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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

IBA/820/2019

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of
the Insolvency and Bankruptcy (Application to Adjudicating Authority)
Rules, 2016)*

In the matter of **M/s. TAQA India Power Ventures Private Limited**

M/s. NCC Infrastructure Holdings Limited ("NCCIHL"),
6th Floor, NCC House, Survey No.64,
Madhapur, Hyderabad – 500 081, India.

... *Operational Creditor*

-Vs-

M/s. TAQA India Power Ventures Private Limited,
Uthangal, Umangalam, Via Vridhachalam,
Cuddalore District, Cuddalore,
Tamil Nadu 607 804.

... *Corporate Debtor*

Order pronounced on 6th August, 2021

CORAM :

R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

*For Operational Creditor : R. Murari, Senior Advocate
For Hema Srinivasan, Advocate*

*For Corporate Debtor : Sathish Parasaran, Senior Advocate
For P. Giridharan, Advocate*

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

Under consideration is an Application filed under Section 9 of
the Insolvency & Bankruptcy Code, 2016 (**IBC, 2016**) by one
M/s. NCC Infrastructure Holdings Limited ("NCCIHL")
(hereinafter referred to as "**Operational Creditor**") against

M/s. TAQA India Power Ventures Private Limited (hereinafter referred to as "**Corporate Debtor**").

2. **BRIEF FACTS OF THE CASE:-**

(i) A Company by name **M/s. Himachal Sorang Power Limited (HSPL)** was set up as a Special Purpose Vehicle (SPV) in order to carry out the project viz. "Sorang Tributary Hydro Electric Power" with a generation capacity of 100 MW and the said project was awarded to HSPL by the Government of Himachal Pradesh.

(ii) The shares of the HSPL are held in the following pattern;

(a)	By the Operational Creditor	-	94.92%
(b)	NCC Limited	-	0.08%
(c)	IL & FS Energy Development Company Ltd.	-	5%

(iii) Subsequent to the same, HSPL has commenced the work relating to the project by entering into the contracts with several contractors between the year 2007 and 2010.

(iv) In or around the year end 2011, when the Corporate Debtor was exploring the possibility of making further investment in power generation in India and was in touch with the various institutions, M/s. IL&FS approached the Corporate Debtor with a proposal to invest in the project. At that point of time, HSPL had run out of funds and the Corporate Debtor was cash-constrained to inject more funds into HSPL and the project. However, since the project was only months away from completion and there were at least four

different contractors working on the project, the Corporate Debtor felt that if it were to acquire the project on 'as is where is' basis, it would have to invest considerable time and effort to learn about the project and complete it.

- (v) Pursuant to the discussions being made between the parties, a Securities Purchase Agreement (SPA) dated 19.09.2012 was entered into between the parties viz.,
- (a) NCCIHL (*the Operational Creditor*);
 - (b) NCC Limited;
 - (c) IL & FS Energy Development Company Ltd. (IEDCL);
 - (d) M/s. TAQA Jyoti Energy Ventures Pvt. Ltd. (*the Corporate Debtor*);
 - (f) M/s. Himachal Sorang Power Ltd. (HSPL);
 - (g) Infrastructure Leasing & Financial Services Ltd. (IL & FS);
- (iv) In the said agreement, the Corporate Debtor is the buyer who has agreed to purchase the entire share capital relating to HSPL from the existing shareholders, wherein the Operational Creditor is one of the major shareholders. The Corporate Debtor has agreed to purchase the same in two tranches i.e., first tranche of 5% of the share capital and 100% of the Fully Convertible Debentures (FCD) from NCCIHL and IEDCL and in the second tranche of 95% of the share capital from NCCIHL, NCC and IEDCL.
- (v) The SPA, apart from recording the terms of acquisition of HSPL's shares and FCDs by the Corporate Debtor, set

out various rights and obligations of the parties. As per Clauses 4 and 6 of the SPA, the total consideration of Rs.360 crore was payable by the Corporate Debtor for the acquisition in the following manner:

"a. Aggregate Consideration of Rs.278,33,00,000/- (Rupees Two hundred seventy eight crores and thirty three lakhs only) (comprising the "Initial Sale Consideration" and the "Subsequent Sale Consideration" as defined in the SPA) was payable by TAQA to the Sellers and it comprised of Rs.150,61,00,000/- (Rupees One hundred fifty crores and sixty one lakhs only) payable to NCCIHL following the satisfaction (or waiver) of all the Conditions Precedent (as set out in the SPA)."

