NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.6
CP(IB)/21(MP)2021

Proceedings under Section 9 IBC

IN THE MATTER OF:

VPR Mining Infrastructure Pvt Ltd ....**Applicant**
V/s
Gajraj Mining Pvt Ltd ....**Respondent**

Order delivered on 05/04/2024

Coram:

P. Mohan Raj, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order.

The order is pronounced in open Court *vide* separate sheet.

Sd/- *Sd/-*

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

P. MOHAN RAJ
MEMBER (JUDICIAL)

Neeraj Gupta/Stenographer

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH

[CP(IB)/21(MP)/2021]

In the main matter of: [CP(IB)/21/2021]

(An application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016)

M/s VPR Mining Infrastructure Pvt Ltd.
Through its Authorized Representative
Mr. G. Ventaka Satyanarayan,
Having its Corporate office at:
8-2-293/82/A/1259,
Laxmi Towers, Road No. 36, Jubilee Hills
Hyderabad-500033, Telangana

.... Applicant/Operational Creditor

Versus

M/s Gajraj Mining Pvt Ltd
Through its Authorized Representative
Having its corporate office at:
Behind Telephone Exchange,
Nehru Nagar, Singrauli,
Madhya Pradesh-486889.
Email: gajrajmpl@gmail.com

.... Respondent/Corporate Debtor

Order Pronounced: 05.04.2024

Coram: P. Mohan Raj Hon'ble Member (J)
Kaushalendra Kumar Singh, Hon'ble Member (T)

Appearance:

For the Applicant/OC : Ld. Adv. Mr. K. Dhananjaya Naidu **(Online)**

For the Respondent/CD: Ld. Adv. Mr. Vijayesh Atre (physical) a.w.
Ld. Adv. Ms. Aarya Chhangani **(Physical)**

ORDER

1. This is an application filed by the Applicant Company, namely, **M/s VPR Mining Infrastructure Pvt Ltd** through its Authorized Representative (AR) Mr. G. Ventaka Satyanarayan under Section 9 of the IBC, 2016 for initiating the Corporate Insolvency Resolution Process ('CIRP') against the Respondent Company i.e., **M/s Gajraj Mining Pvt Ltd** for having defaulted to make a payment of their outstanding dues amounting Rs **22,44,15,010/-** [Rs 19,51,57,798/- + 24% simple interest per annum as on 17.05.2021 i.e. Rs 2,92,57,212]. As per the particulars given in part-IV(2) of the application, the total amount of debt at Rs **22,44,15,010/-** is stated to be as per detailed calculations given in the enclosures to demand notice under Section 8 of the IBC that was served onto the Respondent Company prior to the filing of the application. The date of default, however, is not stated therein.

2. Admittedly, the facts are that Ms/ Northern Coalfield India Ltd (NCL) vide Letter of Acceptance (LOA) dated 25.01.2019 awarded the work of "Excavation of overburden of first-dig (Solid) by mechanical means such as excavators, dumper/tippers, drills, Dozers, graders and water sprinklers for, composite work consisting of blast hole drilling, excavation, loading, transportation of broken rocks/soil/earth, unloading/dumping, spreading, dozing and water sprinkling and grading etc. to the Respondent Company for a contract price of Rs 768.30 crores. This mining work is done at the specified places at Dudhichua Project. The Respondent Company in turn awarded execution of the part of the above work to the Applicant Company vide Memorandum of Understanding (MoU) dated 10.04.2019 for a contract price not exceeding Rs 231.69 crores (excluding applicable taxes). The scope of work was later enhanced vide amendment dated 12.10.2019 and 07.07.2020. Vide the First Amendment dated 12.10.2019, the scope of work was increased to Rs 363.70 crores and vide the Second Amendment dated 07.07.2020, the scope of work was further increased to Rs 610.95 crores with same terms and conditions except for amending few clauses.

3. The main documents as enclosed with the said applications are the demand notice dated 20.05.2021 under Section 8 of the IBC, the reply dated 30.05.2021 of the Respondent Company thereon, the above referred MoU and the amendments made therein, minutes of a meeting dated 16.12.2020 between the Applicant Company and Respondent Company, copy of notice of termination dated 22.10.2021 to the said MoU and amendment thereto, copy of the Respondent Company response dated 08.04.2021 to the termination notice, copy of letter dated 24.04.2021 for termination of work etc. The demand notice dated 20.05.2021 does not contain copy of any invoices, however, it contains the details of the outstanding dues (as per Annexures-1 & Annexure-2 enclosed therein). Annexure 2 provides a summary of various invoices date wise in tabular form. For the sake of clarity and ready reference the content of these Annexures are reproduced here under:

Annexure-1
VPR Mining Infrastructure Pvt Ltd
Gajraj Mining Pvt Ltd-Outstanding Dues Statement

Particulars	Amount(Rs)	Remarks
Bill amounts pending	13,71,02,646	Refer Annexure-2
Security Deposit pending to date	7,35,92,765	Refer Annexure-2
Diesel 1 tanker supplied	13,39,996	
	21,20,35,407	
Less:		
Adjustment	50,00,000	
Commission @ Rs 4/BCM on quantities eligible	4,45,51,598	Invoice not yet raised by Gajraj Mining on VPR Mining
	4,95,51,598	
Balance receivable from Gajraj Mining	**16,24,83,809**	

TDS deducted not yet paid by Gajraj Mining		Amounts not reflecting in 26AS of VPR Mining
FY 2019-20	76,57,041,	
FY 2020-21	2,50,16,949	
Net Receivable from Gajran Mining	**19,51,57,798**	
Interest @ 24% p.a. on Bill amounts due	**2,93,18,068**	Refer Annexure-1
Net Receivable alongwith interest from Gajraj Mining	**22,44,75,866**	

Annexure-2
VPR Mining Infrastructure Pvt Lt
Gajraj Mining Pvt-Ltd–Outstanding Dues Statement

