

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

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

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

CP No. (IB)- 15/9/JPR/2021

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

IN THE MATTER OF:

AIREN METALS PVT. LTD.

...Operational Creditor

VERSUS

KANDOI METAL POWDERS MANUFACTURING CO PVT. LTD.

...Corporate Debtor

MEMO OF PARTIES

AIREN METALS PVT. LTD.

R/o: G-750, Road No. 9F2

V.K.I.A Jaipur, Rajasthan

302013 India

...Operational Creditor

VERSUS

KANDOI METAL POWDERS MANUFACTURING CO PVT. LTD.

R/o: F-381 & 382, Road No. 9

Vishwakarma Industrial Area,

Jaipur Rajasthan 302013 India

...Corporate Debtor

CP No. (IB)- 15/9/JPR/2021

Sd/-

Sd/-

FOR THE APPLICANT: Rajesh Kumar Gautam, Adv.
FOR THE RESPONDENT: Sandeep Taneja, Adv.

Order Pronounced On: 19.01.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application has been preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') by *M/s Airen Metals Pvt. Ltd.* ('Operational Creditor') seeking Corporate Insolvency Resolution Process ('CIRP') of *M/s Kandoi Metal Powders Manufacturing Co. Pvt. Ltd.* ('Corporate Debtor') on account of default in payment of Rs. 6,52,57,581/- (Rupees Six Crores Fifty-Two Lakhs Fifty-Seven Thousand Five Hundred and Eighty-One Only).
2. The Corporate Debtor is a company registered under the provisions of the Companies Act, 2013 having CIN U28910RJ1972PTC001427 and registered office at F-381 & 382, Road No. 9 Vishwakarma Industrial Area, Jaipur, RJ 302013. The same has been verified from the website maintained by the Ministry of Corporate Affairs.
3. The Application has been filed on the basis of the following set of facts:

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3.1. That the applicant is engaged in the business of Non-ferrous metals viz. Copper, Aluminum, etc., and various types of insulating wires and stripes. The Operational Creditors started doing their business with the Corporate Debtor since FY 2007-08, pursuant to which, various transactions took place between the parties herein and accordingly invoices have been raised and processed. Out the invoices raised, the invoices amounting to Rs. 4,00,06,142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) are still outstanding as on date of filing of the Application i.e. 19.03.2021.

3.2. The Applicant has contended that the default on part of the Corporate Debtor was continuous in nature and certain remittances were made which were duly adjusted. The default had commenced after 01.06.2017 i.e. date of first invoice suggesting default and had crystallized on 03.07.2019 i.e. date of last invoice. The applicant has to recover a sum of Rs. 6,52,57,581/- (Rupees Six Crores Fifty-Two Lakhs Fifty-Seven Thousand Five Hundred and Eighty-One Only) in total including Rs. 4,00,06,142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) as principal outstanding and Rs. 2,52,51,439/- (Rupees Two Crores Fifty-Two Lakhs Fifty-One Thousand Four Hundred and Thirty-Nine Only)



towards interest calculated at the rate of 18% p.a. as on 31.12.2020. Copies of the outstanding invoices have been annexed with the petition.

3.3. The Applicant sent a Demand Notice under section 8 of the Code, 2016 dated 18.01.2021 to the Respondent Company and all the Directors of Corporate Debtor. It has been contended that the Respondent neither paid the amount of the unpaid operational debt claimed thereby, nor raised any dispute in respect of said unpaid operational debt. Moreover, it has been undertaken that since the default was done before 25.03.2020, the provisions of Section 10A of the Code are not applicable in the present matter. The Applicant has filed the Affidavit under section 9(3)(b) vide Dairy No. 2126/2021 dated 18.10.2021.

