

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH- II**

**KOLKATA**

**IA(IBC) No. 230/KB/2021**

**IN**

**C.P (IB) No.726/KB/2020**

**In the matter of**

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

**In the matter of:**

**Maruti Packagers Pvt. Ltd.** (CIN: U51909WB1987PTC042921) having its registered office at Poddar Court, 18<sup>th</sup>, Rabindra Sarani, 5<sup>th</sup> Floor, Gate No. 3, Room No.2, Kolkata- 700001, West Bengal.

*...Operational Creditor*

Versus

**JMV Polymer Limited,** (CIN:U25208WB2018PLC226332)having its registered office at 6/C Digberia Road, NR- opp dumping gand, Madhyamgram,Kolkata-7000128

*...Corporate Debtor*

Date of hearing :03/01/2023

Order Pronounced on : 13/01/2023

**Coram:**

***Mr. Bidisha Banerjee, Member (Judicial)***

***Mr. Balraj Joshi, Member (Technical)***

**Counsels appeared through Physically/ Video Conference**

Mr. Shaunak Mitra,Adv.

] For Operational Creditor

Mr.S.R.Kakrania,Adv.

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Mr.T.Kakrania, Adv. ]  
Mr.K.Sharma,Adv. ]

Mr.Ratnanko Banerji,Sr.Adv. ] For Corporate Debtor  
Mr.Jishnu Choudhury, Adv. ]  
Mr. R.S.Tiwari,Adv. ]  
Ms.Madhuri Pandey, PCS ]

**ORDER**

**Per: Bidisha Banerjee, Member (Judicial)**

1. Ld. Counsel for the parties was heard.
2. This is an application preferred under section 9 of the Insolvency and Bankruptcy,2016 ('IBC') by **Maruti Packagers Pvt. Ltd.** through its Director namely Mr. Rajat Rateria, authorised vide Board Resolution dated 01/02/2020 (Annexure-B) (hereinafter referred as the Operational Creditor), who seeks initiation of corporate insolvency resolution process in respect of **JMV Polymer Limited** ((hereinafter referred as the Corporate Debtor for unpaid operational debt of Rs.51, 57,738.28/- as on 07/02/2020).
3. The Operational Creditor is company engaged in the business of manufacturing and supply of various plastic raw materials inclusive of polyethylene terphthalate (PET), high-density polyethylene(HDPE), polyvinyl chloride (PVC), low-density polyethylene (LDPE), polypropylene (PP), polystyrene(PS), inter alia, supply of plastic granules of different quantities measured in bags of 25 each.

It is alleged that Corporate Debtor is indebted to the Operational Creditor for a principal sum of Rs. 38,50,418.40/-, arising out of various invoices raised by the Operational Creditor on the Corporate Debtor in

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the year 2018, for supply of the said goods to the Corporate Debtor. While, the Corporate Debtor is a Company engaged in the business of supplying and dealing of various plastic raw materials, having an authorized capital of Rs.4,00,00,000/- of which the paid up capital comprises Rs.3,76,18,000/-

In or about the beginning of 2018, the Corporate Debtor placed various purchase orders upon the Operational Creditor for the supply of goods. The Corporate Debtor agreed to various payments to the Operational Creditor against the invoices raised by the Operational Creditor and in case of default of payment of the bill amount by the Corporate Debtor within 7 days of the delivery of goods at the construction site and/or office of the Corporate Debtor in West Bengal, the Operational Creditor would be entitled to claim and the Corporate Debtor would be liable to pay penal interest on the outstanding bill amount @ 24% per annum.

Pursuant to and in terms of the various orders placed in 2018, the Operational Creditor, supplied and delivered the goods to the Corporate Debtor at the Corporate Debtor's aforesaid office/warehouse in West Bengal.

The delivery of the said goods was duly accepted at the office of the Corporate Debtor, the Operational Creditor duly raised various invoices on the Corporate Debtor, which was duly received by the Corporate Debtor.

It is submitted that the Operational Creditor has time and again, been demanding the outstanding operational debt from the Corporate Debtor in writing and orally, but the Corporate Debtor has been avoiding all such demands of the Operational Creditor.