Bill No .	Invoice Date	Quantity	Gross Bill incl. GST	TDS 2% Gajraj to VPR	S.D.	Elty. Bank/ Chrg./Ors	Total Deduction	Net Receivable	Received	Received date	Balance Receivable	Qty. Eligible for Com.	Commission @ Rs 4/Per BOM	Cumulative Receivable Net of Com.	No of days	Interest @24%
1	09.07.19	1,67,0,432	163,207,900	2,766,236	8,160,395	106,089	11,032,720	152,175,180	146,642,709	10.07.19 & 12.07.19	5,532,471	–	–	5,532,471	11	40,016
2	20.07.19	342,916	33,379,118	565,748	1,668,956	-106,089	2,128,615	31,250,503	30,119,008	20.07.19	1,131,495		–	6,663,966	18	78,872
3	07.08.19	403,284	39,402,489	667,839	1,970,124		2,637,963	36,764,526	35,428,848	07.08.19	1,335,678		–	7,999,644	12	63,120
4	19.08.19	411,777	40,232,289	681,903	2,011,614		2,693,518	37,538,772	36,174,966	19.08.19	1,363,806		–	9,363,450	17	104,665
5	05.09.19	406,268	39,693,999	672,780	1,984,700	68,320	2,725,800	36,968,199	35,622,639	05.09.19	1,345,560	–	–	10,709,010	14	98,582
6	19.09.19	457,581	44,707,455	757,753	2,235,373		2,993,126	41,714,329	40,198,823	19.09.19	1,515,506			12,224,517	21	168,799
7	10.10.19	491,654	48,036,594	814,180	2,401,830		3,216,009	44,820,585	43,192,224	10.10.19	1,628,361			13,852,877	11	100,196
8	21.10.19	455,692	44,522,954	754,626	2,226,148	129,192	3,109,966	41,412,988	39,903,736	21.10.19	1,509,252			15,362,129	17	171,719
9	07.11.19	962,065	90,811,606	1,539,180	4,699,880		6,239,060	84,572,546	79,000,000	08.11.19	5,572,546			20,934,675	13	178,948
10	20.11.19	792,028	75,791,257	1,284,598	3,869,213	80,183	5,233,994	70,557,264	68,067,717	20.11.19	2,489,547			23,424,222	17	261,838
11	07.12.19	886,945	85,065,117	1,441,782	4,332,906		5,774,687	79,290,429	76,486,514	17.12.19	2,803,915			26,228,137	11	189,705
12	18.12.19	797,562	76,332,011	1,293,763	3,896,251		5,190,013	71,141,998	68,500,472	18.12.19	2,641,526			28,869,663	19	360,673
13	06.01.20	906,942	75,550,907	1,280,524	3,857,195		5,137,719	70,413,187	67,946,825	07.01.20	2,466,362			31,336,025	12	247,254
14	18.01.20	828,911	79,399,665	1,345,757	4,049,633	156,530	5,551,920	73,847,745	71,151,988	18.01.20	2,695,757			34,031,782	17	380,410
15	04.02.20	921,714	88,466,835	1,499,438	4,502,786		6,002,194	82,464,641	79,461,284	05.02.20	3,003,357			37,035,139	13	316,574
16	17.02.20	925,895	70,903,849	1,201,760	3,621,892		4,823,653	66,080,197	63,647,463	18.02.20	2,432,734			39,467,873	26	674,738
17	14.03.20	854,6100	70,163,840	1,189,218	3,584,892		4,774,110	65,389,730	30,000,000	18.03.20	35,389,730			74,857,603	5	246,107
18	19.03.20	809,627	67,280,179	1,140,342	3,441,889	158,471	4,740,702	62,539,477	60,281,192	19.03.20	2,258,285			77,155,888	20	1,014,127
19	08.04.20	939,649	79,926,925	1,354,694	4,074,226		5,428,920	74,498,005	71,787,903	09.04.20	2,710,102			79,825,990	12	629,860
20	20.04.20	815,068	66,537,445	1,127,753	3,391,772		4,519,526	62,017,919	59,538,411	21.04.20	2,479,508			82,305,498	16	865,899
21	06.05.20	884,604	75,691,366	1,282,905	3,849,468	12,645	5,145,018	70,546,348	67,980,537	08.05.20	2,565,811			84,871,309	12	669,670
22	18.05.20	827,817	66,195,854	841,413	3,374,693	151,029	4,367,194	61,828,659	60,119,294	19.05.20	1,709,365			86,580,674	18	1,024,736
23	05.06.20	934,244	89,981,410	1,143,831	4,563,970		5,707,802	84,273,608	81,604,667	05.06.20	2,668,941			89,249,615	13	762,901
24	18.06.20	726,265	69,660,981	885,521	3,547,949		4,433,470	65,227,511	63,161,294	20.06.20	2,066,217			91,315,833	22	1,320,952
25	10.07.20	536,273	51,098,051	649,551	2,619,803		3,269,354	47,828,697	46,313,078	10.07.20	1,515,619			92,831,452	8	488,319
26	18.07.20	753,822	73,651,445	936,427	3,682,572	150,807	4,769,627	68,881,818	66,697,242	20.07.20	2,184,576	287,503	1,150,011	93,866,017	20	1,234,402
27	07.08.20	740,525	72,352,258	919,932	3,617,613		4,537,345	67,814,913	65,668,773	07.08.20	2,146,140	436,052	1,744,207	94,267,951	12	743,813
28	19.08.20	990,991	96,823,809	1,230,811	4,841,190	758,240	6,830,242	89,993,567	87,121,674	19.08.20	2,871,893	517,772	2,071,087	95,068,756	20	1,250,219
29	08.09.20	1,008,633	80,847,476	1,027,722	4,042,374		5,070,096	75,777,380	73,379,361	09.09.20	2,398,019	721,882	2,887,527	94,579,248	12	746,269
30	20.09.20	942,336	86,170,009	1,095,381	4,308,500	157,373	5,561,255	80,608,754	78,052,864	21.09.20	2,555,890	660,934	2,643,734	94,491,403	19	1,180,495
31	09.10.20	831,392	72,874,659	926,373	3,643,733		4,570,106	68,304,554	66,143,018	08.10.20	2,161,536	475,008	1,900,034	94,752,905	9	560,730
32	18.10.20	718,805	70,230,110	892,756	3,511,506		4,404,261	65,825,849	63,742,752	19.10.20	2,083,097	657,872	2,631,488	94,204,514	19	1,176,911
33	06.11.20	612,768	59,869,879	761,058	2,993,494		3,754,552	56,115,328	54,178,130	07.11.20	1,937,198	612,768	2,451,072	93,690,640	11	677,653
34	17.11.20	780,454	81,732,528	1,038,973	3,944,641	191,194	5,174,808	76,557,720	71,413,984	19.11.20	5,143,736	780,454	3,121,814	95,712,562	17	1069,883
35	04.12.20	950,275	92,845,692	1,180,242	4,642,285		5,822,526	87,023,166	84,269,268	05.12.20	2,753,898	842,906	3,371,623	95,094,836	15	937,922
36	19.12.20	971,353	94,905,062	1,206,420	4,745,253		5,951,673	88,953,389	86,121,022	19.12.20 & 21.12.20	2,832,367	772,675	3,090,700	94,836,504	18	1,122,448
37	06.01.21	951,907	93,005,114	1,182,268	4,650,256		5,832,524	87,172,590	84,413,963	07.01.21	2,758,627	677,881	2,711,525	94,883,606	12	748,671
38	18.01.21	885,748	86,541,130	1,100,099	4,327,057	201,769	5,628,925	80,912,206	78,345,308	19.01.21	2,566,898	770,013	3,080,051	94,370,452	19	1,178,984
39	06.02.21	919,661	89,854,537	1,142,219	4,492,727	48	5,634,994	84,219,544	81,554,367	06.02.21	2,665,177	706,563	2,826,250	94,209,379	13	805,297
40	19.02.21	871,790	85,177,327	1,082,763	4,258,866	454	5,342,083	79,835,244	77,308,797	20.02.21	2,526,447	818,734	3,274,937	93,460,889	14	860,352
41	05.03.21	765,750	74,461,175	946,540	3,723,059	50	4,669,649	69,791,526	67,582,932	05.03.21 & 10.03.21	2,208,594	747,658	2,990,631	92,678,852	14	853,153
42	19.03.21	651,227	83,513,817	1,061,616	4,175,691	161,381	5,398,688	78,115,129	75,638,025	20.03.21	2,477,104	651,227	2,604,908	92,551,048	22	3,773,040
		33,337,250	3,126,896,123	45,914,374	157,538,345	2,377,687	205,830,405	2,921,065,718	2,783,963,072		137,102,646	11,137,900	44,551,598			29,378,923