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

PARTICULARS OF OPERATIONAL DEBT

1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	Total Amount of Debt: (Rs. 4,00,06,142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) and Rs. 2,52,51,439/- (Rupees Two Crores Fifty-Two Lakhs Fifty-One Thousand Four Hundred and Thirty-Nine Only) including interest calculated at the rate of 18% p.a.
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		<p>Total amount outstanding is Rs. 6,52,57,581/- (Rupees Six Crores Fifty-Two Lakhs Fifty-Seven Thousand Five Hundred and Eighty-One Only)</p> <p>Date from which debt fell due: 03.07.2019. Last Transaction entered on 03.07.2019.</p>
2.	Amount claimed to be in default and the date on which the default occurred.	<p>Rs. 6,52,57,581/- (Rupees Six Crores Fifty-Two Lakhs Fifty-Seven Thousand Five Hundred and Eighty-One Only)</p> <p>Date from which debt fell due: 03.07.2019. Last Transaction entered on 03.07.2019.</p>

4. The Corporate Debtor vide Dairy No. 228/2022 dated 27.01.2022 has filed preliminary objections to the maintainability of the Application delineating the following points:

4.1. The captioned petition filed on behalf of the Petitioner has been signed by *Mr. Sudeep Goyal*, Advocate and *Ms. Rajani Rawat*, Company Secretary and the affidavits in support thereof have also been filed by them separately in their capacity as authorized representatives of the Petitioner. It is stated in their affidavits that they have been authorized to

present their case which is evident from the vakalatnama filed along with the captioned petition. A company secretary and advocate are entitled to act in a professional capacity to present the case of his/her client before the Tribunal, and thus cannot act as an attorney and sign and verify the pleadings in the same matter. Both these roles being separate and independent cannot be combined and therefore, an advocate and/or company secretary representing his/her client in a judicial proceeding in his professional capacity has no authority to sign pleadings and file affidavit on behalf of any party to the proceedings.

5. The Corporate Debtor has filed reply vide Diary No. 627/2022 dated 01.03.2022 stating the following points:

5.1. The Corporate Debtor submits that the Demand Notice dated 18.01.2021 is not in the prescribed format and has not satisfied the essential requirements of a 'demand notice'. It does not mention the date from which the debt fell due and the date on which the default has occurred. Since, the said notice is improper and incomplete, it cannot be allowed to maintain the company petition. Moreover, the Corporate Debtor contended that the company petition has been filed without complying with the mandatory provisions u/s 9(3)(b) and 9(3)(c) of the IBC, 2016.

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5.2. Further, it has been contended that the Director of the Petitioner requested the Director of the Corporate Debtor to sell goods to one *M/s Emgee Cables and Communications Limited, Jaitpura, Jaipur* (a company with whom the Petitioner was regularly carrying out its business) with the assurance that if *M/s Emgee Cables* does not make payment to the Corporate Debtor, the Corporate Debtor shall be entitled to adjust/ set off the said amount from dues of the Corporate Debtor maintained and payable to the Operational Creditor. Due to long standing business relations, the Respondent agreed to the same. Consequently, an oral agreement was entered between the director of the Petitioner and the director of the Respondent wherein the parties agreed that Corporate Debtor shall sell the goods to *M/s Emgee Cables*. The said verbal agreement was made in the presence of *Sh. Raj Kumar Kandoi*, erstwhile Director of the Respondent company, who was managing the affairs of the company at that time. The affidavit of the said erstwhile director evidencing the existence of oral agreement is annexed with the reply of the Respondent.

5.3. Later, *M/s Emgee Cables* faced financial turmoil and delayed in making payment to the Corporate Debtor. When the aforesaid delay was apprised to the Petitioner, in the light of the abovesaid oral agreement, the

Petitioner transferred an amount of Rs. 4,90,00,000/- (Rupees Four Crores Ninety Lakhs Only) to the Corporate Debtor on 09.10.2017 against the material supplied by the Respondent to the *M/s Emgee Cables*. Thereafter, the respondent settled the account with the Petitioner by transferring the aforesaid amount of Rs 4,90,00,000/- (Rupees Four Crores Ninety Lakhs Only) which included amount against the due as well as some advance towards further purchases. The copy of the relevant bank entry is annexed with the reply. Under these circumstances, no amount is due from the Respondent to the Petitioner and therefore the company petition deserves to be dismissed. Considering the same, it is evident that as a result of the oral agreement and its consequent transactions, the aforesaid claim alleged as a debt, does not amount to an Operational Debt and as a result neither the Petitioner qualifies to be an Operational Creditor nor the Respondent qualifies as a Corporate Debtor as defined under the Code.