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That the amount in question is an admitted liability and that no such payments have been received by the Operational Creditor. A copy of the ledger maintained by the Corporate Debtor evincing the outstanding payments in the books of accounts of the Corporate Debtor, as provided to the Operational Creditor by means of digital media, is annexed and marked as **Annexure-B**.

That the last payment received from the Corporate Debtor was on 7<sup>th</sup> December, 2018, however, no payments have been made subsequent to that, hence the application.

4. At hearing, Ld. Counsel Mr. Shaunak Mitra, appearing for the Operational Creditor would advance the following arguments:-
- i. Drawing our attention to page 44 of the petition, Ld. Counsel would take us through the demand notice under section 8 of the IBC from **Maruti Packagers Pvt. Ltd.**( the Operational Creditor). He would further refer to demand notice demanding payment of unpaid operational debt due from **JMV Polymer Limited**, (the Corporate Debtor), dated 7<sup>th</sup> February, 2020 in Form -3 under Rule 5 of the IBC where the unpaid operational debt as on 7<sup>th</sup> February, 2020 is shown us Rs. 51, 57,730.28 .
  - ii. Ld. Counsel would further refer to page 81 of the petition as proof of receipt of the said notice by the Corporate Debtor.
  - iii. He would further argue that the present Director, Mr. Manish Lakhotia, who has affirmed the reply affidavit, has admitted his liability. That Manish Lakhotia, one of the Directors of the Corporate Debtor has admitted/acknowledged the operational debt by means of digital media (WhatsApp) enumerating and

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evincing the total operational debt to be paid by the Corporate Debtor to the Operational Creditor. A copy of the digital media conversation exchanged between the said Director of the Corporate Debtor and the Operational Creditor along with copy of ledger shared by the corporate debtor has been marked as Annexure-F along with transcript of the WhatsApp messages.

- iv. Ld. Counsel would take us through some of the transcribed statements in WhatsApp messages which appears to be received by the Operational Creditor and reads as under :-

**17.12.2018:**

*“ [17/12/18, 2:04:12 PM] Manish Lakhotia: I will start your payment dont have to worry*

*17/12/18, 2:04:22 PM] Rajat: From when?*

*17/12/18, 2:04:28 PM] Rajat: You told next week”.*

**22/12/2018:**

*“ [22/01/19 , 2:15:31 PM] Rajat: You told me you are sending the invoice*

*[ 22/01/19, 2:15:35 PM] Manish Lakhotia:<attached. 00002175-PHOTO-2019-01-22-35.jpg>*

*[ 01/02/19, 3:13:18 PM] Rajat: Give your planning*

*[01/02/19, 3:13:22 PM] Ratat: or give me money*

*[ 01/02/19, 3:31;25 PM} Manish Lakhotia: LLDPE and Id rate .*

*01/02/19, 3:32:09 PM] Manish Lakhotia: OK, From tomorrow” .*

- v. Ld. Counsel would place page 98 of the petition to show the ledger account indicating an amount of Rs.83,99,221.70.

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vi. Further drawing our attention to page 3 para 7 of the rejoinder., Ld. Counsel would submit Whatsapp number of Mr. Manish Lakhotia, one of the Directors is 9830911576 and that the transcript of the Whatsapp conversation appended as Annexure-F to the application was between Mr. Manish Lakhotia and the Operational Creditor would be evident from the documents collectively marked as Annexure- A to the Rejoinder.

Further Ld. Counsel would urge that such statements have not been denied by the Corporate Debtor.

vii. Referring to the reply filed by the Corporate Debtor, Ld. Counsel would refer to the letters dated 20/11/2018 and 22/12/2018 as contained in pages 34-35 of the petition to show that invoice was raised by **Maruti Packagers Pvt. Ltd.** requesting payments from **JMV Polymer Limited** for the material supplied.

viii. Ld. Counsel would further allege that the said Manish Lakhotia was formerly inducted as Director in 2019. Therefore, the letters dated 20/11/2018(Pafes 32-36 of reply affidavit) etc. depicting the said Manish Lakhotia as a Director are fake, and fabricated and hence are inconsequential

ix. Ld. Counsel drawing our attention to a police complaints filed in July 2019 (pages 37-41 of the reply affidavit), Ld. Counsel would submit that vague allegations have been levelled against the Operational Creditor by the Corporate Debtor.