Received on 10 FEB.2020	58,800,000	Qty eligible for Commission	11,137,900	44,551,598
Received on 10 NOV.2020	25,145,580	Qty eligible for Commission against the work already completed mentioned in agreement	1,669,277	6,677,108
BALANCE IN HAND	**73,592,766**	Qty eligible for Commission against the work completed now	9,468,623	37,874,490

3.1 As could be seen from the content of Annexure-2 which is reproduced herein above, the total outstanding amount was Rs 13.71 crores. To this after the adjustment of the Commission payable to the Respondent Company at Rs 4.45 crores, the net receivable amount is shown at Rs 9.25 crores. The total amount of default at Rs 22.44 crores has been computed as given in Annexure-1 (reproduced above) by adding the security deposit at Rs 7.35 crores and the TDS etc. as well as the interests thereon.

4. It is the case of the Applicant Company that it had commenced the work by deploying huge machinery at the site but there was a delay in the release of payments and in this regard, there is a minute of the meeting entered between the parties (Applicant Company & Respondent Company) on 16.12.2020, whereby the Respondent Company agreed to pay part of the outstanding amount at the earliest, including discharge of Government liabilities i.e. TDS deductions on or before 31.01.2021, and thereafter to pay current TDS amount regularly; that even after, such explicit agreement vide the aforesaid minutes dated 16.12.2020, there was a further delay on the part of the Respondent Company in the release of payment; and therefore, a notice of termination to the MoU and amendments thereto was served by the Applicant Company on 22.03.2021 conveying to the Respondent Company that it had failed to pay the dues of Rs 16.24 crores, and also failed to deposit the TDS to the tune of Rs 3.98 crores in the Government account and in view thereto, the Applicant Company was left with no other option except to terminate the work under the said MoU and amendments made thereunder by giving 30 days' notice. It was, further mentioned in that notice dated 22.03.2021 that as per Clause 10 of the said MoU if the Respondent Company fails to make payment of outstanding dues, work would be terminated automatically from the 30th day of that notice.

The Respondent Company failed to make payment of the outstanding dues. Though the Respondent Company replied to the said termination notice *vide* its letter dated 08.04.2019, however, in the event of failure to pay the outstanding dues by the Respondent Company, the Applicant Company vide its letter dated 24.04.2021 conveyed it that as per the clause 8.1 r.w. 9.1 of the MoU Dated 10.04.2019 and amendments thereto, the work stand terminated w.e.f. 21.04.2021. Following that the Applicant Company issued a demand notice dated 20.05.2021, under Section 8 of the IBC. The Respondent Company, vide its reply dated 30.05.2021, raised therewith, various issues such as that the Applicant Company had stopped/terminated the work in contravention of the provisions made in the MoU and as such there is a pre-existing dispute.

5. In order to bring clarity in the discussion on the issues raised by the Applicant Company and the defence taken by the Respondent Company, we find it appropriate to reproduce the relevant contents of the MoUs, notices letters etc. as under given here under:

5.1 **From the Memorandum of Understanding (MoU) dated 10.04.2019**:

*8. "**TERMINATION OF CONTRACT**:*

8.1 Either Party shall be entitled to terminate this Agreement by giving a notice period of 30 days, upon the occurrence of the following:

(a) In the event of an occurrence of an Event of Default by either Party, as set out in Clause 9 below, and such default is not remedied within 30 days after notice thereof to the other Party.

*(b) An event of Force Majeure occurring for continuous period of 30 days. For the purpose of this Agreement '**Force Majeure**' shall mean to include but not limited to fire, flood, damage by the elements, perils of the sea or air accident, act of God, strike, lock out or other labour disorder not limited to the subject property, act of foreign or domestic de jure, or defacto government whether by law, order, legislation, decree, rule, regulations or otherwise, revolution, civil disturbance, breach of the peace, declared or undeclared war, the act of interference or action by civil/ military authorities or due to any other cause beyond the Parties' control.*

(c) The Contract is terminated by the NCL/Owner i.e. Northern Coalfields Limited.

8.2 In the event of termination of this Agreement, such termination shall be without prejudice to any other rights or remedies a Party may be entitled to hereunder or at law and shall not affect any accrued rights or liabilities of either Party nor the coming into force or continuation in force of any provision hereof which is expressly intended to come into force or continue in force on or after such termination.

9. ***EVENT OF DEFAULT***

9.1 ***First Party****:*

If the First Party fails to pay the bills or any other amount as required under this Agreement to the Second party:

9.2 ***Second Party****:*

a) If the Second party fails to execute the work in accordance with the specific requirements of NCL/Owner as detailed in clause 2.2 of this MoU.

b) If the Second Party fails to provide/ deploy sufficient Equipment to meet the requirement to handle the pre-defined monthly/annual quantities.

c) If the Second Party fails to provide required manpower for maintaining and operating the Equipment as required by the First Party;

d) Second Party failing to maintain the health and safety standards at site.

e) Negligence of any kind by the Second Party.

f) if the second party breaches the terms of this agreement.

10. ***REMEDIES***

10.1 In case of the First party's Event of Default under this Agreement, the Second party shall have the right to exercise any one or more of the following remedies:

a) To receive the amount of consideration, due and payable in satisfactory proportion to the quantum of Work executed by the Second party, after giving a notice of 30 days to the First party.

b) To withdraw the equipment after expiry of the notice period of 30 days, from the work place.

c) To sue for recovery of losses/damages (directly and indirectly)

10.2 In case of the Second Party's Event of Default under this Agreement, the First Party shall have the right to exercise any one or more of the following remedies:

a) To recover the losses, costs, expenses and damages (direct or indirect) from the running bill of the Second Party and/or recover the said amount from the Second Party directly;

b) To sue for recovery of the damages;

*11. **DISPUTE RESOLUTION***

11.1 Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration and Conciliation Act, 1996 (including the amendments thereto) ………..”