5.4. Additionally, it is submitted that the Petitioner Company is not eligible to initiate CIRP against the Respondent as vide order dated 31.01.2022 IRP was initiated against the personal guarantor of the Petitioner i.e. *Ms. Prabha Agarwal* u/s 94 of IBC, 2016. The aforesaid fact implies that CIRP of the Petitioner is already pending. Therefore, the Petitioner is

barred from initiating CIRP against the Respondent in light of provision laid down under section 11 of the Code. Further the alleged amount of debt comprises of an exorbitant amount of interest which merely has a unilateral mentioning in the invoice. In the absence of any agreement with regards to the amount of interest on the alleged due amount, the Petitioner is not entitled to raise the misconceived claim at such high interest.

6. The Petitioner has filed Rejoinder vide Dairy No. 1286/2022 dated 28.04.2022 wherein the following has been submitted:

6.1. The Petitioner Company, by passing different Resolutions, all dated 27.01.2022, cancelled the authorizations of *Mr. Sudeep Goyal*, Advocate and *Ms. Rajni Rawat*, Company Secretary as professional as well as Power of Attorney holders and appointed and authorized *Mr. Sunil Goyal*, *Mr. Anil Goyal*, *Mr. Ajay Kumar Atolia*, *Mr. Praveen Goyal*, *Mr. Anurag Goyal* and *Mr. Ashish Gupta*, Chartered Accountants to pursue the matter in their professional capacity before this Adjudicating Authority. The company also confirmed and ratified the steps and actions already taken by *Mr. Sudeep Goyal*, Advocate and *Ms. Rajni Rawat*, Company Secretary. Copies of the said Board Resolutions have been placed on record vide Dairy No.624/2022 dated 28.02.2022.

6.2. The Corporate Debtor has not raised any dispute regarding the supplied goods and materials against the purchase orders placed by it. The same supply of goods has been acknowledged also by the Respondent in its books of accounts and in written communications, hence the petitioner is an Operational Creditor within the meaning of section 5(20) of IBC, 2016. Further, the Respondent having received the material from time to time is a Corporate Debtor within the meaning of section 3(8) of IBC, 2016.

6.3. The Demand Notice was duly served and is maintainable. It is submitted that the first default of the principal amount had taken place on 01.06.2017 with the non-payment of due Invoice No. 121 of Rs. 23,37,747/- (Rupees Twenty-Three Lakhs Thirty-Seven Thousand Seven Hundred and Forty-Seven Only). The interest on the outstanding amount has been calculated in the interest column @18% p.a., which is the rate of interest mentioned on the invoice of the Petitioner Company.

6.4. The Applicant confirmed that the Corporate Debtor admitted its liability through email dated 19.11.2020. The e-mail dated 19.11.2020 annexed the ledger accounts of different Financial Years maintained by the Corporate Debtor of the Applicant Company i.e. Financial Years from 2015-16 to 2020-21 up to 19.11.2020 of Unit I of Corporate Debtor and

Financial Years 2015-16 to 2017-18 of Unit II of CD, which shows an outstanding amount of Rs. 3,93,10,293.45 (Rupees Three Crores Ninety-Three Lakhs Ten Thousand Two Hundred and Ninety-Three) clearly and unequivocally admitted to be due and payable to the petitioner company. Since, the Applicant was claiming Rs. Rs. 4,00,06,142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only), there was a difference of Rs.6,95,848/- (Rupees Six Lakhs Ninety-Five Thousand Eight Hundred and Forty-Eight Only).

6.5. The abovesaid short amount i.e. Rs.6,95,848/- (Rupees Six Lakhs Ninety-Five Thousand Eight Hundred and Forty-Eight Only) was shown payable in the books of Respondent to the Operational Creditor, for which Corporate Debtor wrote a letter dated 05.03.2018 to the Operational Creditor and sought for account settlement of the petitioner company for reconciliation of the amount under difference. On receipt of the aforesaid letter, the petitioner company vide its letter dated 10.04.2018 provided the desired Account Statement for both the Unit I and Unit II of the Respondent CD maintained in the account's books of the Petitioner along with the Reconciliation Statement as on 10.04.2018 to the Respondent explaining the amount short credited by CD in its books. The relevant annexures have been put on record. This clearly

established that an amount of Rs. 4,00,06,142.01/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) is outstanding and payable by the Corporate Debtor to Operational Creditor.