- (vi) Subsequently after obtaining certain approval from the Government of Himachal Pradesh, the parties in the SPA had agreed to amend the terms of the Agreement in relation to the consideration and covenants vide an Amendment Agreement dated 07.12.2012 to the SPA, wherein it was agreed that the Corporate Debtor would withhold a sum of Rs.24 crore from the consideration payable to the Operational Creditor pursuant to Clause 6.4.1(b)(ii) and then the Corporate Debtor would pay the withheld sum of Rs.24 crore within seven days from the execution of a Supplementary Implementation Agreement. Thereafter, the Corporate Debtor released to the Operational Creditor a sum of Rs.15 crore from and out of the aforesaid withheld amount of Rs.24 crore, while continuing to withhold the balance amount of Rs.9 crore.
- (vii) Subsequently, the Supplementary Implementation Agreement was entered into between the Government of

Himachal Pradesh and HSPL on 23.05.2016 which accorded permission for the transfer of balance shares to HSPL, in and by which, it was alleged by the Operational Creditor that a sum of Rs.9 crore was withheld by the Corporate Debtor, which has become due payable to the Operational Creditor.

(viii) In the meantime, on 31.12.2014, arbitration proceedings were invoked jointly by the Corporate Debtor and HSPL as Claimants against the Operational Creditor and NCC Limited, on account of several alleged breaches by the Operational Creditor & NCC Limited. In the said arbitration proceedings, the Corporate Debtor and HSPL have claimed an amount of Rs.132.648 crore towards Cost Overrun and an amount of Rs.217.827 crore towards loss of profits. In the said arbitration proceedings, the Operational Creditor has filed a counterclaim against the Corporate Debtor in respect of an amount of Rs.9 crore which was held by the Respondent under the terms of the amended SPA. The said claim of Rs.9 crore was made on the basis of the second Supplementary Implementation Agreement dated 23.05.2016. The Arbitral Tribunal on 24.01.2018 has rendered the Award and the operative portion of the award is as follows: -

- (a) NCCIHL shall pay INR 90,44,80,000 to HSPL towards Cost Overrun (after adjusting INR 36,00,00,000 recovered by TAQA on behalf of HSPL by encashing Security Bond I and INR 62,000,000 paid by NCCIHL towards Cost Overrun, against the total Cost Overrun of INR 1,32,64.80,000);



- (b) NCCIHL shall pay INR 28,70,18,685 to HSPL towards the BPTA claim;
- (c) TAQA shall return the four Bank Guarantees (BG No. 030/ LG/101, 102, 103 & 104/ 12-12, duly discharged and cancelled, to NCCIHL, within 15 days of receipt of the Shares Transfer Forms in regard to 91.5% Shares of HSPL;
- (d) TAQA shall pay to NCCIHL, INR 9,00,00,000 towards part of the consideration; and
- (e) NCCIHL shall pay to the Claimants, a sum of INR 1,85,00,000 towards Costs; and the Claimants shall pay to NCC a sum of INR 85,00,000 towards Costs."

(ix) Thus, it is seen from the Award that the Operational Creditor was directed to pay a sum of Rs.120,99,98,685/- to HSPL and that the Corporate Debtor is liable to pay a sum of Rs.9 crore in respect of the counterclaim being made by the Operational Creditor in the said arbitration proceedings. It is seen that the said arbitration proceedings were held at Singapore and it has also been averred in the Counter that the Corporate Debtor and HSPL have sought for the legal enforcement of the Award in India.

(x) The operative portion of the Award wherein the Corporate Debtor was directed by the Arbitral Tribunal to pay a sum of Rs.9 crore to the Operational Creditor. In this regard, para 381 of the Award is extracted hereunder for ready reference:

"381. NCCIHL submitted that in view of the execution of the second Supplementary Implementation Agreement between GoHP and HSPL on 23 May 2016 according permission for transfer of the balance shareholdings to HSPL (that is, the

