



**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**(IB)-474(ND)2022**

**IN THE MATTER OF:**

**Prism Johnson Limited**

Through its RMC (India) Division  
Formerly known as Prism Cement Limited  
305, Laxmi Niwas Apartments,  
Ameerpet, Hyderabad,  
Telangana-500016

**Also, at:**

Prism Johnson Ltd. RMC (India) Division,  
Jail Road, Sohna road,  
Village Dhaspur,  
PO. Badshapur,  
Gurugram -122101, Haryana

**... Operational Creditor/Petitioner**

**VERSUS**

**Doosan Power Systems India Private Limited**

Flat No. C-4, 2nd Floor, Major Nahar Singh,  
Complex, Khasra No. 53, Kapashera,  
Old Gurgaon Road, South West Delhi,  
New Delhi - 110037

**... Corporate Debtor/Respondent**

**Section: 9 of the IBC, 2016**

**Order Delivered on: 03.03.2023**

**CORAM:**

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)**

**SH. L. N. GUPTA, HON'BLE MEMBER (T)**

**PRESENT:**

**For the Petitioner** : Adv. Abhijeet Sinha a/w Adv. Kunal Kashyap  
Adv. Nishant Chothani, Adv. Atishay Jain,  
Adv. Tanushree Sogani

**For the Respondent** : Sr. Adv. Ritin Rai a/w Adv. Deepak Khurana,  
Adv. Abhishek Bansal, Adv. Ashwini Kumar



## **ORDER**

**PER: SHRI. ASHOK KUMAR BHARDWAJ, MEMBER (J)**

The case of the Petitioner captioned in Company Petition (IB)-474/ND/2022 is that the Corporate Debtor/Respondent approached RMC Ready-mix (India), a division of the Operational Creditor/Petitioner for procuring ready-mix concrete qua a project namely 'Obra C Extension Thermal Power Station' situated in Uttar Pradesh. Resultantly, the OC and the CD entered into a Sub-Contract dated 08.07.2017 in terms of which OC agreed to carry out the terms of contract for consideration. The CD placed an order dated 25.07.2017 on OC for purchase of ready-mix concrete. The order contained the detailed terms and conditions for supply of the goods as also the description thereof. According to the OC, it discharged all the obligations in terms of the sub contract dated 08.07.2017 and purchase order dated 25.07.2017 and raised the invoice upon the CD during the period from November, 2017 to August, 2021. It is the case of the OC that it had also issued tax invoices cum delivery challans under Section 31 of the Central Goods & Service Tax Act, 2017 and the material was duly supplied to the CD, which is acknowledged without any demur and protest. As per the stand taken by the OC in the petition, it was required to supply 2,68,798 cum of the captioned material to the CD by December, 2020 but the CD made additional demand which was de hors the terms of the order and the contract (ibid). Nevertheless, the OC supplied the additional material to the CD by the



month of March, 2020 i.e., much before the agreed/due date. When the CD neglected to honour the invoices raised by the OC and neglected to make the payment, the OC sent letters dated 12.07.2021, 16.07.2021, 20.07.2021, 18.08.2021, 28.08.2021 and 15.09.2021 calling upon the CD to release the outstanding amount under the invoices. The OC raised the demand under the following heads inter alia:

- a. Loss in interest on account of delayed payments by the Corporate Debtor.*
- b. Loss in interest on account of not releasing material advance;*
- c. Extra Cement content in M-30 Chimney and pile concrete;*
- d. Cost reimbursement of sand stocking for monsoon period;*
- e. Extra Cement content in M-15 Grade;*
- f. Cost impact due to deployment of additional resources and impact of wages;*
- g. Fixed Cost impact due to low volume by client;*
- h. Building and Other Construction Workers- Deductions; and*
- i. Rs. 500/Cum discount.*

2. Though the CD responded to the letters written to it by the OC, in terms of its missives dated 06.07.2021, 13.07.2021, 17.07.2021, 24.07.2021, 17.08.2021, 23.08.2021, 04.09.2021 and 15.09.2021, it never disputed its liability to make the payment towards the outstanding invoices of the OC.

