

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No.771/MB/2020

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

IN THE MATTER OF

**PRASHANT TRANSPORT EXCAVATION DIVISION
SOLE PROPRIETOR LATE SHRI K. R. BABU NAIDU**

THROUGH LEGAL HEIRS:

- (i) Mrs. Suguna Ramesh Babu Naidu
- (ii) Mr. Prashant Ramesh Babu Naidu &
- (iii) Mr. Sukesh Ramesh Babu Naidu

Shop No.1, 10-11, S. MISHRA CHAWL
GHARTAN PADA NO. 1, DAHISAR (EAST)
MUMBAI – 400068.

...Operational Creditor

VERSUS

VASCON ENGINEERS LIMITED

Registered Office: VASCON WEIKFILED CHAMBERS
BEHIND HOTEL NOVATEL,
OPPOSITE HYATT HOTEL, PUNE NAGAR ROAD
PUNE, MAHARASHTRA 411014.

...Corporate Debtor

Pronounced: 18.01.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: (Hybrid)

Operational Creditor : Adv. Shruti Pednekar

Corporate Debtor : Adv. Rohan Agrawal

[PER: SHRI SANJIV DUTT, MEMBER (TECHNICAL)]

1. Background

- 1.1 This Application bearing C.P.(IB) No.771/MB/2020 was filed by Prashant Transport Excavation Division, the Operational Creditor on 17.02.2020 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Vascon Engineers Limited, the Corporate Debtor.
- 1.2 Prashant Transport Excavation Division is a sole proprietorship concern of Shri K.R. Babu Naidu who expired on 25.04.2020. Thereafter, an interlocutory application bearing IA No.2794/2021 was filed for amending the cause title of the Application as well as Form 5. The IA was allowed *vide* order of this Tribunal dated 03.12.2021. Accordingly, legal heirs of late Shri K. R. Babu Naidu, namely, Mrs. Saguna Ramesh Babu Naidu (wife), Mr. Prashant Ramesh Babu Naidu (son) and Mr. Sukesh Ramesh Babu Naidu (son) were substituted as Applicant Nos.1, 2 and 3.
- 1.3 The Operational Creditor was engaged in the business of undertaking excavation works at various sites. It had carried out excavation works at different sites as per work orders issued by the Corporate Debtor from December, 2007 to March, 2011. The Operational Creditor had raised invoices for the works done aggregating to Rs.1,04,48,389/- as per work orders from 25.06.2008 to 19.03.2011, which remained unpaid by the Corporate Debtor. The Operational Creditor addressed emails to the Corporate Debtor during the period between January and May, 2015 informing the Corporate Debtor about unpaid invoices and requesting it to release the outstanding payment immediately. In view of failure of the Corporate Debtor to make payment of aforesaid invoices within fifteen days, the Operational Creditor charged interest @24% per annum on the overdue amounts till 31.03.2019 amounting to Rs.2,19,53,219/-. As there was a

default on the part of the Corporate Debtor towards payment of outstanding dues of the Operational Creditor, the latter has preferred the present Application for initiating CIRP in respect of the Corporate Debtor.

2. Averments of the Operational Creditor

- 2.1 The Corporate Debtor has been doing business with the Operational Creditor since 2007 for excavation works at various sites. The Corporate Debtor issued work orders for carrying out excavation for various sites. The Operational Creditor raised invoices for works done as per the Work Orders from 25.06.2008 to 19.03.2011. The said invoices were duly acknowledged by the Corporate Debtor. Copies of the Work Orders and invoices issued by the Operational Creditor are annexed to the Application.
- 2.2 The Operational Creditor time and again reminded the Corporate Debtor for payment of its outstanding dues. The Corporate Debtor made a few payments but failed to pay the balance outstanding dues. The last payment of Rs.5,00,000/- was received by the Operational Creditor on 30.10.2017. The Ledger Account of the Corporate Debtor from 01.04.2010 to 31.03.2018 and Bank Statement of the Operational Creditor from 27.10.2016 to 15.11.2017 are annexed to the Application.
- 2.3 In view of non-payment of outstanding dues of the Operational Creditor, a Demand Notice under Section 8 of the Code was issued to the Corporate Debtor on 01.07.2019. The Corporate Debtor replied to the said Demand Notice *vide* its letter dated 29.07.2019 denying the liability and informing that there were no outstanding dues payable to the Operational Creditor as reflected in the books of account of the Corporate Debtor. The Corporate Debtor claimed that the invoices attached to the Demand Notice were never certified by its site offices. In this regard, the Operational Creditor submits that the Corporate Debtor is making false allegations to avoid payment of legal dues of the former.