5.2 **<u>From the Minutes of the meeting dated 16.12.2020</u>***: -*

*“**Minutes of the meeting at Gajraj Office**: -*

*Refer to the meeting between **Gajraj and VPR**, between **Shri Kabir Zaidi and Shri Charan Reddy** on 16.12.2020 at **Gajraj Office, Singarauli**, where the following points were discussed: -*

1. *Shri Charan Reddy requested for the release of government liabilities i.e. TDS deductions for the financial year 2019-20, for the amount of Rs 14785166/-.*
   Shri Kabir Zaidi agreed to make the payments-50% of the above amount by December, 31st, 2020 and the balance amount to be paid by 31st, January, 2021. And also agreed to pay TDS regularly from current month.
2. *Shri Charan Reddy requested for clearing the pending bill amount of Rs 3,23,73,595/- by January, 2021. Shri Kabir Zaidi has not promosed any date for clearing the same. But shall do it as early as possible.*
3. *Shri Charan Reddy requested for clearing of diesel amount of Rs 1339996/- and Shri Kabir Zaidi has agreed to clear the diesel*

amount by cash or supplying one 20 KL tanker by December, 31st, 2020.

N.B.- It was decided that unless the above commitments are fulfilled, a letter might be served as per management policy of VPR.

(Kabir Zaidi)	*(Charan Reddy)*	*(Gopinath Rao)*
(Gajraj)	*(VPR)*	*(VPR)"*

5.3 **<u>From the Termination Notice dated 22.03.2021 (issued by Applicant Company to Respondent Company)</u>*: -***

*" **VPR MINING INFRASTRUCTURE PVT LTD***

To, ***Dated: 22.03.2021***

Sri Nuzhat Zaidi,
Sri Kabir Iram Zaidi,
The Manager Director,
Gajraj Mining Pvt Ltd
Behind Telephone Exchange,
Nehru Nagar, Singarauli,
(MP)-846889.

Dear Madam,

Sub: Notice of Termination of Memorandum of Understanding dated 10th April, 2019 and amendments made thereunder.

Ref: 1. Memorandum of Understanding dated 10th April, 2019.
2. First Amendment dated 12th October, 2019.
3. Second Amendment dated 7th July, 2020.

With reference to the above we entered into a Memorandum of Understanding dated 10th Apr, 2019 and First amendment dated 12th Oct, 2019 with you for excavation of Overburden Removal work for a quantity of 4,36,14,695 BCM at Dudhichua OCP of NCL in West Section.

Under the said MOU and amendments made thereunder, you have failed to pay us the dues of Rs.16,24,83,761/- and not yet deposited the TDS amount, deducted by you from our bills, with the Income-tax authority to the tune of

Rs.3,98,02,115/-, causing non-compliance and default of Clause 9(1) of the said MOU by you, which is detailed as under:

And despite our repeated requests, Intimations, communications made to you by us, and you being well aware have intentionally and willfully failed and defaulted in payment of dues to us, as such we are left with no other option except to terminate the work under this MOU and amendments made there under by giving 30 days' notice from the date of this letter. During the notice period, as per clause 10 of the MOU, you are hereby informed to pay us all the dues detailed above and we will withdraw all the equipment from work place from the 30th day and also the work will be get terminated automatically from the 30th day. And you are liable to pay all the dues along with the amount payable in satisfactory proportion to the quantum of work executed till termination date and we will be left with no other option but to sue you for recovery of losses/ damages (directly/ Indirectly) as per clause 10(C) of the MOU.

In case all the above said dues are cleared from your end within 30 days' time from the date of` receipt of this letter, we will resume the work subjected to arrangement of Escrow account as per our 2 amendment dated 7th July, 2020.

Thanking you,

Yours Sincerely,
For VPR Mining Infrastructure Pvt. Ltd."

5.4 **<u>From the Reply dated 08.04.2021 (CD to OC)</u>** :-

Gajraj Mining Pvt Ltd

To, *Dated 08.04.2021*

Mr. RV Ramana Rao,
Executive Director,
VPR Mining Infrastructure Pvt Ltd
Corporate Office at 8-2-293/82/A/1259,
Lakshmi Towers, Road no. 36,
Jubilee Hills Hyderabad-500 003 (Telangana)

Dear Sir,

Sub: Regarding unilateral stoppage of the work at Dudhichua OCP of NCL Singarauli.

Ref: Your letter dated 22.03.2021.

We are in receipt of the letter under reference and surprised to note the contents of letter intending to close the long standing business relations between us. As regular meetings were being held between both of us to discuss the issues related to the day to day affairs/workings and also of payments and there was no such issue which warranted your taking such stringent action of serving notice to terminate the contract entered under the MOU dated 10/04/2019 between us. As you are fully aware that our company is passing through difficult days due to the sudden demise of our promoter and Managing Director-Late Sri Iram Zaidi, due to which our company has been facing multifarious problems particularly severe liquidity crunch and some operational Issues with our bankers. Considering these difficulties, we had been discussing the issues time and again in the past on several occasions and we had emphasized that it was only a temporary phenomenon and we were expecting to come out from those problems shortly. On receipt of the above referred letter/notice, we were trying to resolve the Issues but there has been no response from responsible authority of your side to meet us. Rather your Managing Director has refused to meet with us.

Under such circumstances, it is regretted to inform you that by serving the letter/notice under reference, you have not only threatened and informed to stop the work but also stopped the work unilaterally from the previous day from *when the notice was served i.e. 21/03/2021. This action on your part l.e. M/s VPR Mining Infrastructure Pvt. Ltd. is not only against business ethics but also a complete violation of the terms and conditions of the MOU dated 10/04/2019 as clause 8.1 of the MOU specifically prescribed 30 days prior notice before termination of the work under MOU. As regards the amount which has been mentioned in the notice is concerned, the amount is not so high considering the volume of work being undertaken in the contract and that too, there is need of reconciling the same as per records maintained by both of us. However, because of your unilateral and arbitrary action, we, M/s Gajraj Mining Private Ltd, are in problem to resume the activities/work left out suddenly by you i.e. VPR Mining Infrastructure Pvt. Ltd. Consequently, NCL, Dudhichua Project has given a letter to us i.e M/s Gajraj Mining Private Ltd. for the said unilateral stoppage of work and it would not be possible for us to resume the work immediately and also make up the shortfall which would arise in not achieving the targeted quantity as agreed in the contract with NCL, Dudhichua Project and ultimately it would attract penalty under the contract in question entered with NCL, Dudhichua Project.*

In light of the above, through this letter, we would expect that by honoring the terms of the MOU entered between us, you i.e. M/s VPR Mining Infrastructure Pvt. Ltd will start the work Immediately without loss of further time and make up the shortfall of the production as per mutually agreed target which has arisen due to unilateral action from your side and for which you will be solely responsible and in no way M/s Gajraj Mining Private Limited can be held responsible.