3. The CD has acknowledged its liability vide Balance Confirmation letters inter alia dated 29.04.2020, 14.06.2021 and 02.09.2021 bearing the common seal of the CD and signature of its representative. According to the OC, the balance confirmation letter dated 28.02.2022 being issued



late, in terms of the same it could be categorically admitted that an amount of Rs. 9,23,99,780.71 is payable by CD to the OC and a further sum of Rs. 81,25,299/- is payable towards retention monies by the CD.

4. The further plea espoused by the OC is that despite issuance of the letter of balance confirmation as late as on 2<sup>nd</sup> September 2021, when the OC insisted for payment of the outstanding amounts, the CD for the first time, vide its letter dated 16.09.2021 made bogus claims in order to evade its admitted liability under the balance confirmation letters. The said letter dated 16.09.2021 was duly replied to by the OC, vide letter dated 17.09.2021. The CD also issued a balance confirmation in respect of monies payable by it to the OC as late as on 28.02.2022. As per the books of the OC, as on 08.03.2022, an amount of Rs.13,26,14,929.67/- comprising the principal outstanding amount of Rs.11,22,88,896.76/- and the interest amount of Rs. 2,03,26,032.91/- charged at the rate of 18% per annum as per the Contract/Order and the invoices issued thereunder has become due and payable by the CD which can also be evidenced from the ledger account of the CD in the books of OC. The CD after utilizing the Material and after acknowledging its liability, did not honor the invoices as well as its obligations stated under the said Contract and the Order, and has defaulted in making payment of the outstanding amount of Rs. 13,26,14,929.67/- under the invoices issued.

5. The particulars of the Operational Debt claimed including the total amount of default and date of default are mentioned in column II of Part IV of the application.



6. From the perusal of the Part IV of the Application, it can be seen that the OC has claimed the total outstanding amount of Rs.13,26,14,929.67/-. (Page no. 4 of Vol I) and the date of default is 30.06.2021.

7. It is stated by the OC that it sent a Demand Notice dated 30.12.2021 under Section 8 of IBC, 2016 at the registered office of the Respondent vide speed post as well as email, which was delivered to the Respondent on 03.01.2022. According to the Petitioner it received reply to the demand notice on 13.01.2022.

8. On issuance of notice by this Adjudicating Authority, the CD filed its reply to the petition espousing inter alia thus: -

- a) The captioned Company Petition (IB)-474/ND/2022 (ibid) is not maintainable, as the same is not supported by an affidavit, in terms of Section 9(3)(b) of the IBC, 2016, required to be filed by the Petitioner/OC.
- b) The petition is defective, in as much as the Petitioner has failed to file a copy of certificate from financial institution.
- c) The purported electronic evidence sought to be relied upon by the OC has not been supported by the affidavit in terms of Section 65B of the Evidence Act, 1872, thus the same cannot be relied upon.
- d) The Petitioner has failed to adduce any documentary evidence to establish the existence of any due and payable debt, far less any default in repayment/payment of the same to it. The claim is founded on the documents, which



were not even part of the demand notice served on the CD under Section 8 of the IBC, 2016.

- e) The alleged invoices qua which non-payment has been alleged in the petition are incomplete, improper and not as per the agreed terms between the parties. The alleged invoices/delivery challans, enclosed with the petition, starting from page no. 545 of the paper book do not contain details/particulars of the receipt and or acknowledgement of delivery of material, not to talk about the same being signed by the Respondent/Respondents authorized personnel. Clause 8.3.2 of the Special Terms and Conditions of the Sub-Contract dated 08.07.2017 executed between the Petitioner and the Respondent stipulates that the invoice shall be submitted with all the related documents by the 8<sup>th</sup> or 23<sup>rd</sup> day of each month in which the invoice is issued for the Progress Payment. The invoices were not accompanied by any of the documents stipulated under the Contract. In a way the invoices are bogus and untenable.
  
- f) The petition is silent as to whether the work contemplated under the Contract and subsequent purchase orders had been completed by the Petitioner. In fact, the petitioner failed to complete the work as stipulated under the Contract and it did not handover the clear site to the Respondent for carrying out further works in respect of execution of Obra “C” 2 x 660 MW Thermal Power Extension Project, thereby committing breach of the Contract resulting in loss to the Respondent. The Respondent suffered various consequences including losses resulting from the breach of the Contract by the Petitioner for the lapse on the part of the Petitioner, the Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited



(‘UPRVUNL’) imposed penalty upon the respondent. In terms of Clause 19 of the GTC under the Contract pertaining to indemnity it was for sub-contractor to indemnify the contractor against losses, liabilities, cost claims, actions or the demands which the contractor and/ or the owner had to incur or which might be made against the Contractor or the owner, as result of or in connection with any failure on the part of the sub-contractor to observe and perform the sub contract.