6.6. That the affidavit of non-existence of dispute in respect of unpaid operational debt is annexed with the petition in compliance with section 9(3)(b) of IBC, 2016 and a certificate of the financial institution being ICICI Bank is also there on record which complies with the requirement of section 9(3)(c) of IBC, 2016.

6.7. Further, no oral agreement was ever entered into between the Directors of petitioner and respondent companies. Whatever goods, if any, have been sold by the respondent to *M/s Emgee Cables* are separate and the petitioner company has no concern with the said *M/s Emgee Cables* owes to Respondent. On the contrary, the letters dated 05.03.2018 and 02.01.2019 exchanged between the parties, expressed to the Petitioner that the Corporate Debtor's substantial payment got struck up with *M/s Emgee Cables* on account of which, they were facing acute financial crisis and assured that they were trying their best to release partial payment to the petitioner in near future.

6.8. The objection against the outstanding amount as alleged in the reply for the payment of Rs. 4,90,00,000/- (Rupees Four Crores and Ninety Lakhs

Only) has been raised by the Respondent for the first time in the reply dated 28.02.2022 i.e., after more than one year from the date of Demand Notice dated 18.01.2021. Due to long standing business relations, the Respondent used to borrow amount from the Petitioner which usually was repaid in short time. The correct fact is that the amount of Rs. 4.90 Crores (Rupees Four Crores and Ninety Lakhs Only) were ad-hoc short-term borrowings made by the Respondent CD which got adjusted on the same day. The correct ledger statement for the period 2017-18 has been submitted for the purpose of record.

6.9. That the Petitioner Company is eligible to initiate CIRP against the Respondent and there is no bar from bringing the action by the Petitioner against the Corporate Debtor in consonance with Explanation II to Section 11 of IBC which was inserted by the *IBC (Amendment) Act, 2020*. Thus, it is clear that even if the CIRP proceedings had commenced against the Petitioner Company, still it is authorized to bring CIRP proceedings against its defaulting Corporate Debtors.

7. That the Petitioner has filed two Written Submissions vide Dairy No. 508/2023 dated 23.02.2023 and vide Dairy No. 2971/2023 dated 14.12.2023 wherein the contentions submitted earlier have been reiterated. In support of the Board Resolutions dated 27.01.2022, the Applicant has relied upon the

judgment of the Hon'ble Supreme Court in *Maharashtra State Mining Corpn. Vs. Sunil, S/o Pundikarao Pathak, 2006 (5) SCC 96* wherein it was held that an act by legally incompetent authority, which is invalid, can be ratified by the Competent Authority and a subsequent rectification of an act is equivalent to prior authority to perform such act, therefore, rectification assumes an invalid act which is retrospectively validated.

8. The Corporate Debtor on 22.12.2023 vide Dairy No. 3061/2023 has filed Written Submissions contending that it is a settled principle of law that an Advocate/ Company Secretary who has been engaged in a professional capacity by a party cannot act as an authorised representatives/ constituted attorney of the same party and verify the facts, sign the pleadings as depose affidavit on their behalf. The *Hon'ble Bombay Hight Court in the matter of Oil and Natural Gas Commission v/s Offshore Enterprises Inc. AIR 1993 Bom. 217* has held that the law does not permit the combination of the aforesaid two capacities in the same cause; rather the law prohibits any such simultaneous culmination of duties as an advocate and a constituted attorney of the client in the same cause. Such combination of roles is opposed and prohibited by law, and thus, illegal.

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9. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, Rejoinder, Written Submission along with the documents enclosed therein.
10. First and foremost, we determine whether there is an Operational Debt and the same has become due and payable. Thereafter, when these conditions are fulfilled, we answer the question regarding the dispute raised by the Corporate Debtor, if any. If both the questions above are answered in a positive light, it is, this Adjudicating Authority shall initiate CIRP of the Corporate Debtor in compliance with the Section 9 of the Code.
11. The Application has been preferred under Section 9 of the IBC 2016 by the Operational Creditor seeking Corporate Insolvency Resolution Process ('CIRP') of Corporate Debtor on account of default in payment of Rs. 6,52,57,581/- (Rupees Six Crores Fifty-Two Lakhs Fifty-Seven Thousand Five Hundred and Eighty-One Only), out of which Rs. 4,00,06142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) is the outstanding principal amount and Rs. 2,52,51,439/- (Rupees Two Crores Fifty-Two Lakhs Fifty-One Thousand Four Hundred and Thirty-Nine Only) is interest amount calculated @18% p.a. from 01.04.2017 till 31.12.2020. The Petitioner has put on record all the invoices suggesting default.