'subsequent share sales'), the balance consideration of INR 9 crores withheld by TAQA has to be released to NCCIHL. When NCCIHL demanded the payment of the said sum of INR 9 crores by letter dated 22 June 2016, TAQA sent a reply dated 27 June 2016 contending that it is entitled to set off and adjust the said sum of INR 9 crores against losses and damages suffered by TAQA on account of breaches committed by NCCIHL. A claim for damages is not a claim for an ascertained sum due and damages claimed become payable only when the claim is adjudicated by a competent court or arbitral tribunal. The claim by TAQA for damages is separately considered earlier in this award. The sum of INR 9 crores (which was a part of INR 24 crores) was withheld pending permission from GoHP for transfer of the entire shareholding of NCCIHL in HSPL to TAQA. It is not in dispute that such permission has been received and there is now no impediment for release of the said INR 9 crores by TAQA to NCCIHL. Therefore, the said counterclaim (g) for payment of the withheld part of the sale consideration INR 9 crores is allowed and TAQA is directed to release the said amount to NCCIHL."

3. From the facts narrated above, it is clear that in an Arbitration proceedings initiated by the Corporate Debtor, the Operational Creditor herein has filed a Counter claim which was allowed by the Arbitral Tribunal in its award dated 24.01.2019 in and by which a sum of Rs.9 Crore is required to be paid by the Corporate Debtor to the Operational Creditor. Under the said circumstances, the present Application has been filed by the Operational Creditor under Section 9 of the IBC, 2016 to initiate the Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor, since the Corporate Debtor has failed to pay the said sum of Rs. 9 Crore to the Operational Creditor.



4. It is seen that the Operational Creditor has issued a Demand Notice to the Corporate Debtor as mandated under Section 8 of IBC, 2016 on 22.02.2019, to which the Corporate Debtor has sent a reply on 05.03.2019 and also in return the Operational Creditor has sent a reply on 11.03.2019. As per Part – IV of the Application, it is seen that the Operational Creditor has claimed a sum of Rs.12,39,95,999/- as the sum which is due and payable by the Corporate Debtor to the Operational Creditor. The present Application is filed before this Tribunal on 09.05.2019.

5. The Learned Senior Counsel who appeared on behalf of the Operational Creditor submitted that by virtue of the award being passed by the Arbitral Tribunal, the Corporate Debtor made a limited challenge on certain portions of the Award before the High Court at Singapore as OS No. 512/2018 which came to be dismissed by an order dated 28.01.2019 and the Corporate Debtor has preferred a further Appeal against said order. However, notwithstanding the same, it was submitted that the award amount of Rs.9 Crore was not subject matter of challenge and the same remains unchallenged till date and only under such circumstances, the Operational Creditor has issued a Demand Notice to the Corporate Debtor under Section 8 of IBC, 2016 on 22.02.2019 demanding the Corporate Debtor to pay a sum of Rs.9 Crores with interest thereon.



6. Further, it was submitted by the Learned Senior Counsel for the Operational Creditor that as per Section 5(21) of IBC, 2016, the term "operational debt" includes a claim in respect of goods and services and as per Section 2(7) of the Sale of Goods Act, "goods" means any moveable property including stocks and shares and as per the SPA, the Operational Creditor has provided shares and FCD's in HSPL to the Corporate Debtor and the consideration payable to the Operational Creditor for the transaction is very much an "operational debt".

7. The Learned Senior Counsel for the Corporate Debtor contended that the present Application is thoroughly motivated and without any basis in law or facts and has been filed only to pressurize and arm-twist the Corporate Debtor to gain an undue advantage in an ongoing dispute between the parties. It was submitted that the claim amount by the Operational Creditor admittedly forms part of the consideration for the transfer of shares from the Operational Creditor to the Corporate Debtor and there are serious and substantial dispute existing between the parties which have arisen subsequent to the Arbitral award and these disputes are in existence even before the issuance of the Demand Notice. The disputes as per the Learned Senior Counsel for the Corporate



Debtor, which exist between the parties are summarized herein below;

- (a) The claim amount forms part of the consideration agreed to be paid by the Respondent in terms of SPA between the Petitioner, the Respondent and HSPL
- (b) The share transfer was admittedly not completed as agreed between the parties and the Petitioner has committed egregious breaches of not only the original SPA but also a subsequent agreement between parties pertaining to the share transfer.
- (c) The Petitioner's breach pre-dates the Demand notice and the said breach was called out by the Respondent and HSPL also prior to the Demand Notice and the said breach has been subject matter of correspondence between the Petitioner and the Respondent and also is the subject matter of proceedings before the Bombay High Court and fresh arbitration proceedings.
- (d) The breach of the Petitioner entitled the Respondent to *inter alia* claim back the entire sale consideration including the claim amount, which it has done by way of counterclaim in the fresh arbitration proceedings between the parties.