- g) For the failure of the Petitioner and to complete the work in accordance with the Contract, the Respondent had to engage another sub-contractor namely JS Mining and Constructions, to whom letter of intent dated 02.02.2021 was issued by the Respondent. The Petitioner even failed to handover the clear site to the Respondent, thus JS Mining had to clear the same, partially on 12.01.2022 i.e., after huge delay of more than 7 months. Nevertheless, the complete site was not clear till filing of the reply, despite the despite the request made by the Petitioner to the Respondent vide letter dated 31.01.2022 to do the needful.
- h) A bare perusal of the demand notice dated 19.12.2021 and the reply thereto dated 13.01.2022 reveals pre-existing dispute between the parties.
- i) The Respondent is wholly owned subsidiary of Doosan Enerbility Co. Ltd., a South Korea based global conglomerate which is renowned in power generation and infrastructure segment and has approximately 1343 employees as on 31.03.2022, at various levels. The Respondent also directly/indirectly overseas approximately 10,000 workers at the construction site of the various current projects and it has been paying the



remuneration to all the concerned persons without any failure. The financial health of the Respondent is very good and the same is a solvent company which is smoothly undertaking its functions and timely discharging its liabilities and debts. It is not the object of the code that corporate Insolvency Resolution Process should be initiated to penalize a solvent company for certain alleged non-payment of dues.

- j) As has been admitted in the petition itself, the Petitioner has received a colossal amount of Rs.1,54,87,51,909/- in terms of the Contract.
- k) The Respondent entered into the contract with RMC Readymix (India) for supply of the RMC. Thus, the present petition preferred by the Prism Johnson Ltd. (through its RMC) (India) Division is not maintainable.
- l) Despite repeated letters sent by the Respondent to Petitioner, the Petitioner did not adhere to the contractual schedule, which resulted loses to the Respondent. The Petitioner failed to maintain availability of minimum stock of raw material as per the contract and the progress of work at the site was enormously hampered.
- m) The Petitioner had incurred liability of Rs.16,76,92,539/- up till 10.01.2022 towards the Respondent and the amount of invoices raised by the Petitioner is Rs. 8,76,25,159/- thus it is the Petitioner which is liable to pay an amount of Rs. 8,00,67,380/- to the Respondent.
- n) The Petitioner also failed to comply with the provisions of Building and Construction Workers Act, 1996 ('BOCW Act'). As per Clause 4.5 of the STC all statutory deductions including BOCW had to be made as per law.



9. Having heard the Counsels for the parties and perused the records, we proceed to examine the issue sans irrelevant details. As far as the plea espoused on behalf of the Respondent regarding non-filing of the affidavit, as required under Section 9 (3) (b) of the IBC, 2016 is concerned, the same is baseless and vexatious and is rejected outrightly. The required affidavit was duly filed by the Petitioner and is at page 835-836 of the petition (paper book). The plea regarding the contract being entered into by the Respondent, not with the Petitioner but with 'RMC Readymix (India)' ('RMC India') for supply of RMC is concerned stands falsified by the Respondent itself, in terms of the pleadings canvassed in its reply. The Respondent has pleaded extensively that the Petitioner committed breach of contract and caused enormous loss to it. It is also the case of the Respondent that the Petitioner received a colossal amount of Rs.1,54,87,51,901/- under the contract. Once the Respondent has alleged enormous loss caused to it on account of breach of contract by the Petitioner as also payment of colossal amount to Petitioner under the contract, it does not lie in its mouth to plead that there being no contract with the Petitioner, the petition filed by it is not maintainable. Besides, while examining an application under Section 9 of IBC, 2016, what we need to judge is, "whether there had been any operational relationship between the Operational Creditor and Corporate Debtor. As has been defined in Section 5 (20) of the IBC, 2016, 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. Thus, nothing turns on the fact that with whom the contract was entered into by the



Respondent and what is material to be seen is, “whether any operational debt is owed or not”. Ergo, the plea raised on behalf of the Respondent qua the maintainability of the petition on the ground that there was no contract executed between the Petitioner and the Respondent is rejected.