Thanking you,

Yours Faithfully,
Gajraj Mining Private Limited,
(Kabar Zaidi)
Director

5.5 **From the letter dated 24.4.2021-termination of work under MoU:-**

To, ***Dated: 24.04.2021***

Sri Nuzhat Zaidi,
Sri Kabir Iram Zaidi,
Gajraj Mining pvt Ltd
Behind Telephone Exhange,
Nehru Nagar, Singarauli,
(MP)-846889.

Dear Sir/Madam

Sub: Termination of work under MoU dated 10.04.2019 and amendments made thereunder.

Ref: 1. MoU dated 10.04.2019, First Amendment dated 12.10.2019 and Second Amendment dated 07.07.2020 made thereunder.

2. Our Notice of Termination letter dated 22.03.2021.

With reference to our notice of termination dated 22.03.2021, within 30 days of notice period, referring per clause 8.1 (a) & 9.1 of the MoU dated 10.04.2019 and right to termination clause as mentioned in the Second Amendment dated 07.07.2020, you have failed to take remedial actions namely:

- *Failed to pay us the bill dues of Rs 16,24,83,761/-*
- *Failed to deposit the TDS amount of Rs 3,26,73,990/- with Income Tax Authority which was deducted from our bills.*
- *Failed to arrange an Escrow Bank account as per clause 5.7 of the Second Amendment to MoU.*

With reference to clause 8 of the MoU dated 10.04.2019, since no remedial actions taken by you within 30 days of notice period, ***the work under this MoU dated 10.04.2019 and amendments made thereunder stands terminated w.e.f. 21.04.2021.*** *And with reference to clause 10.1 of the MoU dated 10.04.2019, we have withdrawn all the equipment from the work palce and we hereby demand you to pay us immediately the bill dues of Rs 16,24,83,761/- and deposit the TDS amount of Rs 3,26,73,990/- with the Income Tax Authority which was deducted from our bills.*

In case of further delay in settlement of our above-mentioned bill dues and TDS amounts, we will be left with no other option but to sue you for recovery *of our dues along with losses/damages (directly/indirectly) incurred on account of your defaults as per clause 10.1. (c) of the MoU.*

Thanking You,

Yours Sincerely,

For VPR Mining Infrastructure Pvt Ltd

6. In the factual matrix of the matter as stated hereinabove, the plea taken by the Applicant Company in its application as well as rejoinder are as under:

   1. The Respondent Company failed to adhere the agreement as arrived through minutes of meeting dated 16.12.2020 (for clearing pending bill amounting to Rs 3.23 crores and depositing the TDS of Rs 1.47 crores; and clearing the amount of Rs 13.4 lakh towards diesel).

   2. The Respondent Company failed to make payment of its outstanding dues amounting to Rs 16.24 crores as on 22.03.2021 and also failed to deposit the TDS to the tune of Rs 3.98 crores in the Government account.

7. In its defence the Respondent Company, as narrated in its affidavit in reply dated 30.09.2021 and stated by its learned counsel Mr. Vijayesh Atre, pointed out that though the original MoU dated 10.04.2019 as well as the first amendment dated 12.10.2019 were executed prior to the pandemic, the 2nd amendment dated 07.07.2020 was executed during the pandemic; and that on 7th August 2020, the Managing Director of the Respondent Company Mr. Zaidi expired due to Covid and the entire work of the Respondent Company got temporarily affected, as the then Managing Director of the Respondent Company was the sole authority and person responsible who was looking after the day to day affairs of the Respondent Company; and thereafter, his son Mr. Kabir Zaidi took over the responsibility, and then had a personal meeting with Mr. Charan Reddy as well as Mr. Gopinath Rao (from the side of

the Applicant Company) on 16.12.2020 to discuss the future course of action in light of death of his father.

7.1 In the context it has been stated that the Applicant Company with *mala fide* intentions to wriggle out of the responsibilities under the MoU dated 10.04.2019, and subsequent amendments thereto, through which the liability of the applicant had increased manifold, misused, the letter head of the Respondent Company and mischievously addressed a letter dated 21.03.2021 to inform the NCL *inter alia* that the Respondent Company would stop operation completely with immediate effect, if required explosives were not supplied to it. To this, the NCL strongly objected to as due to prevailing crisis of explosives those days, the project was not getting the required amount of explosives and thereby in turn they were supplying the explosive on the basis of quantity received by the project; that in view thereof the NCL conveyed its annoyance *vide* its letter dated 21.03.2021 on the same date and conveyed that stopping of the working on the project was in gross violation of terms of work contract.

7.2 The learned counsel submitted that though a Power of Attorney was given by the Respondent Company to the official of Applicant Company namely Mr. Gopinath Rao, for carrying out day-to-day correspondence with NCL as the Respondent Company was the Principal Contractor of the NCL, but the said Mr. Gopinath Rao misused such Power of Attorney by sending the said letter dated 21.03.2021 under his signature to cause inconvenience/embarrassment and consequence losses to the Respondent Company, who had a basic obligation under the work contract of the NCL. He also submitted that in its application this fact has not been disclosed by the Applicant Company.

For the Ready Reference the contents of these two letters are given here under:

A. **From the letter dated 21.03.2021 [in the letter pad of Respondent Company to NCL Signed by Mr. Gopinath Rao (of the Applicant)]**

"***Gajraj Mining Pvt Ltd*** *Dated 21.03.2021*

Lr No. 189/GIMPL/DCH/dated 21.03.2021

To,
The General Manager
Northern Coalfields Limited,
Dudhicua Project,
Post: Khadia-231222, (U.P.)

Sub:- Short Supply of Explosive Material & Idling of Equipment-Reg.

Re:-1. LOA No. NCL/SGR/CMC/DCH/18-19/35 DATED 25.01.2019

2. Work Order No. NCL/GM/Hiring/DCH Area/WO/18-19/929, Dated 30.01.2019

3. Reference our letter No: GM/SGRL/NCL-DCH/19-20/185

4. Reference our letter No: GM/SGRL/NCL-DCH/19-20/188

5. Reference our letter No: GIMPL/Dudhichua/Dated 11.03.2021

Dear Sir,

With reference to the above subject, the agreed target as per the agreement for the month of March 2021 is 23.71 LBCM and target per day is 76451 BCM. To achieve these targets, we have to run minimum of 15 excavators at site. But in present scenario we are running only 4 to 5 No's of excavators due to non- supply or shortage of explosive and more than 70% of the deployed machinery & manpower are kept idle. Due to idling of machinery our fixed overheads like manpower costs, maintenance cost & machinery EMI become a burden, and this has pushed our company into huge financial hardships.

