

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

**Comp. App. (AT) (CH) (Ins.) No. 158 of 2022 and IA No.367/2022,
IA No.368/2022, IA No.369/2022, IA No.545/2022 & IA No.808/2022
Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the 'Impugned Order' dated 21.03.2022 in
CP (IB) No.9/9/AMR/2022, passed by the 'Adjudicating Authority'
National Company Law Tribunal, Amravati Bench at Hyderabad)**

In the matter of:

**Suspended Management of
Apex Meadows Private Limited**

(Suspended management of the Corporate Debtor)

Having its registered office at:

S.No. 104/2, Opp. S.B.T. Hotel,
N.H. 16, Gajuwaka, Vishakapatnam,
Andhra Pradesh – 520026.

Email: apexmeadows@thecelst.com

..... Appellant

v.

1. Mr. Baisetty Ajay Kumar,

(Operational Creditor)

S/o. Late B. Subba Rao,
R/o. Flat No.2, Door No. 49-54-16/3,
4th Floor, Madhuri Residency Apartments,
Balayya Sastry Layout, Vishakapatnam,
Andhra Pradesh – 530013.

Email: d.narendar.naik@gmail.com

..... Respondent No. 1

2. Immanent Eswara Rao

(Resolution Professional)

(IBB/IPA-001/IP-P01224/2018-19/11943)

R/o. 40-26-22, Mohiddin Street,
Opp. BSNL Exchange, Labbipet,
MG Road, Vijaywada,
Krishna District, Andhra Pradesh – 520010.

Email: ier_ca@outlook.com

..... Respondent No. 2

Present:

For Appellant : Mr. Arun Kathpalia, Senior Advocate
For Mr. K. Gowtham Kumar and
Mr. Kamalendra Singh, Advocates.

For Respondent No.1 : Mr. P.H. Arvinth Pandian, Sr. Advocate
For Mr. Anant Merathia, Advocate.

For Respondent No.2 : Mr. Nithin Chowdary Pavuluri, Advocate

WITH

Comp. App. (AT) (CH) (Ins.) No. 170 of 2022
IA No.391/2022, IA No.392/2022, IA No.546/2022 & IA No.809/2022
Under Section 61(1) of the Insolvency and Bankruptcy Code, 2016
(Arising out of the 'Impugned Order' dated 05.05.2022 in IA(IBC)
No.33 of 2022 in CP (IB) No.9/9/AMR/2022, passed by the
'Adjudicating Authority' National Company Law Tribunal,
Amravati Bench)

In the matter of:

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..... Respondent No. 2

Present:

For Appellant : Mr. Satish Parasaran, Senior Advocate
For Mr. K. Gowtham Kumar and
Mr. Kamalendra Singh, Advocates.

For Respondent No.1 : Mr. P.H. Arvinth Pandian, Sr. Advocate
For Mr. Anant Merathia, Advocate.

For Respondent No.2 : Mr. Nithin Chowdary Pavuluri, Advocate

J U D G M E N T
(Virtual Mode)

[Per; Ms. Shreesha Merla, Member (Technical)]:

1. Challenge in these `Appeals' viz. *Company Appeal (AT) (CH) (Ins.) Nos.158 & 170/2022* is to the `Impugned Orders' dated 21.03.2022 and 05.05.2022 passed by the `Learned Adjudicating Authority', (National Company Law Tribunal, Amravati Bench, Hyderabad) in C.P. (IB) No.9/9/AMR/2022 and in IA (IBC) No.33/2022 in C.P. (IB) No.9/9/AMR/2022 respectively. Since both these `Appeals' deal with common issues or fact in law, they are being disposed of by this `Common Order'.

Company Appeal (AT) (CH) (Ins.) No. 158/2022:

2. By the 'Impugned Order' dated 21.03.2022, the 'Adjudicating Authority' has admitted the Application filed by the Respondent/'Operational Creditor' under Section 9 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code'). While admitting the Application, the 'Adjudicating Authority' has observed as follows:

"2. ...