10. In any case, as is borne out of the record, the notice of demand was issued by the Petitioner to the Respondent, only on 30.12.2021 and much before that, the Respondent had been sending missives to it (Petitioner) pointing out the infirmity in the quality of service given by the Petitioner to the Respondent. As can be seen from the letters dated 20.02.2018 (page no. 61-62), the Respondent categorically brought it to the notice of the Petitioner that with the existing status of the stock made available by it at the site the targeted work could not be completed. The Respondent also cautioned the petition regarding its liability to suffer penalty on account of non-availability of raw material as per STC Clause 16.2 between the DPSI and RMC. Such letters, pointing out deficiency in service/supply by the Petitioner were also written by the Respondent to Petitioner also on 07.01.2019, 09.03.2020 inter alia. The letters are enclosed at page nos. 63-65 of the reply. Even the Petitioner also accepted the deficiency in quality, in terms of its letter dated 26.07.2018 (annexure R-6). The relevant excerpts of the letter read thus:

*“Subject- Reply against your letter OBRAC-DPSI-SITE-RNC-00024 failure in quality checks of non-approved aggregates*

*Referring your letter on the above subject, we also share your concern regarding the poor quality material delivered at plant and*



*want to assure you that RMC India will not spare any effort to maintain the quality of concrete including thorough checking of raw material delivered at plant.*

*However, we wonder how we will check the quality of aggregate at the entry gate of the plant when determined supplier hides the poor quality of material inside the truck with good material spread on top of the truck. This is the breach of trust from the sole reputed vendor of aggregate to our site. We also would like to bring your notice that the quality of coarse aggregates delivered at plant mostly fail in fulfilling the IS requirement and we are forced to accept those material to complete our production volumes. Hence, we propose to have a joint visit with you to the aggregate crusher and check the quality of boulders used and understand his process to suggest him the suitable quality improvement measures. Going forward, we also suggest you as the supplier of aggregates to us to hand out a severe warning to the vendor to desist from indulging in this kind of malpractices.*

*This is for your information and records.”*

11. As could be viewed by Jaipur Bench of this Tribunal in CP No. (IB)-217/9/JPR/2020, the dispute between the parties can be inferred, even from the correspondence between the parties. Para 12-14 of the order reads thus:

*“12. We have a number of judgments showing light on the aspect of pre-existing dispute under Section 9 of the Code. Conjoint reading of Section 8 and Section 9 of the Code shows that an Operational Creditor can trigger the CIRP, when there is an undisputed debt and a default in payment thereof. In the present case, the Corporate Debtor had raised dispute with respect to deficiency in service vide the*



*e-mails dated 10.05.2018 to 15.08.2018 to the extent of stating that if the goods are not delivered till 14.05.2018 the Corporate Debtor will not be paying for the services, which was prior to issuance of Demand Notice under Section 8 of the Code. The Applicant had knowledge of the said dispute as well which is visible from its e-mail replies.*

*13. In Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an application under Section 9.*

*Para 34 is as follows: -*

*"34. Therefore, the Adjudicating Authority, when examining an application under Section 9 of the Code will have to determine:*

- (i) Whether there is an "Operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Code)*
- (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.”*

*However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.*

*14. The correspondence between the parties herein clearly shows that a dispute had already risen between the parties after the alleged services were rendered by the Applicant, which were not upto mark as mentioned by the Corporate Debtor. The exchange of e-mails between the parties is enough to show that there was pre-existing dispute with respect to the services rendered by the Applicant. Further, in view of the order of the Hon’ble Supreme Court in M/s S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors. we are not inclined to commence CIRP of the Corporate Debtor.*