In this context, we need the confirmation in writing from your end for supply of at least 45T of explosive per day on continuous basis. Until then we would like to stop our operations completely with immediate effect. Once the situation improves, we will redeploy the machinery back to the operations.

Thanking You

Yours faithfully
Gopinath Rao

For Gajraj Mining Private Limited"

B. From the letter dated 21.03.2020 (NCL to the Respondent Company)*:-*

*"**Northern Coalfields Limited***

Ref. No. GM/DCH/20-21/1345 *Dated 21.03.2021*

***To**,*
Ms/ Gajraj Mining Pvt Ltd
Behind Telephone Exchange,
Nehru Nagar Dist- Singrauli
(MP) 486889

Sub: Stoppage of work at Dudhichua Project

Ref: Your letter no. 189/GIMPL/DCH/dated 21.03.2021.

Dear Sir,

You have been awarded the work vide LOA No. NCL/SGR/CMC/DCH/18-18/35 dated 25.01.2019 and work order no. NCL/GM/Hiring/DCH Area/WO/18-19/929 dated 30.01.2019. It is well aware to all concerns that the Country is facing crises of explosives for want of ammonium nitrate. We are getting less explosive due to short of explosives required by the project and are being distributed to run the operations but the actual acquirement by different departments are not getting fulfilled due to short supply of explosives.

Today, we have received your above referred letter mentioning to stop the operations completely with immediate effect at Dudhichua until you get confirmation in writing from our end for supply of at least 45 tonnes of explosives per day on continuous basis. This type of letter is highly improper, unjustified and undesirable as the project is not in a position to provide the required amount of explosive due to prevailing crises of explosives and explosive is being supplied to you on the basis of the quantity received by the project. However, you are being paid hindrance as per terms and conditions of the contract.

You are, therefore, strongly advised to rethink your decision to stop the operation and start the work immediately".

8. Learned counsel for the Respondent Company further submitted that immediately the next day i.e. on 22.03.2021, the Applicant Company had issued a notice of termination of the MoU dated 10.04.2019, and amendments made thereunder [refer para 5.3 above]; and that in response vide letter dated 08.04.2021, the Respondent Company had made it clear that such action on the part of the Applicant Company (VPR Mining Infrastructure Pvt Ltd) is not only against business ethics but also a complete violation of terms and conditions of the MoU dated 10.04.2019 as clause 8.1 of the MoU specifically prescribed 30 days prior notice before terms of working, whereas vide said termination letter dated 22.03.2021, the Applicant Company had not only threatened and informed to stop the work but had also stopped the work unilaterally w.e.f. 21.03.2021 itself. (refer the content at para 5.4 above). Through their affidavit-in-reply, the Respondent Company has submitted that the consequence of abrupt stoppage of work by the Applicant Company was so severe that it could not have undertaken the responsibilities on its own and resumed the work immediately and that in view thereof vide its letter dated 08.04.2021, in response to the said termination notice had called upon the Applicant Company to resume its work, however that was not done and when Applicant Company did not pay salary and other dues to its employees/workmen who were deployed in the above-referred work of removal of overburden in NCL, they had started an agitation and demanded their wages; that they had started giving Dharna in the NCL office and, therefore, the Officers of NCL had asked the Respondent Company, being the Principal Contractor, to resolve the issue. It is submitted that the following a meeting which was convened by the Management of NCL at Dudhichua project on 08.04.2021, in the wake of agitation of the workmen, the Respondent Company had to undertake the responsibility to pay the wages of the workmen against their duties performed in month of March 2021, and following that it had to make a payment of Rs 75,04,994/- towards wages and EPF payment of Rs 18,12,570/- to settle the unrest created in the NCL Dudhichua Project due to non-payment of the same by the Applicant Company just to avoid

further disruption of work at the mining site and following the instructions of NCL; and that this payment was made by the Respondent Company despite obligations of the Applicant Company under clause 3.2 of the MoU.

8.1 The learned counsel for the Respondent Company also submitted that the Applicant Company vide its letter dated 24.04.2021 [refer para 5.4 above] had finally terminated the work contract; and that on account of disruption in the work, the NCL imposed a penalty of Rs 1.39 crores on the Respondent Company and then it had to resume the work on its own but in the process suffered with losses.

The learned counsel further submitted that due to sudden stoppage of the work in violation of the MoU that resulted into losses, which was later on quantified at Rs 38.61 crores due from the Applicant Company in terms of clause 10.2 of the MoU and thereupon, the Respondent Copmany had initiated the process of arbitration and issued a letter dated 07.09.2021 to the Applicant Company for appointment of arbitrator in terms of provisions of clause 11 of the MoU dated 10.04.2019, for recovery of such losses. It is stated that a bare reading of the letter dated 04.05.2021 would demonstrate that there is a pre-existing dispute between the parties arising on account of unlawful termination of the MoU by the Applicant Company causing severe financial losses to the Respondent Company which cannot be measured in financial terms or adjudicated in the present proceeding under IB Code. It is also submitted that immediately after that, the Applicant Company issued a demand notice on 20.05.2021, and in spite of its reply to the said demand notice, it proceeded for filing the present application which on its merit is not maintainable. For the sake of ready reference. The content of the letter dated 04.05.2021 is also reproduced here under:

From the letter dated 04.05.2021*: -*

"Gajraj Mining Pvt Ltd

Ref/GMPL/VPR/21-22/03

To, *Dated 04.05.2021*
Mr. RV Ramana Rao,
Executive Director,
VPR Mining Infrastructure Pvt Ltd
Corporate Office at 8-2-293/82/A/1259,
Lakshmi Towers, Road no. 36,
Jubilee Hills Hyderabad-500 003 (Telangana)

Sub:- Reply to the notice for termination of the MoU dated 10.04.2019

Ref: (i) Your letter dated 24.04.2021.
(ii) Our letter no. GMPL/VPR/21-21/804 dated 08.04.2021.