8. Further, it was also submitted by the Learned Senior Counsel for the Corporate Debtor that as per Section 5(21) of IBC, 2016 the Petitioner herein does not qualify to be an Operational Creditor in relation to the Corporate Debtor and the claim of the Petitioner falls outside the scope of the provisions of Section 5(21) of IBC, 2016.

9. It was also submitted by the Learned Senior Counsel for the Corporate Debtor that the award which was sought to be relied upon

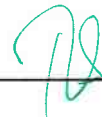


by the Operational Creditor is admittedly a Foreign Award and it was submitted that the Foreign award cannot be a basis of an "operational debt" without a court in India first having enforced the same and in the present case, the Operational Creditor has neither pleaded nor evidenced a declaration of enforceability of the award by a competent Court. Placing reliance on Section 46 of the Arbitration Act, 1996, it was submitted that a foreign award is not considered to be binding in India on the parties to that award immediately after that award is made and that the award can be considered to be binding on the parties only when it is found to be enforceable under Chapter -I, Part - II of the Arbitration Act, 1996. Further, it was submitted that only after such a determination is made, the award becomes binding and can be relied on by the parties, by way of defence, set off or otherwise in any legal proceedings in India. Thus, it was contended that until the proceedings contemplated under the Arbitration and Conciliation Act, 1996 in relation to the finality of awards are complete, the present Application under Section 9 of IBC, 2016 cannot be entertained.

10. In order to countenance the said arguments made by the Corporate Debtor, the Learned Senior Counsel for the Operational Creditor submitted that none of the principles contained in the Arbitration Act in respect of enforcement of a foreign award would be applicable in the context of IBC. It was contended that Section

5(6) of IBC, 2016 defines the term "dispute" and as per the said definition, there is no distinction between an international and domestic arbitration proceedings and consequently no distinction can be drawn between the awards rendered through international and domestic arbitration proceedings. Further, it was submitted that as per the provisions of IBC, 2016 it is immaterial if such arbitration proceedings were held under Part I or Part II of the Arbitration and Conciliation Act, 1996 as amended. In this context, it was also submitted that IBC, 2016 has specifically provided for an order of an Arbitral Tribunal adjudication on the default as being such a record of default and by placing reliance upon the Judgment of the Supreme Court in the matter of **K. Kishan -Vs- Vijay Nirman Company Pvt. Ltd;** 2019(1) CTC 484, it was submitted that only if a challenge was pending against an award, the same could not be treated as *non-est* and the IBC proceedings as in the present case, commenced on the award *per se*. In order to buttress his arguments, the Learned Senior Counsel for the Operational Creditor has pressed into service the following judgments in order to say that the foreign award is binding upon the parties and that the claim of the Operational Creditor would fall within the definition of "operational debt";

- (i) **Agrocorp International Pvt. Ltd. -Vs- National Steel and Agro Industries Ltd.;** CP(IB) No.798/MB/C-



IV/2019 wherein it has been held that a petition under Section 9 can be filed based on a foreign award;

- (ii) **Mobilox Innovations Pvt. Ltd. –Vs- Kirusa Software Pvt. Ltd.;** AIR 2017 SC 4532 in order to show that the dispute raised by the Respondent is an afterthought and not a genuine dispute;
- (iii) **Bacha F. Guzdar –Vs- Commissioner of Income Tax;** Bombay AIR 1955 SC 74 wherein it has been held that a shareholder cannot claim any rights over the assets of a company, which is separate and distinct;
- (iv) **Cheran Properties Ltd. –Vs- Kasturi and Sons Limited & Ors;** 2018 (6) SCALE 267 wherein it has been held that the award is conclusive upon the merits of the controversy and is not merely a paper award.
- (v) **Centrotrade Minerals and Metals Inc. –Vs- Hindustan Copper Ltd.;** AIR 2017 SC 185 wherein it has been held that if the award is final and binding on the parties, it can hardly be said that it is a waste paper unless it is made a Rule of the Court.