12. Also, in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (Civil Appeal No. 9405/2017), it could be ruled by Hon’ble Supreme Court that, “what this Adjudicating Authority needs to see is, whether a dispute truly exists in fact and is not spurious, hypothetical or illusory”. In the said judgment, the Hon’ble Apex Court amplified, “what is important is that the existence of dispute must be pre-existing i.e., it must exist before the receipt of the Demand Notice or invoice as the case may be. While examining the proposition regarding pre-existing dispute, we may usefully espouse that after the judgement of Hon’ble Supreme Court Mobilox Innovations Pvt. Ltd. (ibid), the definition of dispute has



become inclusive and would mean not only the pending suit or arbitration proceedings, but also the controversy espoused in the letters written by Corporate Debtor to Operational Creditor regarding the quality of Goods or Service. Therefore, as the Corporate Debtor had espoused the dispute by sending missives to the Operational Creditor, much before issuance of Demand Notice by Operational Creditor, in terms of Section 8 (1) of the IBC, 2016, and had also brought the existence of dispute to the notice of Operational Creditor by way of its reply under Section 8 (2) of the IBC, 2016, to the Operational Creditor, we are satisfied that pre-existing dispute between the parties was there. We are also satisfied that the dispute is not spurious or hypothetical, as the Respondent had to assign the work of contract required to be performed by the Petitioner to a different contractor namely JS Mining and Constructions to whom it issued the letter of intent dated 02.02.2021. As it may, we have not commented upon the nature of dispute or the fault of the parties qua the same. In the present proceedings what we are required to see is whether dispute existed prior to issuance of Demand Notice and we have recorded our satisfaction only limited to this extent i.e., the existence of dispute.

13. While examining an application under Section 9 of IBC, 2016, we may not be oblivious about the financial health of the Corporate Debtor. The object of the IBC is to ensure that the insolvent company is put back on its feet and not to disarray a solvent and financially sound company. As can be seen from the reply filed by the Respondent (Corporate Debtor),



its financial health is quite commendable. The relevant excerpt of the reply reads thus:

*XIII. The Respondent has approximately 1343 (One Thousand Three Hundred and Forty Three) employees, as on 31.03.2022, at various levels. Additionally, the Respondent directly/ indirectly oversees approximately 10,000 (Ten Thousand) workers at the construction sites of various current projects. Pertinently, the Respondent has been paying the remuneration of all the concerned persons, without any failures. In this regard, it is relevant to note the details of amount deposited by the Respondent owing to the provident fund requirements for the past three years (given below):*

| <b>Sl. No.</b> | <b>Particulars</b> | <b>FY 2018-19<br/>(In Rupees)</b> | <b>FY 2019-20<br/>(In Rupees)</b> | <b>FY 2020-21<br/>(In Rupees)</b> |
|----------------|--------------------|-----------------------------------|-----------------------------------|-----------------------------------|
| <b>1.</b>      | Provident Fund     | 15,40,48,483                      | 14,84,94,662                      | 14,03,66,376                      |

*XIV. Further, some of the biggest financial institutions of India (namely Axis Bank, Standard Chartered Bank and Yes Bank) have shown faith in the credit rating of the Respondent, by providing it with various credit/loan facilities. The Respondent has always obliged the aforesaid institutions by timely repayment. The said is evident from the overall reducing debt for the past three years (highlighted below):*

| <b>Sl. No.</b> | <b>Particulars</b>   | <b>FY 2018-19<br/>(In Millions)</b> | <b>FY 2019-20<br/>(In Millions)</b> | <b>FY 2020-21 (In<br/>Millions)</b> |
|----------------|--|-------------------------------------|-------------------------------------|-------------------------------------|
| <b>1.</b>      | Outstanding Loan<br>(Current Bank Over<br>Draft & Working<br>Capital Loans)      | 10732.3                             | 8257                                | 2468.09                             |
| <b>2.</b>      | Outstanding Loan of<br>Financial Institution<br>(Non-Current-Long<br>Term Loans) | 1,250                               | Nil                                 | Nil                                 |

*Pertinently, the turnover of the Respondent for last three years (2020-2021) is as under:*



| <b>Sr. No.</b> | <b>Particular</b> | <b>FY 2018-19<br/>(In Millions)</b> | <b>FY 2019-20<br/>(In Millions)</b> | <b>FY 2020-21<br/>(In Millions)</b> |
|----------------|-------------------|-------------------------------------|-------------------------------------|-------------------------------------|
| <b>1.</b>      | Total Turnover    | 30,396.53                           | 34,119.32                           | 29,405.39                           |