Dear Sir,

This has reference to your letter dated 24.04.2021 informing therein to terminate the work which was being undertaken by you in accordance with the terms of the MoU entered on 10.04.2019 between us. The contents of notice with regard to allegations made vehemently denied as you i.e. M/s VPR Mining Infrastructure Pvt Ltd has violated the terms and conditions of the MoU by stopping the work unilaterally without complying with the terms of MoU. In this context, we would like to invite your attention towards our reply dated 08.04.2021 clarifying the issues raised by you in the letter/notice dated 22.03.2021 and the issued raised from your end have been clarified categorically by us therefore, the chapter must have been closed. In fact, we regularly held meetings with the work, payment related issued with the NCL and also other problems being faced by us due to sudden demise of our promoter Late Sri Iram Zaidi and consequently we were facing multifarious problems particularly severe liquidity crunch and some operational issues with our bankers. Thus, we were sharing with you, the problems being faced and everything was within your knowledge and considering our long relationship of business such unilateral action of stopping the work was not at all expected from your organization. As regards the amount which is being claimed under the notice and is stated to be the crux of disputes is concerned, it is quite surprising the amount is not so high keeping in view the value of the work under *the MoU and that too as per our mutual discussion, there is a need reconciling the same from the records maintained by both of us the payments made from time to time.*

It is pertinent to mention that you have failed to honour the terms and conditions of the MoU as before serving the notice through e-mail on 22.03.2021 the ongoing activities/work was stopped unilaterally w.e.f. 21.03.2021, even without informing us in total disregard and violation of the terms under the MoU. Thus, it seems that you somehow trying to stop the work and therefore creating such situation with ulterior motive and intention to rescinded/terminate the MoU dated 10.04.2019, reason of which is best known to you. This action on your part is not only violative of the terms of MoU but it also affects our credibility with the Principal Employer and possibility of giving rise to additional liabilities. It was incumbent upon you to serve the notice in accordance with the terms of MoU if there were any difficulties in performing the obligations and thereafter, you should have waited for the reply on our behalf for further period of 30 days and the ongoing activities/work must have been continued during this period. Thus your above action is in violation of the provision under clause 8.1 of the MoU and consequently, the management of NCL, Dudhichua vide letter no.GM/DCH/20-21/1345 dated 21.03.2021 and GM/DCH/20-21/1353 dated 24.03.2021 have shown their annoyance for such stoppage of the work and directed us to start the work immediately failing which the management of NCL Dudhichua would have no option but to start the work by engaging the departmental machineries and manpower at the Risk and Cost of the Contractor as per terms of the Contract in question.

Further you have also failed to release the payment of the workmen deployed in the work for the month of March 2021 for which we have requested you vide our letter no GMPL/VPR/21-22/1404 Dated 14.04.2021 to release the payment of wages to the concerned workers at the earliest to avoid any adverse situation in maintaining the Industrial Relations in NCL, Dudhichua Project as the workers and representative trade unions have started protests and agitations before NCL management, but nothing has yet been done from your end in this regard, which is also violation of the terms of MoU on your part.

In view of above, the contents of your letter under reference is denied and you are again advised to adhere to the terms of Memorandum of Understanding *strictly and in case the terms and conditions of the MoU is not adhered properly, M/s VPR Mining Infrastructure Private Ltd shall only be responsible for such lapses and losses and accordingly shall also be liable for all losses, damages and cost etc.*

Thanking you,

Yours Faithfully
Gajraj Mining Private Ltd.
Director (Kabir Zaidi)"

9. We have considered the submissions made by the counsels for both sides, and we have also perused the relevant documents placed on record. During the course of the argument, learned counsel for the Respondent Company also raised the issue that the default as stated by the Applicant Company as on 16.12.2020 as well as on 22.03.2021, is within the period given under Section 10A of the IBC Act (that is within 25.03.2020 to 24.03.2021) and thereby, he submitted that the application of the Applicant Company is not maintainable at all.

To this, the learned counsel appearing for the Applicant Company took the plea that this defense is not stated in the respondent's, and therefore the same cannot be considered at this stage. The learned counsel for the Applicant Company, however, also stated that as per the MoU, the Respondent Company is liable to pay each and every bill in entirety and referred to Annexure 2 of the Application (refer para 3 above) and submitted that as per the statement of outstanding dues [Annexure 2 to the demand notice refer para 3 above] the due amounts are related to the period from 09.07.2019 to 05.03.2021, and even if the dues are considered till March 2020 (i.e. prior to the period under Section 10A) that also is more than Rs 1 crore and, therefore, the petition is not hit by Section 10A of the IB Code.

On perusal of the said statement, it is noted that in all 42 invoices were issued during the period 09.07.2019 to 19.03.2021. It is also noted that by and large two invoices/bills were raised during any particular month within this period and the net amount payable against each and every invoice so raised had ranged between Rs 3 crores to Rs 9 crores (generally 6 to 9 crores). Against each and every such invoice the payment was made within a day or two (from the date of invoice) more or less in the very same range but some amount remained to be payable.

9.1 It is noted that the net outstanding amount as on any day ranged from Rs 55.32 lakhs to Rs 9.50 crores only whereas during the period the total amount payable as per the various bills/invoices amounted to Rs 292.21 crores and as against that the Respondent Company had paid an amount to the extent of Rs. 278.39 crores. Thus the outstanding, if any, as on a particular day during the entire period of 09.07.2019 to 19.03.2021, which ranged between Rs 55.32 lakhs to Rs 9.5 crores only, was not as high when compared to the total amount of Rs 278.39 crores paid by the Respondent Company. Furthermore, keeping in view the nature of contract, the invoices are to be considered as running bills only and as such the payments made by the Respondent Company is to be adjusted against the outstanding dues as per the running account. However, it has been stated on behalf of the Applicant Company that these were not running bills and rather as per the terms of the MoU each bills were to be settled by the Respondent Company at 100 % separately.

9.2 But, in the context, on perusal of Clause 10.2 of the MoU dated 10.04.2019, we find that the invoices raised were running bills only (refer para 5.1 above.) For ready reference the content of clause 10.2 of the MoU is reiterated herein as under:

> "10.2 In case of Second Party's Event of Default under this Agreement, the First Party, shall have the right to exercise any one or more of the following remedies".
>
> *(a) To recover the losses, costs, expenses & damages (Direct or Indirect) from the running bills of the Second Party and/or recover the said amount from the Second Party directly.*
>
> *(b) To sue for recovery of the damages.*

Here the Respondent Company is referred to as First Party and the Applicant Company is referred to as Second Party. In this clause there is a reference for recovery of losses/ damages incurred to the First Party from the running bills of the Second Party. Thus, the plea taken by the Applicant Company that its invoices cannot be considered as running bills is quite misplaced. The above-mentioned clause of the MoU also supports the view that the bills under reference have to be treated as running bills, and thus the outstanding amount as on any day has to be first adjusted as against the regular payments made immediately after that day. That way the total payment of Rs 278.39 crores was to be adjusted against the various bills and if that is done then the outstanding, amount of Rs 9.25 crores will have to be co-related to the last two invoices dated 05.03.2021 & 19.03.2021.