iii. The revenue share of the Operational Creditor is payable to him from out of the advances received by the Corporate Debtor pursuant to the sale of residential units, the Operational Creditor started tracking the transactions being made by the Corporate Debtor in respect of residential units sale in the Project. As on 21.12.2021 more than 200 transactions were registered without transferring the share of the Operational Creditor as per the Revenue Sharing Agreement. The Corporate Debtor sold carpet area of 1,36,978 sq. ft. in the project out of which, the Operational Creditor is entitled for Rs.26,80,31,333/- including interest @ 18% p.a. The Corporate Debtor did not pay amount due to the Operational Creditor. The Operational Creditor issued a legal notice dated 20.08.2021 to the Corporate Debtor for repayment of the debt. The Corporate Debtor issued a reply notice dated 04.10.2021, with unsubstantiated excuses for avoiding payment. Thereby the Corporate Debtor committed default. On the basis of the above submissions, the learned counsel appearing for the Operational Creditor

seeks this Tribunal to admit the Company Petition.”

Company Appeal (AT) (CH) (Ins.) No. 170/2022:

3. Subsequent to the Admission of the Section 9 Application, the `Applicant’/`Appellant’/Suspended Management of the `Corporate Debtor’ preferred I.A. 33/2022 under Rule 49(2), read with Rule 11 of NCLT Rules, 2016, seeking to set aside the `Ex-Parte Order’ dated 17.03.2021 and 21.03.2022. The `Adjudicating Authority’ while dismissing the Application observed in paras 12, 13 & 20 as follows:

“12. In the impugned order, it can be seen that this Tribunal considered the reply notice dated 04.10.2021 wherein it was stated that the Operational Creditor failed to perform his duties as prescribed under the agreements and that the term of 4 years elapsed as per contract dated 31.12.2011 and was not renewed and that the project did not materialize during the term in question, and observed that no evidence was produced in that regard, since the Corporate Debtor did not choose to appear and contest the case and prove the contentions made in the reply notice.

13. A perusal of the reply notices dated 04.10.2021 and 06.01.2022 would be beneficial. Both the notices do not spell that there is any pre-existing dispute, except raising certain contentions with regard to contractual obligations and denying the due. The allegation that is made is that Respondent No. 1/Operational Creditor has failed to perform his duties and the contractual term of Respondent No.1 has expired.

Hence even if the reply notice dated 06.01.2022 was placed on record, the same conclusion, as was drawn in respect of the reply notice dated 04.10.2021, could have been drawn in respect of the said notice, since, no document in support of the proof of the contents of the notice dated 06.01.2022 also came forth.

.....

20. From the conspectus of the judgements and the relevant provisions of law, it can be understood that in an application seeking to set aside the order of ex-parte, the Applicant needs to either prove that the service of notice is not effected on him or that he was prevented by sufficient cause not to appear before this Tribunal in spite of such service. In this case the pleas taken in the application are none of the above two. The plea taken is that the notice was refused as the Office was not functioning or that the office was functioning limitedly with skeleton staff, which can be held as not proved in the light of above discussion. The reply notices do not spell existence of pre-existing dispute in terms of section 8 of IBC. It is only the contentions in the demand notices that are disputed. According to section 8 of IBC a dispute should be existing by the date of demand notice or there should be pending a suit or arbitration proceedings which are filed before the receipt of such notice, which is not made out in this case.”

4. Learned Sr. Counsel for the ‘Appellant’, Mr. Arun Kathpalia submitted that an ‘Executive Director Agreement’ was executed between the ‘Corporate Debtor’ and the first Respondent/‘Operational Creditor’ on 08.02.2008, under which the first Respondent was appointed as an

`Executive Director' of the `Corporate Debtor' for the purpose of rendering services for a period of 4 years commencing from 01.01.2008. On 29.01.2009, a `Revenue Sharing Agreement' was also entered into, according to which terms, the first Respondent was entitled to some compensation arising out of the `sale proceeds' of the Project. It is submitted by the Learned Sr. Counsel that the `Revenue Sharing Agreement' is co-terminus with the `Executive Director Agreement'. The contractual terms of 4 years lapsed on 31.12.2011 and the same was not renewed as the first Respondent/`Operational Creditor' had failed to perform his duties. It is contended that the Project has not materialized in terms of the Agreements due to the failure of the first Respondent in rendering the requisites services. Hence, the first Respondent seized to be a Director with effect from 30.04.2012 and as no residential units were sold during his tenure as an `Executive Director', he was not entitled receive any compensation. It is submitted that on 19.07.2012 M/s. Apex Meadows Private Limited, the `sister concern' of the `Corporate Debtor', instituted Legal Proceedings against the first Respondent for utilising for personal gain a sum of Rs.20Cr./-, which was advanced to him for the purpose of aggregating certain land parcels. A Police Complaint was lodged by the `sister concern' and an FIR was registered on 19.07.2012

and Criminal Proceedings are currently pending before the first Additional Chief Metropolitan Magistrate, Visakhapatnam.