- 2.4 The Operational Creditor submits that its transactions with the Corporate Debtor are in the form of a running account and, therefore, there is no particular date on which the said amount has fallen due.
- 2.5 The Operational Creditor submits that as per the terms and conditions of its invoices raised on the Corporate Debtor, 24% per annum interest was to be charged, if payment was not made within 15 days.
- 2.6 In Part-IV of the Application, the Operational Creditor has shown unpaid operational debt at Rs.3,24,01,608/- due from the Corporate Debtor including Principal outstanding amount of Rs.1,04,48,389/- and interest of Rs.2,19,53,219/- from the due date of each invoice till 31.03.2019.
- 2.7 The Operational Creditor has placed on record copies of emails addressed to the Corporate Debtor during the period January to May, 2015 urging it to release the outstanding dues immediately.
- 2.8 The Operational Creditor has produced copies of three Ledger Accounts of the Corporate Debtor. The first Ledger Account is in the name of 'Vascon Engg (Excavation)' in the books of Prashant Transport Excavation Division showing credit balance of Rs.2,92,26,225/- as on 31.03.2013 (Page No.94 of the Application). The second Ledger Account is of 'Vascon Engg Limited' as per the books of account of Prashant Transport New for the period from 01.04.2010 to 31.03.2018 showing credit balance of Rs.84,58,405/- as on 31.03.2015 (Page No.95 of the Application). The third Ledger Account is titled 'Vascon Ex' in the books of Prashant Transport New which shows credit balance of Rs.24,91,372/- as on 30.10.2017 (Page No.96 of the Application).
- 2.9 As the Corporate Debtor failed to clear the dues of the Operational Creditor despite repeated reminders, the latter issued a Demand Notice to the former in the prescribed Form 4 on 01.07.2019 for payment of outstanding amount of Rs.3,24,01,608/- including interest.
- 2.10 In the rejoinder dated 13.03.2023 filed by the Operational Creditor, it is submitted that there has been no denial of aforesaid invoices by the Corporate Debtor for the period 2010-2011 till the date of issuance of

Demand Notice dated 01.07.2019. There has been no dispute or notice of dispute either in respect of the aforesaid invoices. It is claimed that the Corporate Debtor's plea regarding non-certification or non-verification of invoices is only an afterthought. It is also submitted that no such issue was raised by the Corporate Debtor in response to various email reminders addressed by the Operational Creditor to the Corporate Debtor. It is pointed out that such disputes were raised for the first time only *vide* Reply dated 29.07.2019 furnished by the Corporate Debtor in response to the Demand Notice.

- 2.11 It is submitted that the Corporate Debtor had made payments of Rs.2,91,372/- on 22.12.2016, Rs.7,00,000/- on 28.02.2017, Rs.5,00,000/- on 20.06.2017, Rs.5,00,000/- on 21.08.2017 and another Rs.5,00,000/- on 27.10.2017 towards outstanding dues under the subject invoices. Further, the Corporate Debtor had deducted TDS on the invoices and bills during the period 2008-2011 which is reflected in Form 26AS (TRACES) issued by the Income-tax Department.
- 2.12 It is pointed out that one Mr. Hari Chadde from the Corporate Debtor *vide* his email dated 18.05.2018 had sought balance confirmation for outstanding dues as on 31.03.2018 in the books of the Operational Creditor. The Operational Creditor had responded to the same via its email dated 19.05.2018. Both these emails put a question mark on the Corporate Debtor's claim that the operational debt is barred by limitation.
- 2.13 The Operational Creditor claims that Ledger Accounts of the Corporate Debtor in the books of account of "Prashant Transport Excavation Division" and "Prashant Transport New" are not of different entities. It is pointed out that the word "New" stated in the Tally Ledger pages is a mere typographical error.
- 2.14 It is also submitted that the Operational Creditor is following the cash system of accounting, as is evident from perusal of its audited Financial Statements from Assessment Year 2009-10 to Assessment Year 2012-13. It is stated