12. It has been admitted by the parties that the Operational Creditor and the Corporate Debtor were conducting business by virtue of which the Operational Creditor would supply goods and material to the Corporate Debtor and generate invoices. Thereafter, the Corporate Debtor would clear the dues of the Financial Creditor as and when due. On perusal of the invoices, it is seen that the invoices carry an interest clause which states that *“Interest at the rate of 18% p.a. will be charged on account if not paid on due date.* The Corporate Debtor has contended in its submissions that the amount of interest is exorbitant, however, no dispute/question had been raised at the time when the invoices were raised by the Operational Creditor.
13. As per the provisions of the Code, an Operational Debt constitutes a claim in respect of the provision of goods or services arising under any law for the time being in force and Operational Creditor means a person to whom an operational debt is owed. In the current situation, it is evident that the Operational Creditor/Applicant would provide goods to the Applicant and raise invoices which were due and payable by the Corporate Debtor. Hence, the amount of unpaid dues against the invoices raised by the Applicant amounts to Operational Debt and the Applicant falls within the definition of Operational Creditor as envisaged under Section 5(20) of the Code.

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14. It is seen that the last invoice was dated 03.07.2019 amounting to Rs. 1,92,345/- (Rupees One Lakh Ninety-Two Thousand Three Hundred and Forty-Five Only), which has been duly annexed with the Application. As per the Application, the total amount due is Rs. 6,52,57,581/- (Rupees Six Crores Fifty-Two Lakhs Fifty-Seven Thousand Five Hundred and Eighty-One Only) which includes principal outstanding of Rs. 4,00,06,142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) and interest calculated at the rate of 18% p.a. of Rs. 2,52,51,439/- (Rupees Two Crores Fifty-Two Lakhs Fifty-One Thousand Four Hundred and Thirty-Nine Only). The Applicant has annexed a calculation of the interest from 01.04.2017 to 31.12.2020 which depicts that the Corporate Debtor used to make lump-sum payment towards the invoices raised which became due and payable. The last payment by the Corporate Debtor was made on 03.07.2019, hence the date of default as mentioned is 03.07.2019.
15. Initially, the Applicant requested the Corporate Debtor to make payment towards the outstanding amount of Rs. 4,00,06,142/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) vide letter dated 19.02.2018 to which the Corporate Debtor replied via letter dated 05.03.2018 stating that as per the books of the Corporate Debtor, there was a difference of Rs. 6,95,848/- (Rupees Six Lakhs Ninety-Five Thousand Eight Hundred and

Forty-Eight Only) in comparison, hence, it requested the Applicant to send its ledger account for reconciliation. Further, the Corporate Debtor has also mentioned in the same letter that it was facing financial crisis for non-payment by *M/s Emgee Cables* (one of the debtors of the Corporate Debtor). Again on 10.04.2018, the Applicant apprised the Corporate Debtor that no payment was received in the last quarter i.e. January to March 2018 and requested for release of the same; the ledger accounts were also annexed with the said letter. The ledger accounts and the letters mentioned herein have been annexed with the Application.

16. Bare perusal of the letter along with the ledger account demonstrates that the Corporate Debtor acknowledged its liability towards the Applicant vide letter dated 05.03.2018. Hence, it is clear that there was a debt which had become due and payable by the Corporate Debtor towards the Operational Creditor. Further, the difference in the balance account was met with by the Applicant by annexing the Ledger Accounts which clearly show that the amount of Rs. Rs. 4,00,06,142.01/- (Rupees Four Crores Six Thousand One Hundred and Forty-Two Only) is payable by the Operational Creditor.
17. Finally, the demand notice was preferred by the Applicant on 18.01.2021 to which no reply was received. The Corporate Debtor had not raised any dispute regarding the debt due and payable to the Applicant. Moreover, the

act as authorized representatives of the Petitioner vide Board Resolution dated 15.12.2020. However, the said resolution reveals that no specific authorization has been given to the aforesaid persons to file the captioned petition against the Respondent. The aforesaid persons have been authorized to act only in their professional capacity to represent and appear on behalf of the Petitioner.