5. Learned Sr. Counsel submitted that a 'Legal Notice' dated 18.07.2015 was issued by the first Respondent to the 'Corporate Debtor', demanding that he be reinstated and a compensation be paid within 7 days of the receipt of Notice. This 'Legal Notice' was replied to by the 'Corporate Debtor' on 04.08.2015, denying any amounts 'due and payable' to the first Respondent. Subsequently, the first Respondent initiated winding up proceedings against the 'Corporate Debtor' on 03.08.2016 before the Hon'ble High Court of Telangana under Sections 433 & 434 of the Companies Act, 1956, vide Company Petition No.190/2016. It is submitted that the same was subsequently withdrawn by the first Respondent and the same was not brought to the Notice of the 'Adjudicating Authority'.

6. Another 'Legal Notice' dated 20.08.2021 was issued on behalf of the first Respondent seeking payment of some amounts under the 'Revenue Sharing Agreement'. Learned Sr. Counsel argued that Clause 3.10 of the same Agreement refers to 'Arbitration', if any dispute arises between the parties. The first Respondent in invoking this Clause 3.10

himself 'acknowledges' and 'admits' that the 'claimed amount' is disputed.

7. It is submitted by Learned Sr. Counsel, Mr. Satish Parasaran that the 'Adjudicating Authority' has committed a 'grave error' in holding that there was no 'Pre-Existing Dispute' when the 'Claim' was disputed since 2015 and placed reliance on the following documents:

- Reply dated 04.08.2015 to the 'Legal Notice' dated 18.07.2015, denying all dues;
- Reply dated 04.10.2021 to the Letter dated 20.08.2021, denying all dues;
- Reply dated 06.01.2022 to the Section 8 Demand Letter dated 21.12.2021, once again denying all dues;
- The Letter of the first Respondent dated 20.08.2021, citing the 'Arbitration Clause' in the 'Revenue Sharing Agreement' dated 29.01.2009;
- Details of Criminal Proceedings in the case **DDR NO. 7063/2019**, instituted by the 'sister concern' of the 'Appellant' alleging cycling of funds;

- `Order' dated 03.08.2016 passed by the Hon'ble Hyderabad High Court recording the withdrawing of *Company Petition No.190/2016*, filed by the first Respondent.

8. It is submitted by both the Sr. Counsels that the `Adjudicating Authority' has traversed into the `merits' of the matter giving a finding that there was no `Pre-Existing Dispute' without referring to all the aforementioned documents and without giving an opportunity for hearing the `Appellant' herein.

9. It is submitted by the Learned Sr. Counsel, Mr. Arun Kathpalia that the `Corporate Debtor Company' is a Profitable Financially Sound Company and that the purported `Operational Claim' is also `barred by Limitation' as the Agreement between the first Respondent and the `Corporate Debtor' ended on 31.12.2011 and the first Respondent was removed from the post of Director on 30.04.2012. The sales of the Project were affected only after May, 2015. The present Insolvency Petition has been filed after 10 years of the Respondent having no nexus with the Company.

10. As regarding the service of `Notice', Learned Counsel submitted that as there was a resurgence of the Covid-19 cases in the months of January & February 2022, 8 employees of the `Corporate Debtor

Company' were infected and to ensure the safety of the staff the Company was largely closed and the staff was encouraged to work from home. Hence, the 'Notice' was refused on account of limited functioning of the 'Corporate Debtor Company'. The emails notifying, the date of hearing was inadvertently missed on account of this limited functioning only. The 'Reply' dated 06.01.2022 issued by the 'Corporate Debtor' to the Section 8 'Notice' was not amended by the 'Operational Creditor', though it was duly delivered on 08.01.2022. The matter was listed before the 'Adjudicating Authority' on 10.02.2022 and on 17.03.2022.