11. Adverting to his submission, the Learned Senior Counsel for the Corporate Debtor has relied upon the following Judgments in order to bolster his arguments;

- (i) **Adityaa Energy Resource Pte. Ltd. –Vs- Simhapuri Energy Limited;** CP(IB) No. 289/9/HDB/2018, wherein it has been held that the Adjudicating Authority cannot rely upon a foreign award;



- (ii) **Government of India –Vs- Vedanta Limited and 2 Ors;** *Civil Appeal No. 3185 of 2020*, wherein it has been held that a foreign award does not become a decree until and unless it passes the muster of Section 47 to 49, only after which it acquires the status of a decree.
- (iii) **K. Kishan –Vs- M/s. Vijay Nirman Company Pvt. Ltd;** *2018 SCC Online SC 1013* in order to say that a domestic award cannot form the basis of an operational debt, since challenge proceedings constitute a 'dispute'.
- (iv) **Usha Holdings LLC & Anr. –Vs- Francorp Advisory P. Ltd.;** *Company Appeal (AT)(Insolvency) No. 44 of 2018*, wherein it has been held that the Adjudicating Authority not being a Court, it has no jurisdiction to decide whether a foreign decree is legal or illegal.

12. Heard the submissions made by the Learned Senior Counsel for both the parties and perused the records including the pleadings and the written submission placed on record. From the elaborate submissions made by the Learned Senior Counsel for both the parties, the following issues arise for consideration before this Adjudicating Authority in order to render a finding in the present Application;

- i. Whether the "debt" of the Petitioner qualify to be an "operational debt" in terms of Section 5(21) of IBC, 2016 and as such the Petitioner would qualify to be an "Operational Creditor" in respect of the Corporate Debtor under the provisions of the IBC, 2016;

- ii. Whether there is any dispute exists between the parties that exist before the issuance of the Demand Notice by the Operational Creditor;
- iii. Whether the Award passed by the Arbitral Tribunal, which is a foreign Award has become legal enforceable in India and if so what would be the consequences?

ISSUE No. (I)

13. In relation to Issue No. i, it is necessary to refer to the of the term 'operational debt' and 'operational creditor' as defined under Section 5(20) and (21) of IBC, 2016;

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

14. *Prima-facie* from the definition as extracted above, a plain reading of the same would manifest the fact that the 'operational debt' means '*a claim in respect of the provision of goods or services including employment*'. As to the present case, it has to be seen whether the claim of the Petitioner as extracted in Part-IV of the Application would fall within the definition of 'operational debt'.



15. From the Award, it is seen that the entire disputes as between the parties arose in respect of a SPA dated 19.09.2012 in and by which the Corporate Debtor has agreed to purchase the major shares of the Operational Creditor in SHPL. Now the question which fell for consideration before this Adjudicating Authority is that whether the said SPA and any claim made in respect of the same would be treated as a claim in respect of the 'provision of goods'. In this context, it is seen that the term 'provision' has not been defined under IBC 2016. The Oxford Dictionary, defines the word 'provision' that the '*act of supplying someone with something that they need or want*'.

16. It is no doubt that as per the definition of 'Goods' under Section 2(7) of the Sale of Goods Act, 1930 includes stocks and shares. However, the term 'goods' cannot be given an independent meaning *de hors* the term 'provision' being prefixed to the said definition. In any case, as per the SPA dated 19.09.2012, the Corporate Debtor has agreed to pay the sum in exchange of the shares being transferred by the Operational Creditor. In the present case, as per the SPA, it is the Corporate Debtor who has agreed to buy the shares by paying the money to the Operational Creditor and that the Operational Creditor has not provided any goods to the Corporate Debtor but in turn it is the Corporate Debtor who has



agreed to pay the money for the shares held by the Operational Creditor.

17. Further, viewed from another perspective, as to the facts of the present case, the right to claim money from the Corporate Debtor emanates from a SPA dated 19.09.2012, pursuant to which the Corporate Debtor had acquired the shares from the Operational Creditor. The transaction as transpired between the parties could have been treated as an 'operational debt' had it occurred in the 'ordinary course of business' of trading in shares by one seller and another purchaser, in which context the expression 'shares' would partake the characteristics of 'goods' as envisaged under the Sale of Goods Act, 1930. However, it is not so in the present case and the parties to the present proceedings are governed by a 'Share Purchase Agreement', and non - adherence / violation of the said terms and conditions envisaged thereunder, cannot be, under any circumstances, be treated as a claim in respect of the 'provision of goods' as defined under Section 5(21) of IBC, 2016. Thus, for the aforestated reasons, we are of the considered view that the alleged 'debt' as claimed by the Operational Creditor in the present Application does not fall within the definition of the expression 'operational debt' as defined under Section 5(21) of the IBC, 2016.



