmine Buildmart Pvt. Ltd. CP. No. (IB)-1941(ND)/2019*

"At this juncture, we find it advantageous to refer the Hon'ble NCLAT judgement dated 25.11.2020 in case titled Amrit Kumar Aggarwal versus M/s. Tembo Appliances Private Limited in Company Appeal (AT) (Insolvency) No. 1005/2020 wherein while discussing this issue, it was observed by Hon'ble NCLAT that a mere obligation to pay does not bring the liability within the ambit of 'financial debt' as defined under IBC. The debt, along with interest, if any, should be disbursed against the consideration for the time value of money. Mere breach of terms of any agreement

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including a Settlement Agreement by a party, whereby some payment was due, would not fall within the scope of Section 5(8) of IBC, so as to constitute a 'Financial Debt'. Accordingly, it was observed that mere obligation to pay under a Settlement Agreement would not amount to disbursement of amount for consideration against the time value of money, and thus, breach of such obligation would not entitle a party to invoke CIRP against the other party. Taking guidance from the aforesaid judgement, it can be concluded that mere breach of terms of any agreement including a settlement agreement by a party, whereby some payment is due cannot take colour of an operational debt arising out of supply of any goods or services as envisaged under Section 5(20) of the Code, 2016”.

7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, Rejoinder, and Written Submissions along with the documents enclosed therein.
8. The question for consideration is:
 - 8.1. Whether the Petitioner has *locus standi* to file a case under section 9 of the Code claiming service benefits/ welfare benefits as an Operational Debt under section 5(21) of the Code?
 - 8.2. Whether the case has been filed as a recourse to recover debts against a solvent company under Section 9 of the Code considering the intent and object of the Code?

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9. First and foremost, it is pertinent to decide the nature of claims claimed by the Petitioner considering the intent and objective of the Code. In light of the judgement pronounce by Hon'ble NCLAT Delhi in *Kishore K. Lonkar Vs. Hindustan Antibiotics Ltd.* (supra), the claims made by the Petitioner in respect of unpaid Gratuity amount, leaves encashments, 90 days compensation for inappropriate termination and inappropriate EPF deductions fall under the category of 'service claims' or 'welfare claims,' which may arise during the term of employment or after cessation of employment, as the case may be. The relevant paragraph of the judgment is reproduced below:

"9. The aforementioned Section includes any 'Claim' in respect of the provision of Goods and Services including 'employment'. It is not the case of the Appellant that the amounts claimed are due towards any emoluments/salary for the services rendered by him to the 'Corporate Debtor', while he was in service. Though 'service benefits' like 'LTC' accrue, on account of the service rendered during the period of employment, the scope and objective of the Code is simply not just for recovery of 'dues' but Resolution of the Companies meant for 'maximisation of the value of assets', to promote entrepreneurship, availability of credit and balance all interest of the stakeholders. Employees and workmen do constitute a major part of the stakeholders. The term 'employee' in general parlance refers to a person, who is hired by the employer to perform a particular job and is entitled to a specific wage or salary. Section 3(36) of the Code states that the term 'workmen' shall have the same meaning as provided under Section 2(s) of the Industrial Disputes Act, 1947. For the purpose of the Code, the term 'workmen dues' has to be interpreted in terms of explanation to Section 326 of the Companies Act, 2013. As per the definition

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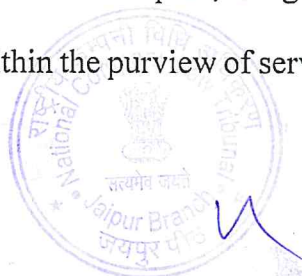


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incorporated therein, the dues would cover wages and salary, accrued holiday remuneration, workmen compensation, and all sums due from Provident Fund, Pension, Gratuity Fund or any other fund for the welfare of the workmen, maintained by the employer. Generally speaking, the 'Claims' of the workmen/employees may be classified as 'service claims' which arise during the terms of employment, in lieu of service rendered by the employee, salary, wages, bonus, dues etc., and 'welfare claims' which arise after cessation of employment, like 'Gratuity', 'Leave Encashment', Superannuation Dues, Workmen Compensation for closure of the entity which all depend on the tenure of the employment. Subsequent to the Company going into the Insolvency, all such claims may be submitted in Form D under Regulation 9 of the (Insolvency and Bankruptcy) CIRP Regulations, 2016. But seeking to initiate CIRP on the ground that 'LTC' and 'EL Encashment' has not been paid, which fall within the ambit of service benefits/welfare benefits cannot be said to be the intent and objective of the Code."