4.2. The Board Resolution shows that *Mr. Sudhir Kumar Agarwal*, a director of the Petitioner has been authorized to sign petition, vakalatnama and other documents on behalf of the Petitioner Company. Also, Board Resolution reveals that the Board of Directors of the Petitioner had resolved to issue a general power of attorney in favour of *Mr. Sudeep Goyal*, Advocate and *Ms. Rajani Rawat*, Company Secretary, however, no such power of attorney has been placed on record. This vindicates that the said persons are not authorized to sign petition and verify affidavit on behalf of the Petitioner. Thus, signing of the petition and filing affidavit by the advocate and the company secretary in an unauthorized manner, renders the captioned petition as invalid and therefore, the same is liable to be dismissed.

4.3. It is submitted that *Mr. Sudeep Goyal*, Advocate and *Ms. Rajani Rawat*, Company Secretary, have been engaged by the petitioner to appear and

contention raised by the Corporate Debtor with respect to existence of an oral agreement between the Directors of the Applicant and the Corporate Debtor is not supported by any written evidence. Moreover, the Applicant in its letter dated 05.03.2018 has contended that it was awaiting payment from *M/s Emgee Cables* to make payment to the Petitioner. Hence, the contention of the Corporate Debtor does not hold ground.

18. Further, the transfer of Rs. 4.90 Crore (Rupees Four Crores and Ninety Lakhs Only) by the Petitioner to the Respondent on 09.10.2017 was returned on the same date to the Applicant, hence, the submissions made regarding the same are not tenable. There appears to be no pre-existing dispute between the parties herein.
19. The Corporate Debtor had raised the question regarding maintainability of the Application filed under Section 9 of the Code. During the pendency of the Application, the Applicant has rectified the same via issuance of Board Resolutions dated 27.01.2022. The respective affidavits as prescribed under Section 9(3)(b) and 9(3)(c) of the Code have been duly annexed by the Applicant. Section 11 of the Code prescribes that a Corporate Debtor undergoing CIRP is eligible to file an application against another Corporate Debtor. Therefore, the Applicant which has now undergone CIRP, was eligible at the time of filing of the Application.

20. In *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited*, para 34, the Hon'ble Supreme Court laid down the conditions precedent for triggering the CIRP under Section 9 of the Code. Para 34 is as follows: -

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

21. Therefore, to initiate CIRP in the present matter the conditions have to be satisfied. At this juncture it is also important to quote the judgment of the Hon'ble Supreme Court in *M/s S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Limited*, which reads as follows:

"32. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must

commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

22. It has very well been established that under Section 9 of the Code, to initiate CIRP proceedings, the Applicant is required to prove that the debt is due, it has not been paid and the debt is an undisputed debt. We are of the view that in the present matter, all the ingredients laid out under Section 9 are fulfilled. Therefore, we are inclined to initiate CIRP of the Corporate Debtor in the present matter.
23. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional (‘IRP’) but it is not obliged to do so. In the instant case, the Operational Creditor has not proposed that any person may be appointed as IRP. Hence, this bench can appoint the RP from the pool of RPs empanelled with the IBBI.
24. In view of this *Ms. Pratibha Khandelwal*, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-002/IP-N00031/2016-17/10068 (email: cspratibhak@gmail.com) (mobile no. 9928325945), is hereby appointed as the IRP. The said IRP is directed to file her written consent to act as a

resolution professional in Form-2 provided under Rule 9 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.

25. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder. It is directed to the Interim Resolution Professional /Resolution Professional to check the genuineness of the claim while admitting the operational dues of the Applicant.

26. Consequences of initiation of CIRP shall be inter-alia as follows:

26.1. The IRP appointed by the Adjudicating Authority, *Ms. Pratibha Khandelwal*, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by her under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.

26.2. Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor

which will be in vogue during the CIRP of the Corporate to Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.

26.3. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray her expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

26.4. In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

27. Accordingly, CP No. (IB)-15/9/JPR/2021 is admitted. In view of the foregoing, pending applications, if any, shall stand disposed off.
28. The Registry is directed immediately to send a soft copy of the instant Application along with this order to the parties along with the RP nominated herein.


**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**


**RAJEEV MEHROTRA,
TECHNICAL MEMBER**