ISSUE NO. (II)

18. In relation to issue No. ii, it is seen that one of the important components in respect of Admission of and Application under Section 9 of the IBC, 2016 is that the 'operational debt' should be an 'undisputed debt'.

19. It is seen from the Application that the Operational Creditor has issued a Demand Notice on 22.02.2019 and the Corporate Debtor responded to the said Demand Notice on 05.03.2019. In the said reply to the Demand Notice, the Corporate Debtor had disputed the amount which is alleged to be paid by the Corporate Debtor and that a cursory reading of the said Demand Notice would point out the fact that there exists a dispute between the parties in relation to the claim of Rs.9 crore made by the Operational Creditor. On perusal of the reply to the Demand Notice, it is seen from para 10, 11, 12, 13 and 14, the Corporate Debtor has explained the disputes which existed between the parties before the issuance of the Demand Notice and also the disputes which have arisen after the Award being passed by the Arbitral Tribunal. For the sake of brevity, the said paragraphs are extracted hereunder:

10. In view of the aforesaid position under the SPA and in order to effectuate the CAP at the material time, the Project Lenders and NCCIHL wanted that TAQA India should forebear from demanding that NCCIHL should transfer the Subsequent Sale Shares of NCCIHL (amongst others) to TAQA India in terms of the SPA. TAQA India

only agreed to such forbearance qua NCCIHL solely on the condition that NCCIHL would have no further claims against HSPPL except for those already pending in First Arbitration Proceeding. Further, TAQA India also agreed, pursuant of the aforesaid "no-claim" undertaking by NCCIHL, to the return of the Bank Guarantee that was meant to inter alia secure the performance of NCCIHL's obligation to transfer the said Subsequent Sale Shares of HSPPL to TAQA India. It is stated that at the material time the "no-claim" undertaking from NCCIHL referred to above was crucial for TAQA India if it was to transfer its rights and interest in HSPPL and the Subsequent Sale Shares of NCCIHL and the other shares and securities in the form of Fully Convertible Debentures to Greenko for no monetary consideration. TAQA India's letter dated 30 May 2017 clearly noted that the Subsequent Sale Shares (which were originally agreed to be transferred to TAQA India under the SPA) be transferred to Greenko only pursuant to the CAP. TAQA India also stated that if the terms of the CAP were not adhered to, then TAQA India would be entitled to seek return of the Bank Guarantees that had been provided by NCCIHL.

11. As noted hereinabove, in order to implement the CAP, and proceed with the transfer of the Subsequent Sale Shares and other securities to Greenko, the Project Lenders required that NCCIHL and NCC Limited confirm and undertake that NCCIHL and NCC Limited will make no further claims against HSPPL. By way of a letter dated 30 May 2017 to the lenders and HSPPL, NCCIHL made this confirmation and undertaking, part of which is reproduced below:

"...(d) All liabilities of the Company in relation to NCCIHL remain the subject matter of an arbitration being conducted under SIAC Rules before the arbitral tribunal comprising of (i) Mr. Justice R.V. Raveendran, (ii) Mr. Justice A.K Patnaik and (iii) Mr. L. V. Sreerangaraju, with its seat in Singapore.

NCC Limited and NCCIHL hereby confirm that they do not have and will not make, any other claims against the Company other than those set out in (c) and (d) above..."

A copy of the letter signed by NCC Limited and NCCIHL dated 30 May 2017 is enclosed with this Reply as Annexure-A.

12. As NCCIHL is aware, NCCIHL has breached the said undertaking by instituting a second arbitration proceeding against TAQA India

and HSPPL vide an arbitration notice dated 28 December 2018 (Arbitration Notice). This breach has admittedly been committed after the issuance of the Award. Hence, NCCIHL has become liable for damages to TAQA India, which TAQA India reserves the right to claim at an appropriate stage that would be contingent on further proceedings, if any, in respect of the Arbitration Notice. The quantum of damages that may be claimed by TAQA India would include the entire purchase consideration (i.e. INR 360 crores) that TAQA India had paid NCCIHL and NCC Limited for the securities of HSPPL under the SPA, since TAQA India's forbearance from demanding the transfer of HSPPL's securities to TAQA India was premised on the adherence to the CAP, which required that NCCIHL would have no further claims against HSPPL other than those already pending in the First Arbitration Proceedings.