that “all incomes and expenses are accounted on cash basis”. Therefore, all sale invoices are accounted only when the payment is received.

3. Contentions of the Corporate Debtor:

- 3.1 It is strongly contended that the present Application is *ex facie* barred by limitation and is hence, liable to be rejected. As per the Application, the last invoice was raised on 19.03.2011 and thus, the present Application filed on 17.02.2020 is *prima-facie* time-barred and liable to be dismissed. It is submitted that even though a communication/reminder does not extend the period of limitation, the first email seeking payment of dues was issued by the Operational Creditor on 02.01.2015, which is about four years after the last invoice dated 19.03.2011. Therefore, it is argued that the reliance on the email dated 02.01.2015 does not come to the rescue of the Operational Creditor. It is claimed that the Operational Creditor has tried to mislead the Adjudicating Authority by concealing the fact that the alleged amounts sought under the present Application relate to two separate entities/ proprietorships, namely, Prashant Transport Excavation Division (Operational Creditor herein) and Prashant Transport having separate PAN registrations.
- 3.2 It is submitted that the Ledger Account at Page No. 94 of the Application relates to the Operational Creditor herein and clearly shows the last payment having been made by the Corporate Debtor on 17.10.2012. Accordingly, it is submitted that the present Application filed on 17.02.2020 is barred by limitation. It is also contended that the Operational Creditor is attempting to seek final reliefs without making any application seeking condonation of the inordinate delay in approaching the Adjudicating Authority [***B.K. Educational Services Private Limited v. Parag Gupta and Associates (2019) 11 SCC 633***]. In the present case, the defaults occurred when the debt fell due (15 days after the invoices were raised by the Operational Creditor) i.e., 10.07.2008 to 03.04.2011. Therefore, it is argued that the right to sue occurred at that time and not in the year 2017, as has been falsely claimed. However, it is submitted that the present Application has been filed on

17.02.2020 i.e. after a lapse of almost 9 years from the alleged date of default and hence, it is clearly barred by limitation.

- 3.3 It is submitted by the Corporate Debtor that extension of limitation under Section 18 of the Limitation Act, 1963 is available only when there is a clear acknowledgment of debt within three years from the date of invoice. The Operational Creditor has sought extension of the limitation period on the basis of payment dated 30.10.2017 made by the Corporate Debtor. However, it is claimed that the payment dated 30.10.2017 relates not to the Operational Creditor but to another entity, namely, Prashant Transport, having a separate and distinct PAN registration. Further, it is submitted that the said payment dated 30.10.2017 had clearly been made much beyond the period of three years from the date of last invoice raised on 24.03.2011, which will not extend the period of limitation and as such, the present Application is liable to be dismissed as being barred by limitation.
- 3.4 In Part-IV of the present Application, the Operational Creditor has declared various dates of default as enumerated in Annexure-A at page 11 of the Application. It is a well-settled law that there cannot be more than one date of default for an Application either under Section 7 or Section 9 of the Code. However, the Operational Creditor has filed the present Application based on 42 dates of alleged default with the earliest being 10.07.2008 and the latest being 03.04.2011. There is no mention of any specific Date of Default in Form 1 either at Part-IV thereto or otherwise.
- 3.5 It is submitted that the Corporate Debtor issued multiple work orders to the Operational Creditor for carrying out excavation work at different sites. It is submitted that as per the work orders, the Operational Creditor was obligated to seek certification of the bills/ invoices within 15 days of the date of issuance and the payment was only to be released "within 15 days after Bill Certification at Site". In other words, the payments were subject to certification of bills by the Corporate Debtor. For example, Invoice No. PTED/406-107-10-11 (available at Page No.67 of the Application), which is the bill annexed and relied upon by the Operational Creditor is amounting to Rs.28,96,037/-. However, the certified amount of the bill as per the Corporate