11. On the very second date of hearing, the 'Adjudicating Authority' heard the Insolvency Petition, Ex-Parte and reserved 'for Orders', and the 'Order' was pronounced on 21.03.2022. It was only on 23.03.2022, that the 'Appellant' learnt about the present Proceedings, subsequent to which, I.A.33/2022 was filed under Rule 49(2) read with Rule 11 of the NCLT Rules, 2016, seeking to set aside the 'Ex-Parte Order' of Admission dated 21.03.2022. The 'Ex-Parte Order' was suspended vide 'Order' dated 21.03.2022 and it remained in force till the pronouncement of the 'Order' on 05.05.2022. Therefore, the 'Appeal' filed before this Tribunal is well within the period of Limitation. The non-appearance of the 'Corporate Debtor' before the 'Adjudicating Authority' was not attributable in any

manner to the inaction or negligence on the part of the `Corporate Debtor` but only on account of an inadvertent lapse.

12. The `Adjudicating Authority` did not appreciate the various communications exchanged between the parties and came to a finding that there was no `Pre-Existing Dispute` which was observed in the `Impugned Order` dated 05.05.2022, despite the fact that this `Order` was passed against Application I.A.33/2022, wherein and whereunder the `Adjudicating Authority` ought to have either rejected the Application or allowed it without traversing into `merits`.

13. Learned Sr. Counsel, Mr. Arvind Pandian submitted that the `Appellants` themselves inflicted the wound by adhering to Rule 49 of the NCLT Rules, 2016, as it is very clear from Order 5 Rule 9 of CPC read with Section 27 of the General Clauses Act, 1897 that once a `Notice` is refused, it is deemed to be `Proper Service`. It is submitted by the Learned Counsel that under Rule 49 of the NCLT Rules, 2016, the aggrieved party may file an Application only in the instance where the aggrieved party satisfies the Tribunal that the `Notice` was not duly served on them or when the party was prevented by a `sufficient cause` from appearing. In the instant case, the `Appellant` does not satisfy either of the two conditions as provided to invoke the said Rule. It is not the

case of the `Appellant` that the `Notice` was not served on them. It is their case that the `Notice` was received, that was missed due to limited functioning of the Company and therefore they cannot take benefit of their own doing and seek protection under Rule 49(2) of the NCLT Rules, 2016. The said Rule is to be invoked only on *bona fide* circumstances and not be abused as being done by the `Appellant` herein.

14. It is submitted by the Learned Sr. Counsel that the `Adjudicating Authority` heard the matter `Ex-Parte` and the `Order` of Admission was pronounced after providing multiple opportunities to the `Corporate Debtor` to present their case. I.A.33/2022 was dismissed and therefore the Counter filed by the `Appellant` herein was not taken on record. Since the documents were not taken on record by the `Adjudicating Authority`, the same cannot be dealt with in this `Appeal`. The Learned Sr. Counsel submits that there was no `Notice` served on the Respondent regarding termination of his service but rather the Respondent on completion of his tenure has himself stepped down from his post. It is vehemently contended that the first Respondent had delinquently performed all his duties and there was no action for any `Pre-Existing Dispute` to have arisen. The `Revenue Sharing Agreement` is an independent Agreement entered into between the `Corporate Debtor` and the first Respondent for

the services rendered by the first Respondent and the `revenue` shall be paid for the same in the manner provided for the said Agreement. Clause 3.3 of the `Revenue Sharing Agreement` confirms that the `Appellant` is only trying all possible ways to avoid payment to the first Respondent. Learned Sr. Counsel placed reliance on Clause B of the `Revenue Sharing Agreement`, which is detailed as hereunder:

“It has been agreed between the Parties that in consideration of the services rendered by Ajay Kumar to the Company in terms of the Executive Director Agreement, Ajay Kumar shall be entitled to receive consideration from out of the sales proceeds of the Project Components of the Company which shall be exclusive of the remuneration received by him in terms thereof.”

15. It is submitted that the said Clause clearly establishes that the first Respondent is entitled to a share in the `revenue` generated by the `Appellant Company` and is exclusive of the remuneration received by him under the `Executive Director Agreement`. Both the Agreements are independent of each other and cannot be said to be co-terminus. The delay in implementation of the Project was purely due to lack of funds which the `Appellant Company` had failed to organize. It is submitted that the first Respondent is not aware of the `Legal Notice` or the `Reply` dated 04.08.2015, as the Advocate who issued the `Notice` on behalf of the first

Respondent had passed away within a couple of months, after the issuance of the said `Notice` and his office was closed.