*XV. The Respondent has majorly contributed to the state exchequer, the same is evident from a cursory look at the details (Below) of Goods and Service tax deposited by the Respondent for the state of Uttar Pradesh, where the Respondent is undertaking majority of its current projects:*

| <b>Sr. No</b> | <b>Particular</b> | <b>FY 2019-20<br/>(In Rupees)</b> | <b>FY 2020-21<br/>(In Rupees)</b> | <b>FY 2021-22<br/>(In Rupees)</b> | <b>FY 2022-23<br/>(till July 2022)<br/>(In Rupees)</b> |
|---------------|-------------------|-----------------------------------|-----------------------------------|-----------------------------------|--|
| <b>1.</b>     | GST Deposited     | 5,25,78,58,956                    | 4,45,41,42,653                    | 4,01,23,25,791                    | 59,74,78,533   |

*XVI. Further to all the aforementioned, the Respondent most humbly submits that the Respondent is a solvent company which is smoothly undertaking its functions and timely discharging its liabilities and debts; and it is not the objective of the Code that Corporate Insolvency Resolution Process be initiated to penalize a solvent company for certain alleged non-payment of dues. It is submitted that the scope and objective of Code is to bring about 'resolution' of an insolvent debtor. The present proceedings are a misconceived attempt of the Applicant to use insolvency as a substitute for the appropriate proceedings for recovery of the alleged debt.*

*XVII. It is pertinent to mention that as admitted in the Application itself, the Applicant has received a colossal amount of Rs. 154,87,51,909/- under the contract (Ref. Page 829 of the Application). The Respondent has always been very cooperative with the Applicant right from the beginning, however, Applicant's persistent defaults and breaches have caused enormous loss and hardship to the Respondent, for which the Applicant is liable as per*



*the express provisions of the contract. The Respondent has always acted within the four corners of the contractual provisions and all its actions have been in conformity with the contract as brought out above. The Applicant on the other hand, has acted in complete disregard of its contractual obligations as well as the express provisions of the contract & has filled the present application with an ulterior motive.”*

14. In Vidarbha Industries Power Ltd. Vs. Axis Bank 2022 SCC Online SC page 841, the Hon’ble Apex Court clearly delineated the legal position and declared that the Adjudicating Authority should examine the expediency of initiating the CIRP after taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The relevant excerpt of the judgment containing the discussions regarding the procedure for considering the application filed by the Financial Creditor under Section 7 of IBC is extracted hereunder for convenient reference;

*“59. There can be no doubt that the Corporate Debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the Corporate Debtor are not extraneous matters.*

*XXXXX*

*62. As pointed out by Mr. Gupta the legislature has, in its wisdom, chosen to use the expression “may” in Section 7 (5)(a) of the IBC. When an Adjudicating Authority is satisfied that a default has occurred and the application of a financial creditor is complete and there are no disciplinary proceedings against the proposed resolution professional, it may by order admit the*



*application. Legislative intent is construed in accordance with the language used in the statute.*

*63. The meaning and intention of Section 7 (5)(a) of the IBC is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC. This Court would have to consider the effect of the provision being construed as directory or discretionary.*

*64. Ordinarily, the word “may” is directory. The expression ‘may admit’ confers discretion to admit. In contrast, the use of the word “shall” postulates a mandatory requirement. The use of the word “shall” raises a presumption that a provision is imperative. However, it is well settled that the prima facie presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.*

*65. XXXXX*

*79. As observed above, the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC, relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same. If does not, CIRP must be commenced. In the case of a financial debt, there is a little more flexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to*



*apply fresh for initiation of CIRP, if its dues continue to remain unpaid.”*

15. In the wake of the discussion and finding as above, we are of the considered view that the Petition is misconceived and devoid of merits thus deserves to be rejected. Ordered accordingly. It goes without saying that nothing observed or recorded hereinabove will be construed as expression of opinion on merit of the claim of the Petitioner against the Respondent and the Petitioner would be entitled to avail appropriate remedies against the Respondent to espouse the same in accordance with law. It is also made clear that the Petitioner will not be denuded of his right to initiate fresh proceedings against the Respondent, under Section 9 of IBC, 2016 if its claim is determined and found substantiated against the Respondent in appropriate proceedings, in accordance with law. **The Petition stands disposed of. No order as to cost.**

**Sd/-**

**(L. N. GUPTA)  
MEMBER (T)**

**Sd/-**

**(ASHOK KUMAR BHARDWAJ)  
MEMBER (J)**