Debtor was only Rs.13,02,418/-. The amount certified by the Corporate Debtor is acknowledged by the Operational Creditor as Rs.13,02,418/- in the Table of Claimed Invoices available at Page No.11 of the Application. It is thus evident that the Operational Creditor is well aware of the requirement of certification of invoices and also acknowledges the certified amount. However, despite this, it is contended that the Operational Creditor has claimed as many as 24 invoices aggregating to Rs.62,66,415/- to be in default which have not been certified by the Corporate Debtor and, therefore, the question of the Corporate Debtor allegedly being in default in payment thereof cannot arise.

3.6 It is strongly contended that there pre-exists a dispute as to whether the uncertified invoices are even payable by the Corporate Debtor to the Operational Creditor which issue can only be decided and adjudicated upon by a civil court of competent jurisdiction and not by the Adjudicating Authority. Reliance is placed in this regard on the judgment of the Hon'ble Supreme Court in the case of **Rajaratn Babulal Agarwal v. Solartex India Private Limited (2023) 1 SCC 115**. It is asserted that there is a plausible dispute with regard to the liability, if any, to make payment of uncertified invoices which requires enquiry and investigation and which is neither a patently feeble legal argument nor a mere assertion of facts wholly unsupported by evidence.

3.7 It is submitted that the Corporate Debtor *vide* its Reply dated 29.07.2019 to the Demand Notice had categorically disputed the amount alleged to be in default and had also denied the invoices and the work claimed to have been done under the said invoices. It is reiterated that no amount is due to the Operational Creditor and the present Application is nothing but a figment of Operational Creditor's imagination. It is vehemently contended that the Ledger Account placed on record by the Operational Creditor at the face value is illegal and completely unreliable since the same seems to relate to different entities and different time periods. Further, the Ledger Account only mentions the credit entries while completely ignoring and disregarding the debit entries. In its Additional Affidavit filed on 05.07.2023, the Corporate

Debtor submits that the Operational Creditor has mischievously concealed the details of the invoices against which such payments were appropriated by the Operational Creditor. It is further pointed out that though the Corporate Debtor has already made payments against 14 out of 42 invoices claimed to be in default, these invoices are still forming part of the claim of the Operational Creditor. It is contended that the Operational Creditor has thus sought to mislead the Adjudicating Authority by not giving due credit against the payments made by the Corporate Debtor and is double claiming the invoices in the Application. It is argued that the Operational Creditor has mischievously relied on a misleading Ledger Account in the Application only to show credit entries i.e., the details of the payments made by the Corporate Debtor with a view to falsely take shelter of the provisions of Section 19 of the Limitation Act, 1963.

- 3.8 It is the case of the Corporate Debtor that no interest was ever agreed upon between the parties and, therefore, the claim of the Operational Creditor pertaining to interest is not maintainable at the threshold. The Operational Creditor has claimed a sum of Rs.2,19,53,219/- towards interest payable by the Corporate Debtor on the strength of a unilateral condition pre-printed on its invoices. However, it is contended that the Corporate Debtor's work orders do not contain any such promise/ agreement to pay interest to the Operational Creditor. Hence, it is argued that the claim towards interest is unilateral and not agreed to by the Corporate Debtor. Reliance is placed in this regard on an order of the co-ordinate Bench of NCLT, New Delhi dated 14.09.2023 in the matter of M/s. Twenty First Century Wire Rods Ltd. v. M/s. Rohit and Company [CA 1466/PB/2019 in CP(IB) 737/PB/2018].
- 3.9 It is submitted that the Corporate Debtor is amongst the leading companies in construction business having an authorised Share Capital of Rs.269 crores approximately and paid-up Share Capital of Rs.178 crores approximately. The Corporate Debtor is a solvent and profit-making public listed company having no default with any of the Creditors and the initiation of CIRP against the Corporate Debtor will be against the objective of the Code. It is contended that the present Application is nothing but a desperate

attempt to arm-twist the Corporate Debtor into surrendering to the illegitimate demands of the Operational Creditor. According to the Corporate Debtor, it has repeatedly been held that the present insolvency regime is not to be misused as a recovery mechanism.