16. Even if the `Reply Notice` is taken into consideration, the `Appellant` had only blindly denied the payment of any dues. The first Respondent issued a `Legal Notice` dated 20.08.2021, calling for an `Amicable Settlement` of the `Claims` but has nowhere in the `Notice` acknowledged that the amount was `disputed`. Clause 3.10 of the `Revenue Sharing Agreement` is only with respect to failure of either parties to fulfil their obligations.

17. It is vehemently argued by the Learned Sr. Counsel that the `Appellant` had failed to establish any grounds under Rule 49 of the NCLT Rules, 2016, to set aside the `Order` of Admission and failed to establish any sufficient cause as required under the said Rule. It is also contended that the said `Appeal` is `barred by Limitation` as it was filed on 09.05.2022, when the `Order` of Admission is dated 21.03.2023.

Assessment:

18. At the outset, we address to the contention of the Learned Sr. Counsel Mr. Arvind Pandian that the *Company Appeal (AT) (CH) (Ins.) No. 158/2022* is `barred by Limitation`. It is seen from the record that though the `Impugned Order` of Admission is passed on 21.03.2022, the

`Operation of the Order' was stayed vide `Order' dated 25.03.2022 till 05.05.2022, that is the date on which the `Order' in I.A.33/2022 was passed. It is apparent from the record that the `Appellant' has diligently pursued their remedy of seeking recall of the `Ex-Parte Order', passed against the `Corporate Debtor', and therefore the period spent before the `Adjudicating Authority', pending adjudication, would not be included in computing the Limitation. This Tribunal is of the considered view that when the `Operation' of the `Impugned Order' dated 21.03.2022 was suspended till 05.05.2022, no `Appeal' could have been preferred by the `Appellant' herein, *pending the adjudication* before the `Adjudicating Authority'. The `Appellant' had challenged both `Orders' dated 21.03.2022 and 05.05.2022 by filing both these `Appeals' before this Tribunal on 09.05.2022 which is well within the period of Limitation and therefore we hold that *Company Appeal (AT) (CH) (Ins.) No.158/2022* is not `barred by Limitation'.

19. Rule 49 of the NCLT Rules, 2016, reads as follows:

“2. Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the

application was called) for hearing, the Tribunal may make an order setting aside the ex-parte hearing as against him or them upon such terms as it thinks fit...”

20. It is the case of the Respondent that the ‘Appellant’ herein admittedly states that the ‘Notice’ was refused, but only on account of limited functioning of the ‘Corporate Debtor’ and this cannot be a satisfactory ground for the ‘Adjudicating Authority’ to have allowed the Application under Rule 49 of the NCLT Rules 2016. It is contended that the ‘Appellant’ did not satisfy either of the two conditions as provided for, to invoke the said Rule. Learned Sr. Counsel Mr. Arun Kathpalia has fairly conceded that the ‘Notice’ was ‘refused’ but it was only on account of the fact that most of the staff was infected with Corona and were functioning from home. It was only after the Insolvency Resolution Process (‘IRP’) had presented himself at the office of the ‘Corporate Debtor’ on 22.03.2022, that the ‘Corporate Debtor’ had learnt of the Proceedings and then learnt that it had received two emails from the Registry of the ‘Adjudicating Authority’. It is the case of the ‘Appellant’ that it was an inadvertent error on the part of certain officers of the ‘Appellant Company’, for which the ‘Corporate Debtor’ cannot be faced with disastrous consequences.

21. This Tribunal is conscious of the fact that any Admission under Section 9 of the Code, it is also mandated that the existence of a 'Pre-Existing Dispute' is to be ascertained by the 'Adjudicating Authority'.

22. Section 9(5)(ii)(d) of the Code stipulates that the 'Adjudicating Authority' has to satisfy itself from the records/Information Utility as to whether a 'Pre-Existing Dispute' existed with respect to the 'Operational Debt'. At this juncture, we find it relevant to reproduce Sections 8 & 9 of the 'Code' which read as follows:

“8. Insolvency resolution by operational creditor.

—
(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the

unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

9. Application for initiation of corporate insolvency resolution process by operational creditor. –

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under subsection (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if -

(a) the application made under subsection (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional.