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5. Per Contra, repelling the arguments, Ld. Senior Counsel Mr. Ratnanko Banerji, appearing for the Corporate Debtor would forcefully plead that a section 8 Notice is *sine qua non* for the admission of a motion under 9 of the IBC and in view of the law laid down in the case of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***, in case of a pre-existing dispute a section 9 application is not to be admitted.

Ld. Senior Counsel would submit that the Section 8 notice that was issued on 7<sup>th</sup> February, 2020 is an admitted fact. However, Ld. Counsel would take us through the letters issued by Shri Manish Lalkhotia the one of the Directors of **JMV Polymer Limited** at pages 45 and 46, dated 08/08/2019 in response to letter dated 29<sup>th</sup> July , 2019 from the **Maruti Packagers Pvt. Ltd.**(the Corporate Debtor) being the Operational Creditor and submit that prior to issuance of Section 8 Notice by the Operational Creditor, the **JMV Polymer Limited** being the Corporate Debtor had evidently raised dispute about the quality of the goods supplied by Operational Creditor, the **Maruti Packagers Pvt. Ltd.**, that the goods supplied were of inferior quality and as a result, the **JMV Polymer Limited** lost faith of its customers. That goodwill of the company was damaged in the plastic business market and it had to spent lot of money to regenerate the goodwill.

That the Corporate Debtor **JMV Polymer Limited** had also alleged in tis response to the Section 8 Notice, on 15/02/2020 that the **Maruti Packagers Pvt. Ltd.** was trying to extort money by using illegal means particularly criminal force and demanded Rs.94 lakhs as damages sustained by **JMV Polymer Limited** (The Corporate Debtor) due to supply of inferior quality materials by, the **Maruti Packagers Pvt. Ltd.** (the Operational Creditor).

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Ld. Senior Counsel would further vociferously argue that the since such notices indicate a pre-existing dispute, raised before issuance of section 8 notice, the company petition preferred by the Operational creditor ought to be dismissed.

Ld. Senior Counsel would further draw our attention to the complaints dated 12/08/2019 (Pages 47-63 of affidavit in reply) made to the SP North 24 Parganas to the DM North 24 parganas ,to the Barasat Police Station , Bauihati Police Station to the Officer Incharge Madhyam Gram Police Station and the Commissioner of Police Lal Bazar as contained in Annexure-D collectively to the affidavit in reply, alleging reply of spurious materials, creating pressure with an intention to extort money by applying criminal force, deception , commission of offences relating to Criminal Breach of Trust, Criminal Misappropriation, Criminal Conspiracy, Extortion and Cheating.

Further, an application under section 156(3) Cr.P.C., filed by Rajat Rateria, Director of **Maruti Packagers Pvt. Ltd.**(Operational Creditor ) against Mr. Manish Lakhotia and ors. bearing Case No. 1746 of 2019 is also placed.

6. We have given our anxious consideration to the arguments advanced, the rival contentions between the parties, perused the documents and considered the implication of the decisions of the ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited and M/s S.S. Engineers vs Hindustan Petroleum Corporation*** placed by Ld. Sr. Counsel for the Corporate Debtor.
7. The provisions in Section 8 of the IBC are as under 8(1):-

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*“8(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”.*

Further the provisions of section 8(2) are loud and clear that

*“ 8(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, 1[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 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.*

8. The Section 9 of the IBC,2016 further enjoins the following:-

*“ 9. Application for initiation of corporate insolvency*

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*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 sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*

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

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

*xxx*

*xxx*

*xxx*

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

9. In **Mobilox** (Supra) Hon'ble Apex Court has succinctly propounded as under:-

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

*(i) Whether there is an “operational debt” as defined exceeding Rs, 1 lakh? (See Section 4 of the Act)I (2018) SCC 353*

*(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not been paid? and*

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(iii) Whether there is existence of a dispute between the parties or the record of the 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. A part 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”*

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*“ 51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the*

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*grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”[*

***[Extracted with supplied emphasis for clarity].***

10. The position is further clarified by Hon’ble Apex Court in Civil Appeal No. 2199 of 2021 (**Rajratan Babulal Agarwal –vs- Solartex India Pvt. Ltd. & Ors**). In the said matter, the Hon’ble Apex Court was considering the following : **[Extracted with emphasis for clarity]**

*“ 55.This is a case where there was a contract for sale of goods. The contract as gleaned from the purchase order related to goods which were sold by description, namely, Indonesian coal. Parties clearly contemplated that the coal was to be a certain quality, the details of which are expressly enumerated in the purchase order. The purpose for which the coal was purchased was also indicated, namely, it was to be used in a boiler. Therefore, it formed a part of the raw material for the second respondent. Pursuant to the purchase order, it is undoubtedly true, that 412 MT was delivered at the factory site of the second respondent. It is beyond challenge that no part of 412 MT has been returned by the second respondent to the first respondent. It would be safe to proceed on the basis that the goods so delivered may have been used or consumed. It may constitute acceptance of the goods within the meaning of [Section 42](#) of the Act. But then the case of the*

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*appellant is anchored in Section 13(2) of the Act. The case is that the characteristics of the coal or quality of the coal with reference to certain objective criteria were indeed specified and was understood as a condition to be fulfilled by the seller and that those conditions were not fulfilled by the first respondent-seller. It is, therefore, the case of the appellant that the acceptance of the goods under Section 42 may not detract from Section 13(2) of the Act applying to the facts. In other words, treating the quality of the coal with reference to certain standards as conditions to be fulfilled by the seller, the mere acceptance of the goods by the buyer may not prevent the buyer from still contending that there has been a breach of the condition, but since the law permits the buyer to treat such breach of the condition when there is acceptance of the goods as only a breach of a warranty, Section 59 of the Act immediately gets attracted. Section 59 of the Act contemplates a buyer 'setting up' a breach of a warranty to diminish or reduce the price or even extinguish it. If this line is accepted, it could indeed be said that the decks are not cleared for the first respondent-seller for its claim under Section 8”.*

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*“ 59. In Mobilox (supra), this Court took the view that one of the objects of the IBC in regard to operational debts is to ensure that the amount of such debts which is usually smaller than the financial debts does not enable the operational creditor to put the corporate debtor into the insolvency resolution process prematurely. It is further declared that it is for this reason that it is enough that a dispute exists between the parties. It is further the law as declared in Mobilox (supra)*

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*that Section 5(6) of the IBC excludes the expression bona fide which qualified the words suit or arbitration proceedings in [Section 5\(4\)](#) under the Bankruptcy Law Reforms Committee Report. All that is required is to see whether there is a plausible contention which must be investigated. This Court has gone on to declare that a 'patently feeble' legal argument may not be a plausible dispute. We respectfully agree. We are unable to find that in the facts of this case, that the case set up by the second respondent was a patently feeble legal argument. Again, following what this Court held in *Mobilox (supra)*, we do not have to go CA NO. 2199/ 2021 to the extent of finding that the second respondent is likely to succeed. Still further, finding guidance from *Mobilox (supra)*, the examination of the merits need not transcend the limited extent which we have undertaken which is to find that the case of the second respondent is not to be brushed aside as spurious, hypothetical or illusory. We cannot find that the dispute as projected by the appellant on behalf of the second respondent does not exist. In the teeth of the emails which we have adverted to, and the inference sought to be drawn in particular as also the Lab Reports produced, no doubt, from the second respondent's Labs, we cannot also find that the case of the corporate debtor is wholly unsupported by evidence. As to the acceptability of these materials and the weight to be attached to them, needless to say, we have not pronounced on the same".*

*" 60. When we speak about evidence, we must not overlook the law laid down in *Mobilox (supra)* that the court need not be satisfied that the defense is likely to succeed. The standard, in other words, with reference to which a case of a pre-existing*

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*dispute under the IBC must be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit. Once this subtle distinction is not overlooked, we would think that the NCLAT has clearly erred in finding that there was no dispute within the meaning of the IBC”.*

11. In **M/s S.S. Engineers vs Hindustan Petroleum Corporation**, cited by Ld.Sr. Counsel for the Corporate Debtor, the Hon’ble Apex Court discerned the following :-

*“ 20. The correspondence between the parties evince the existence of real dispute, particularly the letter dated 02.01.2014 from HBL to the appellant stating that the appellant had inter alia raised improper invoices for materials not supplied and had failed to effect supplies and complete work within a stipulated period; debit note dated 03/01/2014 raised by HBL in respect of consumption by the appellant of spares and consumables from the warehouse of HBL; letter dated 11.04.2014 from HBL to the appellant, inter alia, contending there was no payment outstanding from HBL to the appellant and claiming that a sum of Rs. 1.49 Crores was due from appellant to the HBL excluding consequential losses; an email dated 07.05.2014 from HBL to the appellant declining to release money claimed by the appellant on the ground of poor quality of work and breaches of the terms and conditions of the Purchase Order.*

*21. Going by the test of existence of a dispute, it is clear that HBL had raised a plausible defence. It was not for the Adjudicating Authority to make a detailed examination of the*

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*respective contentions and adjudicate the merits of the dispute at this stage.*

12. In the case at hand, it is quite discernible that:
- (i) Admittedly a demand notice under section 8 was issued to the Corporate Debtor by the Operational Creditor on 07.02.2020 which was duly served upon the Corporate Debtor and acknowledged by the Corporate Debtor.
  - (ii) Evidently and irrefutably, prior to its receipt, one Mr. Manish Lakhotia, on behalf of the Corporate Debtor complained about the quality of goods/materials supplied by the Operational Creditor, which factum of supply of inferior quality materials was never denied and disputed by the Operational Creditor.
  - (iii) Such Notice dated 07.02.2020 was responded to by the Corporate Debtor through its lawyer on 15/02/2020 alleging supply of spurious materials and raising other allegations.
  - (iv) In the teeth of the WhatsApp messages adverted to earlier, and the inference likely to be drawn therefrom, as well as other supporting documents, we cannot hold that the defence of the Corporate Debtor is unsupported by evidence.
  - (v) Further, the Corporate Debtor lodged complaints to the Police Authorities etc. on 12/08/2019 (prior to receipt of section 8 notice) alleging Criminal Breach of Trust, deception etc. against the Operational Creditor.
  - (vi) The Operational Creditor also lodged complaint under section 156(3) of Cr.P.C. before the ACJM, Barasat against the Corporate Debtor and *vice versa*, the Corporate Debtor filed a

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case under section 419/420 of IPC against the Operational Creditor in 2019.

(vii) The dispute raised by Corporate Debtor was in regard to supply of materials of inferior quality by the Operational Creditor. It stands never denied by the Operational Creditor, which allegation cannot be brushed aside as spurious, hypothetical and illusory.

13. It is trite, axiomatic and settled law that in section 9 application under the IBC, the Adjudicating Authority will only determine:

- (i) Whether there is an operational debt;
- (ii) Whether the documents show that the debt is due and payable, and has not been paid;
- (iii) The existence of disputes between the parties before receipt of demand notice of unpaid operational debt;
- (iv) Mere acceptance of goods by the buyer (here the Operational Creditor) cannot prevent it from raising a dispute;
- (v) This Adjudicating Authority is also not required to make an investigation to the extent of finding whether the Corporate Debtor is likely to succeed;

14. In view of the discussions (supra), we infer that a dispute prior in time was raised by the Corporate Debtor, before receipt of section 8 notice from the Operational Creditor and therefore the provisions of Section 9 (5)(ii)(d) of the IBC would come into play.

15. In view of the discussions supra, we are constrained to hold that this application under section 9 of IBC is not maintainable. Accordingly this

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petition is **dismissed**.

16. In view of the dismissal of CP, the application IA (IBC) 230/KB/2021 and its prayers cannot sustain and therefore, the IA stands rejected.
17. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**(Balraj Joshi)**

**Member (Technical)**

**(Bidisha Banerjee)**

**Member (Judicial)**

Order signed on the 13<sup>th</sup> day of January, 2023

*P.J.*