Only this inference can be derived in another way also. From Annexure 2 of the demand notice (refer to para 3 above), it can be noted that the last two invoices are dated 05.03.2021 & 19.03.2021. The payable amount as per these invoices amounted to Rs 6.98 crores & Rs 7.81 crores respectively totalling to Rs 14.79 cores as against these invoices the payments made by the Respondent Company amounted to Rs 6.75 crores & 7.56 crores totalling to Rs 14.31 cores. As already mentioned the balance outstanding as at the end of the period amounted to Rs 9.25 crores only which is less than the total invoices value as per the last two bills dated 05.03.2021 & 19.03.2021, thus it has to be inferred that this balance outstanding is to be correlated to the last two bills only and that way the default date falls within 10A period. In view thereof, the application is not maintainable at all and on that ground, itself deserved to be rejected.

It is to be noted that the liability for depositing the TDS in the Government account is of the Respondent Company only, but in terms of the said MoU and amendments made thereto, if the Respondent Company is made liable to pay that amount also to the Applicant Company (on failing to pay within due dates as per the Income Tax Act), then that amount would also fall within the period of 10A and as such on that account also the application filed by the Applicant Company does not succeed.

Even otherwise, if we consider the admitted amount as per the minutes dated 16.12.2020 (for clearing pending bill amounting to Rs 3.23 crores and depositing the TDS of Rs 1.47 crores) and also the outstanding dues as on 22.03.2021 for an amount of Rs 16.24 crores, and the TDS to the tune of Rs 3.98 crores, as stated by the Applicant Company, in default then also such default would lie within the 10A period and as such the application would not be maintainable and on that ground itself the application deserves to be rejected.

10. Without regards to the above, we have also taken note of the submissions made by the Respondent Company stating that there had arisen a pre-existing dispute on account of stoppage of the work by the Applicant Company, in violation of the terms of the MoU that has led to the damages/losses to the Respondent Company.

In the context, we have noted the content of the letter dated 08.04.2021 as well as letter dated 04.05.2021 whereby, prior to the issue of demand notice dated 20.05.2021, the Respondent Company had called upon the Applicant Company to resume the work and had brought to their notice the liabilities on accounts of agitation/unrest created by the workmen deployed by the Applicant Company for their salaries, which the Respondent Company had to pay on the instruction of the NCL to settle the unrest created in the NCL and also the penalty that was imposed onto it on account of stoppage of the work.

We find that the submission so made by the Respondent Company is substantiated with the fact that the employees deployed by the Applicant Company had started an agitation in the NCL Office as their salary was not paid and in that context, the NCL Officers, in a meeting which was convened on 08.04.2021 had directed the Respondent Company, being “Principal Contractor” to insure the payment to those employees to settle the unrest created therein, and the fact that the NCL had imposed the penalty onto the Respondent Company on account of the disruption in the work.

The termination notice was issued on 22.03.2021 and after 30 days, the MoU was terminated w.e.f. 21.04.2021 as conveyed by the Applicant Company *vide* its letter dated 24.04.2021. In the context, we note that vide its affidavit-in-reply at para 20(l), the Applicant Company has stated that the work was never stopped by the Applicant Company till expiry of 30 days' notice i.e. up to 21.04.2021. However, the Respondent Company has submitted that it had indeed stopped the work w.e.f. 21.03.2021 itself i.e. prior to the issue of the termination notice dated 22.03.2021. We find that the submission so made by the Respondent Company gets substantiated as per its letter dated 08.04.2021 whereby, it has called upon the Applicant Company to start the work immediately without loss of further time and to make up the shortfall of the production as per mutually agreed target.

We also note that the last bill raised by the Applicant Company is dated 19.03.2021 only which also substantiate the plea of the Respondent Company that the Applicant Company stopped the work w.e.f. 21.03.2021 itself in violation of the MoU without waiting for 30 days' time period after issuing the termination notice.

11. In the context of the clarification sought on the issue, the Respondent Company also filed a daily report issued from the NCL, which is termed as "Hindrance Report". The document reflects the target and the achievement as well as the equipment deployed. Such daily "Hindrance Report" are filed for the period 01.03.2021 to 31.03.2021. On perusal of these reports, we note that on 15.03.2021, as against the daily target of 32,129 BCM the achievement was 30,600 BCM, and the shortfall of 1529 BCM has been attributed due to shortage in supply of explosive. The Report also reflects the deployment of equipment such as 6 excavators, 30 tippers, 3 dozers, 1 drills, 1 water tankers & 1 grader. Then, there is downfall in achievement as on 16.03.2021 & 17.03.2021. The equipment deployed, however remains at the same level. The shortage has been attributed to the non-availability of the required quantity of explosive. Then on 18.03.2021, there has been no achievement but the equipment remained deployed at the same level. From

19.03.2021 onwards there was no achievement towards the target that reflects the stoppage of the work. Not only that the level of equipment deployed for the various machineries also reduced to zero. On that the learned counsel for the Respondent Company had taken a plea that the Applicant Company had not only stopped the work but had also shifted its plant and machinery from the mining site. The deployment of equipment at zero level may & may not be sufficient proof for removal of the plant and machinery from the mining site but these reports conclusively prove that there was no production work after 19th March 2021.

We also note that through its Rejoinder, the Applicant Company has also raised the bill dated 16.05.2021 for the work done during the period 16.03.2021 to 31.03.2021 for an amount of Rs 1.91 crores only. Keeping in view, the volume of work and the invoices raised in a particular month, particularly the last bill dated 19.03.2021 [for the period 01.03.2021 to 15.03.2021] that this invoice dated 16.05.2021 may relate to the work done for the period 16.03.2021 to 21.03.2021 only. In any case, the termination notice in this was issued on 22.03.2021. And the said MoU was terminated after 30 days w.e.f. 21.04.2021. No bills have been placed for the period 01.04.2021 to 21.04.2021. This would mean that conclusively no work was done by the Applicant Company during the period meaning thereby the Applicant Company had stopped the work even prior to the termination of the MoU. And as such the dispute between the Applicant Company and Respondent Company had arisen thereon which led to the genesis for the damages that was computed later on for that the arbitration proceedings were initiated after filing petition under Section 9 of the IBC. We also note that as per clause 10.2 of the said MoU [refer para 5.1 above] the First Party also had the right to adjust these losses damages, if any, against the running bills raised by the Applicant Company, and thus based upon that we have to infer that there is a pre-existing dispute which cannot be decided in the summary proceedings under Section 9 of the IBC and on that account also the application filed by the Applicant Company is not **maintainable** at all and on this ground also the application deserves to be **rejected**.

12. In view thereof, the application/**CP(IB)/21/2021** stands **dismissed**.

Sd/-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

Sd/-

P. MOHAN RAJ
MEMBER (JUDICIAL)

Neeraj Gupta/Steno