3.10 It is submitted that the Operational Creditor's act of treating the part payments made by the Corporate Debtor towards certain invoices, as per Section 60 of the Indian Contract Act, 1872 will deprive it of taking benefit of Section 19 of the Limitation Act 1963. In this regard, reliance is placed on the following authorities:

- ***Abdul Aziz v. Munna Lal AIR 1921 ALL 325***
- ***Puttu Lal Kunji v. B Jagannath, AIR 1935 ALL 53***
- ***Anmol Steel Processors (P) Ltd. v. Color Roof India Ltd. 2022 SCC Online BOM 116***

It is contended that the invoices claimed to be in default in the present Application will have to be treated as separate and independent transactions and the issue of limitation will have to be examined on an invoice-to-invoice basis. It is submitted that some part payments were made by the Corporate Debtor in respect of invoices which are claimed to be in default in the present Application. However, these payments were admittedly made long after the expiry of the limitation period in respect of each of the invoices. It is, therefore, submitted that the part payments cannot enure to the benefit of the Operational Creditor to raise a plea of acknowledgement of liability by the Corporate Debtor under the provisions of Section 19 of the Limitation Act, 1963. In view of the above, it is prayed that the present Application is *ex-facie* barred by the laws of limitation and is, therefore, liable to be dismissed.

ANALYSIS AND FINDINGS:

4.1 We have heard the Counsel for both the parties and duly considered the pleadings, oral as well as written submissions along with the materials available on record. It is now proposed to deal with the main issues arising in the matter. It is well-settled that while examining an application under Section 9 of the Code, the Adjudicating Authority will have to determine-

- (i) Whether there is an 'operational debt' as defined under Section 5(21) exceeding the threshold limit under 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 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 of the aforesaid conditions is lacking, the application would have to be rejected [*Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353*]. It is also a settled proposition of law that an application under Section 9 of the Code has to be mandatorily admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) are satisfied.

- 4.2 It is well-established that an application under Section 9 of the Code requires strict proof of debt and default. The Operational Creditor has placed on record copies of work orders, invoices and Ledger Account of the Corporate Debtor in support of its claim. A perusal of the terms and conditions recorded in all 13 work orders clearly reveals that payment for works done was to be made by the Corporate Debtor within 15 days "after Bill Certification at Site". It is observed from the record that there were admittedly regular dealings between the parties since 2007. It is also observed that all certified invoices have already been paid by the Corporate Debtor. The Corporate Debtor has in this regard also drawn attention to Invoice No. PTED/406-107/10-11 dated 08.02.2011 (annexed at Page No.67 of the Application) for an amount of Rs.28,96,037/- of which the certified amount was only Rs.13,02,418/-. It is noticed from the record that the certified amount of Rs.13,02,418/- has been acknowledged by the Operational Creditor in the Table of Claimed Invoices available at Page No.11 of the Application. In these circumstances, it is hard to accept the Operational Creditor's claim that the requirement of certification of invoices is an 'afterthought' or a 'false and fabricated defence' on part of the Corporate Debtor. To say that invoices raised by the Operational Creditor

were acknowledged by the Corporate Debtor is not enough. The Operational Creditor has to demonstrate that all invoices claimed to be in default in the Application were duly certified in terms of the work orders which it has failed to do. In the absence of certification, these invoices neither create any payment obligation on the Corporate Debtor nor confer any right on the Operational Creditor to claim payment thereof.