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify

the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

23. Keeping in view the peculiar facts of the attendant case that the ‘Corporate Debtor’ had replied on 06.01.2022 to the Section 8 Demand Notice dated 21.12.2021, highlighting the ‘Pre-Existing Dispute’; the Section 9 Application was filed on 07.01.2022 and the copy of the ‘Reply Notice’ was delivered to the first Respondent on 08.01.2022; that the matter was listed before the ‘Adjudicating Authority’ on 10.02.2022 and on 17.03.2022, but the Respondent had failed to place this ‘Reply’ before the ‘Adjudicating Authority’ either on 10.02.2022 or on 17.03.2022; this Tribunal is of the earnest view that in the ‘interest of justice’, an opportunity be given to the ‘Appellant’ herein to be heard ‘on merits’.

24. The ‘Adjudicating Authority’ in their ‘Ex-Parte Order’ dated 21.03.2022 has observed that ‘*whereas, by virtue of the documents filed by the ‘Operational Creditor’, his case stands proved prima facie. Since his case is non-controverted, which has to be accepted as true*’. The first ‘Respondent’/‘Operational Creditor’ ought to have placed the Section 8 ‘Reply Notice’ before the ‘Adjudicating Authority’ at that point of time,

for the 'Adjudicating Authority' to have taken a comprehensive note. Though the Learned Sr. Counsel Mr. Arun Kathpalia has drawn our attention to the various documents on record to establish his case that there was a 'Pre-Existing Dispute' between the parties, we refrain from addressing to the 'merits' of the matter. This Tribunal finds it a fit case to remand to the 'Adjudicating Authority' to decide the matter 'on merits', specifically keeping in view that in paras 13 & 20 of the 'Impugned Order', the 'Adjudicating Authority' has observed that 'even if the 'Reply Notice' dated 06.01.2022, was placed on record, the same conclusion, as was drawn in respect of the 'Reply Notice' dated 04.10.2021, could have been drawn in respect of the said 'Notice', since, no document in support of the proof of the contention of the said 'Notice' dated 06.01.2022 also came forth'. In para 20, it is observed by the 'Adjudicating Authority' that 'the 'Reply Notice' do not spell instance of any 'Pre-Existing Dispute' in terms of Section 8 of the IBC. It is only the contention and the Demand Notice that are disputed. According to Section 8 of the Code, 'dispute' should be existing by the date of Demand Notice or they should be pending a Suit or Arbitration Proceedings, which are filed before the receipt of such 'Notice', which is not made out in this case and dismissed the Application'. Having regard to the fact that the 'Adjudicating

Authority' has touched upon the 'merits' of the case by adverting to the submissions made in the 'Reply Notice', this 'Tribunal', is of the earnest view that an opportunity be given to the 'Appellants' to raise all contentions and put forth the communication between the parties and argue their case 'on merits'. The citations relied upon by both parties with reference to 'Pre-Existing Dispute' are not being discussed at this juncture, as this 'Tribunal', expresses no opinion, regarding the 'existence' or 'otherwise' of any 'Disputes', on merits of the matter.

25. The Hon'ble Apex Court in '*G.L. Vijain' Vs. 'K. Shankar'*¹', has observed that the Court can , while exercising its jurisdiction under Order 9 Rule 7 of CPC, the Court can impose conditions in regard to payment of costs, but while exercising its power under Order 9 Rule 13 thereof, the Court can exercise a larger jurisdiction in the sense that it can impose other conditions.

26. For the latches on behalf of the 'Appellant' in 'refusing' the 'Notice', though during the time of pandemic, this Tribunal, while setting aside the 'Ex-Parte Order', finds it appropriate to place the 'Appellant' on terms of 'payment of costs of Rs.15,000/-', to be 'paid' to the 'Prime Minister's Relief Fund', and produce the 'Receipt' of the same, before the

¹ (2006) 13 SCC 136

`Registry' of the `Adjudicating Authority' (`Tribunal'), three days prior to the date of first appearance.

27. For all the foregoing reasons, these `Appeals' are `Allowed', and the `Impugned Orders' are set aside and the `Adjudicating Authority' (`Tribunal'), shall hear both parties `on merits' and decide the matter afresh, uninfluenced by any of the observations made by this `Tribunal' in this `Order'. Both sides are directed to appear, before the `Adjudicating Authority' (`National Company Law Tribunal', Amravati Bench, Hyderabad) on 15.03.2023. The connected pending `Interlocutory Applications', if any, stand Closed.

[Justice M. Venugopal]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

01/03/2023
HIMANSHU / TM