10. The Hon'ble NCLAT has held that the aforementioned claims, however, may be submitted in Form D under Regulation 9 of the (Insolvency and Bankruptcy) CIRP Regulations, 2016 subsequent to the Company going into Insolvency. It is important to mention that the Respondent Company is currently a going concern and not facing Corporate Insolvency. Therefore, seeking to initiate CIRP on the grounds that 'Gratuity amount', 'Leave Encashment', '90 days compensation for inappropriate termination from employment' and 'inappropriate EPF deductions' have not been paid, is against the intent and object of the Code. The same falls within the purview of service benefit/welfare

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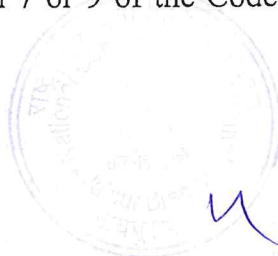
benefit. In addition, the question of rightfully determining the amount of such claims along with the interest does not fall within the domain of IBC, thus the said claims do not amount to Operational Debt at this point in time when the Company is not facing Insolvency.

11. Further, in order to decide whether the case has been filed as a recourse to recover debts against a solvent company under section 9 of the Code considering the intent and object of the Code, it is important to reiterate that the Respondent Company is a going concern, a solvent company, earning profits and has good reputation in the market. The following table depicts the financial strength of the Respondent Company from 01.04.2022 to 30.06.2022:

<i>PARTICULARS</i>	<i>AMOUNT</i>
Sales	Rs. 1339.48 lakh
Total Income	Rs. 1346.62 lakh
Total Expenses	Rs. 1296.69 lakh
No of permanent employees and workers as on 01.09.2022	102 permanent employees

12. The fact is undisputed that the Respondent Company is a going concern, solvent, and profit-making company. In this light, referring to *M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Limited and Ors. (supra)*, the law is well settled that the NCLT cannot be used as a debt collection forum while exercising power under section 7 or 9 of the Code. Additionally, it is

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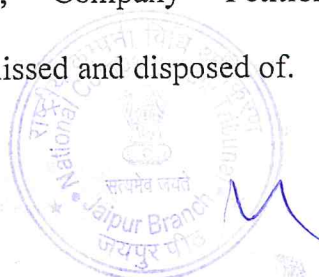
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against the intent and object of the Code to penalize solvent companies for non-payment of dues claimed by the Operational Creditor by initiating CIRP under the Code.

13. We are of the view that these debts do not qualify as Operational Debt under Section 9 of the Code. Further, since the debt does not amount to an Operational Debt under Section 5(21) of the Code, we are not delving into the issue regarding the existence of any dispute prior to the issuance of Demand Notice under Section 8 of the Code. Considering the facts and circumstances of the case, we are not initiating CIRP of the Corporate Debtor.
14. However, this will not stand in the way of the Petitioner approaching the appropriate forum seeking enforcement of his claim, as this petition has been dismissed on the issue of maintainability taking into consideration the provisions of the Code, 2016 and developments made therein. It is further clarified that the Order in the present matter is made in terms of section 9(5)(ii) of the Code based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
15. In view of the foregoing, Company Petition numbered as *CP (IB)15/9/JPR/2020* stands dismissed and disposed of.

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16. The registry is directed to provide copy of this Order to the parties.



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CERTIFIED TO BE TRUE COPY

N. Mehta

Assistant Registrar
National Company Law Tribunal
Jaipur.

Sd/-

**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

Sd/-

**RAJEEV MEHROTRA,
TECHNICAL MEMBER**