4.3 It is pertinent to mention that this issue of uncertified invoices was raised by the Corporate Debtor in its reply to the Demand Notice itself *vide* its letter dated 29.07.2019. The Corporate Debtor had categorically stated in its reply that “there is no conclusive evidence showing the work has been actually carried out by you (Operational Creditor) at our sites. Mere receiving the acknowledgement does not mean that the amount is due and payable”. Further, the Corporate Debtor had also stated that as per its own records and statement of accounts, the amount due and payable from the Corporate Debtor to the Operational Creditor was ‘Nil’. As stated above, the Operational Creditor has claimed principal amount of Rs.1,04,48,389/- on account of 42 invoices raised on the Corporate Debtor during the period from 25.06.2008 to 19.03.2011. The Corporate Debtor has in its Affidavit in Reply clearly brought out that out of the aforesaid 42 invoices, as many as 24 invoices aggregating to Rs.62,66,415/- were uncertified for which it was not liable to make any payment to the Operational Creditor. It is submitted that the remaining invoices have already been paid but credit has not been given by the Operational Creditor in the Ledger Account. Thus, it clearly emerges that the Operational Creditor has failed to establish the existence of debt merely on the strength of uncertified invoices.

4.4 With regard to the so-called Ledger Account of the Corporate Debtor, the Operational Creditor has placed lot of emphasis on the fact that he is following the cash system of accounting. Under the cash system of accounting, revenue is recognised when cash is received and expenses are recognised when cash is paid out. Thus, a purchase invoice is recorded in the books of account of a trader only at the time of making payment. Similarly, all invoices raised by him on his customers are not recorded as

sales till the payment in respect thereof is received or realised. Thus, cash system of accounting does not show money that is owed by his customers to the trader (Trade Debtors) or money he owes to others (Trade Creditors) in relation to his business. In other words, no accounts of trade creditors and trade debtors showing outstanding dues are maintained in the books under cash system of accounting. This is also evident from perusal of Income Tax returns and final accounts attached thereto by the Operational Creditor for FYs 2012-13 to 2016-17, wherein no outstanding balance in the name of the Corporate Debtor is reflected. Therefore, it is found that the so-called Ledger Account of the Corporate Debtor furnished by the Operational Creditor along with the Application has not been maintained in its books of account in the ordinary course of business and has been prepared only for the purpose of filing this Application.

- 4.5 Let us now consider the authenticity as well as the reliability of the Ledger Accounts of the Corporate Debtor as annexed to the Application and ascertain whether the said Ledger Accounts establish the existence of operational debt. As stated above, the Operational Creditor has submitted Ledger Account of "Vascon Engg (Excavation)" (Page No.94 of the Application) purportedly maintained in the books of account of Prashant Transport Excavation Division, Shop No.10, Siddhanath Mishra Chawl, S.P Road, Vaishali Nagar for the period 01.04.2010 to 31.03.2018, which shows amounts aggregating to Rs.2,92,26,225/- received from the Corporate Debtor on various dates from 17.04.2010 to 31.03.2013. There are no other entries from 01.04.2013 to 31.03.2018 in this account.
- 4.6 The Operational Creditor has also furnished two more Ledger Accounts (Page Nos.95 and 96 of the Application) appearing in the books of "Prashant Transport New", Dheeraj Enclave, C-604, C-Wing, W.E. Highway, Borivali (E), Mumbai-400066 for the period 01.04.2010 to 31.03.2018 which reveal as under :-

Title of Account	Period	Amount of Credit Balance (Rs.)
Vascon Engg Ltd	01.07.2011-31.03.2015	84,58,405/-
Vascon Ex	22.12.2016-30.10.2017	24,91,372/-
Total		1,09,49,777/-

However, since only amounts received from the Corporate Debtor from time to time are reflected in all three Ledger Accounts, these accounts show an aggregate credit balance of Rs.4,01,76,002/- (Rs.2,92,26,225+1,09,49,777) due and payable by the Operational Creditor to the Corporate Debtor. In other words, the so-called Ledger Accounts actually show the Corporate Debtor not as a debtor but as a creditor. Therefore, it is found that the Ledger Accounts also fail to establish the existence of an operational debt supposedly owed by the Corporate Debtor to the Operational Creditor. The so-called Ledger Accounts thus deserve to be rejected as incorrect and unreliable on this ground alone.

- 4.7 We find merit in the contention raised by the Corporate Debtor that the Operational Creditor has not given credit for the invoices for which payments have been made by the former to the latter from time to time. On the one hand, the Operational Creditor claims that all sale invoices are accounted when the payment is received and on the other hand, it has not accounted for any of the invoices against which the payments appearing in the aforesaid Ledger Accounts of the Corporate Debtor were received. In the absence of any contemporaneous debit entries in the Ledger Accounts on account of bills raised by the Operational Creditor on the Corporate Debtor, its claim that it is a "running account" also stands demolished on its own. The concept of a "running account" is now well recognised in judicial pronouncements. The Hon'ble Delhi High Court in ***Bharat Skins Corporation v. Taneja Skins Corporation Pvt. Ltd. (2012) 186 DLT 290*** has brought out the ingredients of a running account as follows:-

“19. In case of a running and non-mutual account between the buyer and seller, when goods are delivered by the seller to the buyer, the value of the goods is debited in the debit column and when amounts are paid by the buyer to the seller, they are entered in the credit column. The difference is continuously struck in the column for balance. In such a case, when the buyer defaults to make balance payment, the seller’s action is not for the price of goods sold and delivered but for the balance due at the foot of an account”.

The Hon’ble High Court of Bombay in ***Wilson’s Jacobs v. Lucid Prints & Ors. 2018 SCC OnLine BOM 1998*** has also observed as under:-

“7. ...The fact that there were continuous transactions does not make it a running account. Again the concept of a running account in commercial practice is well-known. It must be demonstrated that there are debits and credits going on simultaneously or on a regular basis and that balances are struck with some periodicity; not that there are a number of invoices, some of which remain unpaid”.

4.8 In view of above facts coupled with the settled legal position, the Ledger Accounts of the Corporate Debtor can by no stretch of imagination be treated as “running accounts”. The Operational Creditor has in its Written Submissions attempted to distinguish the judgments cited by the Corporate Debtor from the facts of its own case. While reiterating its claim of having a “running account” of the Corporate Debtor, the Operational Creditor submits that the former used to make *ad hoc* payments which were not against any specific bills or invoices. However, we do not find merit in aforesaid claim of the Operational Creditor, because considering the amounts received from the Corporate Debtor from time to time, it becomes clear that almost all amounts in question were received from the Corporate Debtor against specific invoices viz. Rs.11,38,697/-, Rs.5,93,431/-, Rs.64,10,433/- and so

on. The Operational Creditor has thus adopted an arbitrary and whimsical approach in preparing the said Ledger Account. This lends credence to the claim of the Corporate Debtor that the Ledger Account is nothing but a manufactured or cooked-up account filed by the Operational Creditor for extraneous considerations. This also puts the authenticity or genuineness of the so-called Ledger Account to serious doubt.

4.9 Let us now deal with the issue of limitation which will have to be determined on an invoice-to-invoice basis. As the invoices raised by the Operational Creditor were to be paid within 15 days, the Operational Creditor in its computation of the amount in default has indicated respective date of default for each of the invoices falling between the period 10.07.2008 and 03.04.2011. As stated above, the present Application was filed on 17.02.2020. We find merit in the contention of the Corporate Debtor that the present Application having been filed far beyond the statutory period of 3 years is barred under Article 137 of the Limitation Act, 1963. The Operational Creditor has not taken any steps to satisfy us that it had sufficient cause for not making the Application within the prescribed period of 3 years from the date of default. The Operational Creditor's reliance on the last payment of Rs.5,00,000/- received from the Corporate Debtor on 30.10.2017 will not save limitation because aforesaid payment was made not within the period of limitation but much after the claim had already become time-barred. Therefore, limitation will not revive under Section 18 or Section 19 of the Limitation Act, since the part payment or acknowledgement of liability had taken place after expiry of the period of limitation. We thus find that the present Application is *ex facie* barred by limitation and is liable to be dismissed on this ground itself.

4.10 As the invoices claimed to be in default include those which have not been certified by the Corporate Debtor as per the terms of the work orders, the uncertified invoices point towards a dispute about the liability of the Corporate Debtor to pay the same. It is pertinent to mention that the Corporate Debtor in its reply dated 29.07.2019 had categorically stated that there were "no outstanding dues payable" to the Operational Creditor

reflecting in the books of account of the former and that as per its records and statement of account, the amount due and payable from the Corporate Debtor to the Operational Creditor was 'Nil'. Further, the Corporate Debtor had clearly disputed the claim of the Operational Creditor in regard to the uncertified invoices as brought out in para 4.3 above. In view of this, there is no valid basis for the Operational Creditor to claim in its Affidavit under Section 9(3) (b) dated 07.02.2020 that "no notice is given by the Corporate Debtor relating to a dispute of the unpaid operational debt till date in terms of Section 8(2) of the Code". There is merit in the contention of the Corporate Debtor that a dispute exists between the parties as to whether the uncertified invoices are even payable by the Corporate Debtor to the Operational Creditor and that such dispute requires inquiry, investigation and determination by a Civil Court of competent jurisdiction. This Adjudicating Authority is not required to embark upon any detailed enquiry or investigation in this regard. For the purpose of our adjudication which is in the nature of a summary proceedings, we find that this issue clearly indicates a real and genuine dispute between the parties which is not vexatious or frivolous and grounds for which are real and not spurious, illusory, hypothetical or misconceived. The dispute is far from being a patently feeble legal argument or an assertion of fact unsupported by evidence.

4.11 It is also seen from the record that there was no provision for charging of interest under the work orders placed by the Corporate Debtor on the Operational Creditor. It is well-settled that the charging of interest ought to be an actionable claim enforceable under law, provided it was properly agreed upon between the parties. It is also well-established that interest cannot be claimed as a matter of right when there is no agreement between the parties for the same. Therefore, in the absence of mutual agreement between the parties and owing to its failure to prove the very existence of operational debt in the instant case, the Operational Creditor's claim for interest is found to be untenable.

4.12 As regards the claim of the Operational Creditor that the Corporate Debtor had deducted TDS on the invoices during the period 2008-2011, it is now

well settled that mere deduction of TDS by the corporate debtor is not enough to prove operational debt. TDS deduction does not imply acknowledgment of any liability as outstanding qua the operational creditor. Merely on the basis of TDS deducted by the Corporate Debtor, no liability for operational debt can be fastened on the Corporate Debtor.

4.13 It is well-established that the Code cannot be used as a recovery mechanism or as a substitute for debt enforcement procedures. In this connection, the Hon'ble Supreme Court in the case of ***M/s S. S. Engineers v. Hindustan Petroleum Corporation Ltd. 2022 SCC OnLine SC 1385***, has held as under:-

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum....It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor...

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.... However, if the debt is disputed, the application of the operational creditor for initiation of CIRP must be dismissed”.

4.14 In view of aforesaid findings, it clearly emerges that the Operational Creditor has failed to demonstrate the existence of an operational debt exceeding the threshold limit under Section 4 of the Code and default thereof which is the *sine qua non* for admission of an application under Section 9 of the Code. We also find that the documentary evidence annexed to the Application does not show that any operational debt was due and payable by the Corporate Debtor to the Operational Creditor which has not yet been paid. Further, the Corporate Debtor has been able to establish the existence of a dispute with regard to the uncertified invoices alleged to be in default by the Operational Creditor. In these circumstances, we are of the

considered view that the present Application filed by the Operational Creditor under Section 9 of the Code deserves to be dismissed.

ORDER

The present Application bearing C.P.(IB) No.771/MB/2020 filed by Prashant Transport Excavation Divison, the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 on 17.02.2020 for initiating CIRP in case of Vascon Engineers Limited, the Corporate Debtor is hence **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Applicant to pursue such other remedies as may be available in accordance with law.

Sd/-

**SANJIV DUTT
MEMBER (TECHNICAL)**

//JNK//

Sd/-

**K. R. SAJI KUMAR
MEMBER (JUDICIAL)**