13. Further, NCCIHL's failure to adhere to the foregoing undertaking has also entitled TAQA India to invoke the Bank Guarantees under the SPA to the amount of INR 59 crores (approx.). TAQA India has invoked the Bank Guarantees vide an invocation letter dated 28 January 2019. However, the primary obligor under the Bank Guarantees, i.e. Indian Overseas Bank, Hyderabad Branch (IOB) has wrongfully failed honour its commitments therein thus far, which TAQA India is taking appropriate steps to redress.

14. Meanwhile, the Project Lenders have filed an interpleader suit before the Hon'ble Bombay High Court (i.e. Commercial Suit (L) No. 101 of 2019) [Interpleader Suit] seeking directions from the Hon'ble Court in respect of the treatment of the Bank Guarantees. The Interpleader Suit has been filed to adjudicate rival claims between NCCIHL and TAQA India over possession of the original Bank Guarantees. As has been (and shall be) contended by TAQA India in the Interpleader Suit, TAQA India is entitled to seek return of the Bank Guarantees in view of NCCIHL's breach of its undertaking as set out above. A copy of the order passed by the Hon'ble Bombay High Court in the Interpleader Suit on 29 January 2019 is enclosed with this Reply as Annexure B. Further, as a party to the said Interpleader Suit NCCIHL is already in possession of the relevant documents on the record therein."

20. Perusal of the aforesaid reply which was given by the Corporate Debtor, would prove the fact that certain civil suits were filed by the parties before the Hon'ble High Court of Bombay even

before the issuance of the Demand Notice. In any case, it is evident from the documents placed on record that there is pre-existing dispute between the parties. The Supreme Court in the matter of **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited**; 2017 1 SCC Online SC 353 held that the 'existence of dispute' and/or the suit or arbitration proceeding must be pre-existing

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.."

At paragraph 51 it is held:

"51.Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application"



21. Thus, from the evidence placed on records, we are of the considered view that there exists a 'dispute' between the parties before the issuance of the Demand Notice itself and the defence raised by the Corporate Debtor on the grounds of existence of a dispute cannot be considered as spurious, hypothetical, illusory or misconceived. Further this Tribunal in exercise of summary jurisdiction cannot adjudicate upon the dispute between the parties.

ISSUE NO. (III)

22. In relation to Issue No.iii, an argument was put forth by the Learned Senior Counsel for the Corporate Debtor that the Award being a foreign Award is not enforceable as per the provisions of the Arbitration and Conciliation Act, 1996. Part - II of the Act, 1996 deals with the "Enforcement of Certain Foreign Awards". Section 48 of the Act, 1996 postulates certain conditions for Enforcement of Foreign Award, which is extracted hereunder;

48. Conditions for enforcement of foreign awards.— (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of

the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

23. The Supreme Court in the matter of **Government of India – Vs- Vedanta Limited and 2 Ors; Civil Appeal No.3185 of 2020** has held that a petition for enforcement and execution of a foreign award by way of a petition is required to be filed under Section 47 and a foreign award does not become a decree until and unless it passes the muster of Section 47 to 49, only after which it acquires the status of a decree. Only after the Court adjudicates on the enforceability of the foreign award under Section 47 to 49, the foreign award would deem to be a decree of the Court.

24. However, in relation to the enforcement of 'Domestic' award that is not the case; in respect of the 'Foreign' Award, a further declaration is required to be made in respect of its enforcement and admittedly the award in the present case is yet to be enforceable under Section 47 to 49 of the Act, 1996. While this being the fact, and also by taking into consideration the divergent views expressed in this regard by NCLT Hyderabad Bench and Bombay Bench, this Tribunal does not wish to render its finding in relation to the said Issue No.iii and keep it open.



25. In any case, since the Issue Nos. i & ii were decided in favour of the Corporate Debtor and against the Operational Creditor and that there exists dispute between the parties and also the 'debt' as claimed in the Application does not partake to the character of an "operational debt", the Application as filed by the Operational Creditor is liable to be dismissed and accordingly, stands **dismissed**.

No costs

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond