

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 332 of 2020

(Arising out of Order dated 12th February, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata, in C.P. (IB) No.- 1422/KB/2018).

IN THE MATTER OF:

**1. Hindustan Petroleum Corporation Ltd.
Through Power of Attorney Holder
Sh. Ramesh Chandra Bagh,
Deputy General Manager – Delhi
Retail Regional Office**

**Registered Office: Petroleum House,
17, Jamshedji Tata Road,
Churchgate,
Mumbai – 400020**

And

**North Zone Office: 7th Floor, Scope Minar,
Laxmi Nagar District Centre,
Delhi – 110092.**

...Appellant No. 1

**2. Mr. Rakesh Misri
Director (suspended) of HPCL Biofuels Ltd.**

**Registered Office: Hindustan Bhavan,
8, Shoorji Vallabhdas Marg,
Mumbai – 400001.**

**And Residence at: Framroz Court,
Flat No. 24, 5th Floor,
Marine Drive,
Mumbai – 400020**

...Appellant No. 2

Versus

**1. M/s. S.S. Engineers
A Sole Proprietorship concern through Sole
Proprietor**

**Registered Office: J-179, MIDC, Bhosari,
Pune – 411026**

...Respondent No. 1

**2. HPCL Biofuels Ltd.
Through Mr. Nitesh Kumar More,
Interim Resolution Professional,**

Registered Office: 18,

**Rabindra Sarani Poddar Court,
Gate No. 1, 7th Floor,
Room No. 701,
Kolkata 700001**

**Also at: House No. 9,
Shree Sadan, 1st Floor Patliputra Colony,
Patna – 800013.**

...Respondent No. 2

Appellants: Mr. Ramji Srinivasan, Sr. Advocate along with Mr. Ishaan Chakrabarty, Mr. Vivek Pandey, Mr. Shivkrit Rai, Mr. Abir Roy, Harshapreetha & Mr. T. Sundar Ramanathan, Advocates.

Respondents: Mr. Ratnako Banerjee Sr. Advocate along with Mr. Avinash Das, Ms. Sakshi Kapoor, Mr. Ranjit Singh, Mr. Swatarup Banerjee, Ms. Pooja Sethi & Mr. Amar Singh, Advocates for R-1.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 12.02.2020 in CP (IB) No. 1422/KB/2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata), ‘M/s. Hindustan Petroleum Corporation Ltd.’, preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as the ‘**Code**’). By the Impugned Order, the Learned Adjudicating Authority has allowed the Application preferred by ‘M/s. S.S. Engineers & Anr.’ (hereinafter referred to as the ‘Respondent/‘Operational Creditor’), and observed as follows:

“16. Thus, considering the legal framework as a whole, i.e., provisions of section 3(23) along with other provisions of the IBC, 2016, in our considered view, in the present context, the term "person" in our considered view would include sole proprietorship firm as well being eligible to file petition under section 7 or 9 under IBC 2016. We further observe that these aspects and legal provisions were not argued in cases relied on by the Corporate Debtor while deciding the issue as regards to maintainability of the application

by the sole proprietorship firm, hence, we most humbly submit that such decisions are not applicable.

17. As regards the pre-existing dispute, we have gone through all the facts stated by the Corporate Debtor but having regard to the quantum of claim in respect of supplies order, in our considered view, the amount of disputed claim due and payable will be more than Rs. One lakh in any case. Hence, such claims do not help the case of Corporate Debtor in substantial manner. Having said so, we would further refer to the provisional statement attached with the letter of the Corporate Debtor dated June 25, 2014 copy of which has been placed at Page 1779 of Vol. 10 of the paper book to find as to what is the factual position as per the stand of Corporate Debtor on various issues. As per this provisional statement, the total purchase order value has been shown as Rs. 3818.72 lakhs. There have been several deductions including for services provided by Corporate Debtor to the Operational Creditor in the execution of the contract, entry tax, TDS, WCD, payment to parties/ payment to Operational Creditor by the Corporate Debtor / sub-vendors and subcontractors/vendors of the Operational Creditor. These are normal deductions as per business practice and terms of contract. However, it is noteworthy that Liquidated Damage @ 5% amounting to Rs. 190.94 lakhs, Performance Bank Guarantee to the tune of 673.6 lakhs, work claim of Rs. 352.00 lakhs for boiler house extension P.O. finalisation and additional work 71 lakh have also been considered. The net effect has been worked out by Corporate Debtor as Rs. 500 lakhs receivable from the Operational Creditor. If the boiler house extension and additional work are ignored, the amount recoverable from the Operational Creditor gets reduced to 63.13 lakhs. Further, if the amount retained for Performance Bank Guarantee is taken into consideration, then the amount payable to Operational Creditor works out at Rs. 610.23 lakhs (i.e., 673-63.13). As noted earlier, L.D. Is applicable @5% amounting to Rs. 190,94 lakhs has already been deducted. Further, amount of Rs. 400.55 lakhs in respect of Purchase Orders issued at the risk and cost of the vendor have also been deducted. Thus, all recoveries for non-performance/default has been considered and therefore, amount of Performance Bank Guarantee minus recovery i.e., 610.23 lakhs at least becomes payable by Corporate Debtor to the

Operational Creditor. As an adjudicating authority in the proceedings, we are not suppose to do this kind of working, but to find out the genuineness of the claim of pre-existing dispute, and amount of outstanding debt, it was necessary in the facts and circumstances of the case, hence, it has been so analysed on the basis of the provisional statement prepared and filed by the Corporate Debtor itself. At the cost of repetition, we again state that this statement takes into consideration all these disputes raised by the Corporate Debtor, hence, the amount payable by the Corporate Debtor remains in positive which is more than one lakh ultimately that too when we have considered the project as a whole against the claim of Operational Creditor of undisputed dues of supply portion only. We have also gone through the emails which have been taken into consideration while preparing this provisional statement. Hence, on the basis of material on record, it cannot be said that any other dispute remains to be considered. Apart from this, the fact which is crucial to note is that the Corporate Debtor has awarded new work orders to the Operational Creditor subsequently which means that all the disputes relating to this contract had been considered/resolved and this fact has remained undisputed. Further, Form "C"s have been issued as late as up to March 2018. We further make it clear that we have analysed the provisional statement with limited objective of admissibility of this application and this analysis cannot be considered as expression of opinion on the amount of claim in any manner which may be actually due and payable."

(Emphasis Supplied)

2. **Submissions of Learned Counsel appearing on behalf of the**

Appellant:

- It is strenuously argued that the Application for initiation of CIRP is 'barred by Limitation' as the last payment was made by the 'Corporate Debtor' on 07.11.2013, the Demand Notices were issued on 30.08.2017 and on 25.07.2018 and the Application was filed on 05.10.2018.

- The various Form-C's issued by the 'Corporate Debtor' would not amount to an 'Acknowledgement of Debt' so as to extend the period of limitation, as the Form-C's were issued for the purpose of paying concessional rate of tax under CST Act, 1956 and the rules made therein. Form-C does not meet the requirement of an 'Acknowledgement of Debt' in writing for the purpose of Section 18 of the Limitation Act, 1963 as there is no conscious admission of the liability to pay and the commitment towards the liability. In support of this contention, the Learned Counsel placed reliance on the following Judgements:
 - *'Reunion Electrical Manufacturers (P) Ltd.'* (2006) 70 SCL 52 (Bom);
 - *'Taipack Limited' Vs. 'Ram Kishore Nagar Mal'*, 2007 (3) ARB LR 402 (Delhi)
 - *'Alliance Paints and Varnish Works Pvt. Ltd.' Vs. 'Hari Kishan Gupta'* (2010) 168 DLT 591
 - *'Zion Steel Limited' Vs. 'Subtleweigh Electric (India) Pvt. Ltd.'* (2014) 1 HCC (Cal) 284.
- The project was a turnkey project and the bifurcation given in the said Purchase Order was for the purpose of calculation of tax and not otherwise. The said Purchase Orders were under the same tender and the disputes which arose were under the same tender. The Adjudicating Authority failed to take note that the Purchase Order and the tender documents provide for a turnkey based project.

- It is contended that there is a 'Pre-Existing Dispute' between the parties as the first Respondent failed to honour the terms of the Purchase Order and its terms and conditions and delayed the supply of material, failed to deploy completion contractors, delayed the execution of the project and rendered inferior and substandard quality of work and finally withdrew from the Project abandoning the site as can be seen from the correspondence and the Minutes of the Meetings held with the 'Operational Creditor'. In support of his contention, the Learned Counsel placed reliance on Annexure 8 and Annexures 16-93.
- It is on account of abandoning of the project by the 'Operational Creditor' that the 'Corporate Debtor' had suffered huge losses and made excess payments to the sub-contractors. The 'Corporate Debtor' had cleared all outstanding dues in a timely manner as was agreed to by the first Respondent in the Minutes of the Meetings.
- The 'Corporate Debtor' invoked the Arbitration clause seeking to refer the 'disputes for adjudication by an Arbitrator'. Two Demand Notices were issued by the first Respondent one on 30.08.2017 and the other on 25.07.2018, both raised a demand for payment in relation to the very same 8 Purchase Orders seen in the letter dated 09.07.2016. The Learned Counsel placed reliance on the ratio of Hon'ble Supreme Court in the following Judgments:
 - '*Mobilox Innovations (P) Ltd.*' Vs. '*Kirusa Software (P) Ltd.*' (2018) 1 SCC 353.
 - '*K. Kishan*' Vs. '*Vijay Nirman Co. (P) Ltd.*' (2018) 17 SCC 662.

- The Application for initiation of CIRP is not properly authorised as the business of the sole proprietorship is not a legal entity.
- The 'Corporate Debtor' acts as the extended limb of the Central Government and cannot be put under CIRP.

3. **Submissions of Learned Counsel appearing on behalf of the Respondent/'Operational Creditor':**

- Learned Counsel strenuously contended that the work is divided into three parts **(a)** supply **(b)** works contract **(c)** services. He contended that the C Forms/Sales Tax declaration were given for the entire supply portions and this amounts to liability and admission as stipulated under Section 18 of the Limitation Act, 1963.
- Learned Counsel placed reliance on the Judgement of the Hon'ble High Court of Andhra Pradesh in **'M/s. Electroflame Ltd. Hyderabad' Vs. 'M/s. Mittal Iron Foundry Private Limited' 1998 (2) APLJ 6 (HC)** wherein it was held that submission of Form-C is a significant element itself as the same signifies a jurat relationship between the parties. He submitted that when liability is shown in the Balance Sheet, it itself is a clear 'Acknowledgement of Debt' by the Company and has the effect of extending the period of limitation under Section 18 of the Limitation Act, 1963. It is also contended that the Balance Sheets of the 'Corporate Debtor' has not been placed on record.
- The tender conditions provide that C Forms will have to be issued for the supply portion. The Learned Counsel drew our attention to the 8 Purchase Orders to show that there is a clear breakup of the 'supply'

portion, 'works contract' portion and the 'services' portion and further submitted that the issuance of C Forms from the period 11.03.2015 to 27.03.2018 is an act of admission of the supply of machinery as also of their value and amounts to 'part payment' of the total consideration and hence, the Application is not 'barred by Limitation'.

- It is contended that there is no 'Pre-Existing Dispute' and the letters relied upon by the Appellants to urge 'Pre-Existing Disputes' are all prior to the letter dated 25.06.2014 in which an unascertained sum is claimed as damages by the 'Corporate Debtor'. In the provisional Financial Statement given by the 'Corporate Debtor', there is a clear admission of debt owed to the 'Operational Creditor'. The unascertained sum which is sought to be adjusted against the bill amount is a counter claim for alleged damages and cannot be adjusted against the admitted claim. Further, there is no defense as against the sum which has been retained against the Purchase Orders.
- The Arbitration Notice issued on 09.07.2016 was for the recovery of the amount as there was an Arbitration clause in the tender and does not in any manner bar any initiation of Insolvency Proceedings. The 'Corporate Debtor' did not reply to the Notice dated 09.07.2016. There is also no Reply to the first Notice under Section 8 of the Code, which is dated 30.08.2017. The second Notice was replied to by letter dated 07.08.2018, in which counter claim for damages was made which is wholly a malafide and a frivolous attempt by the 'Corporate Debtor' and is also otherwise 'barred by Limitation'.

Assessment:

4. A perusal of the 'Tender Enquiry' dated 27.06.2012, the 'Instructions to bidders', 'General Conditions of Contract' and 'Special Conditions of Contract', show that the tender is for *'design, engineering, manufacture, procurement, supply, transportation to site, transit and storage, insurance, storing at site, project management, civil work, mechanical works, electrical works, instrumentation work, erection, installation, interfacing, testing, commissioning, performance testing, putting into successful commercial operation and handing over additional equipment goods, and material centrifugal section including civil foundation for enhancing the boiling house capacity from 1750 TCD to 3750 TCD on Lumpsum Turnkey Basis including civil foundation work'*. It is an admitted fact that the 'Operational Creditor' was awarded another work on 13.06.2013 and on 08.08.2013 all on a 'lumpsum turnkey basis'.

5. It is seen from the subject matter of the tender that the execution of the Project is on a lumpsum turnkey basis, whereby and whereunder the contractor was responsible for the entire execution of the work in accordance with the specifications and to the satisfaction of the 'Corporate Debtor'. Clause 5.1 of the General Condition of Contract stipulates that 'as soon as the work is completed in all respects, the contractor shall give Notice of such completion to the site in charge and within 30 days of receipt of such Notice, the site in charge shall inspect the work and furnish the contractor with a certificate of completion indicating, the defects, if any, and the date of completion'.

6. For better understanding of the case, the Purchase Order dated 15.10.2012 (Annexure-2) is reproduced as hereunder:

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(38) ANNEXURE-2

Exhibit- 'C'

B 2-8



एचपीसीएल बायोफ्यूलर्स लिमिटेड
(हिन्दुस्तान पेट्रोलियम कॉर्पोरेशन लिमिटेड के पूर्ण स्वामित्व वाली सहायक कम्पनी)
HPCL BIOFUELS LIMITED
(A wholly owned subsidiary company of Hindustan Petroleum Corporation Ltd.)

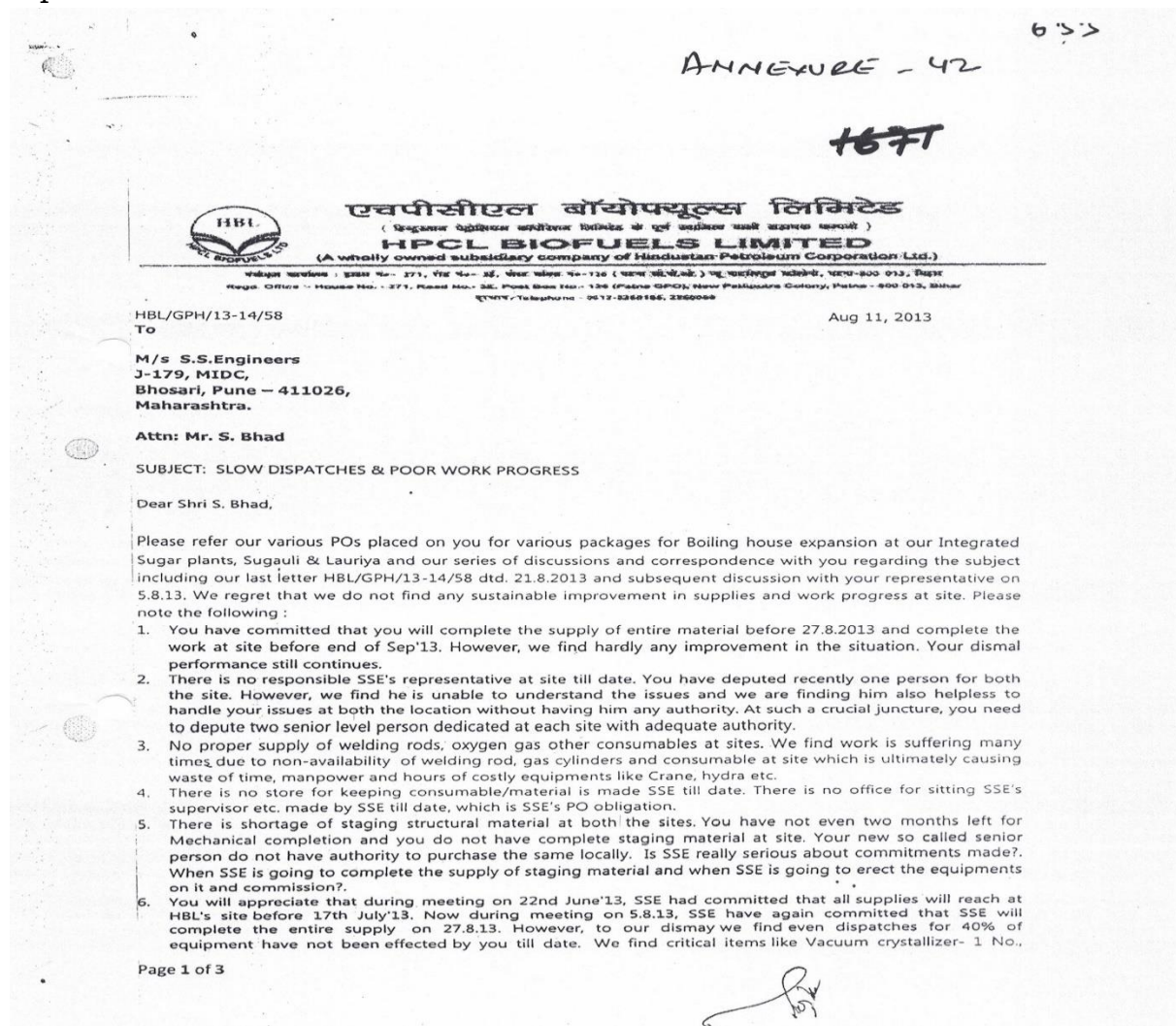
पंजीकृत कार्यालय : हाउस नं०-271, रोड नं०- 3ई, पोस्ट बॉक्स नं०-126 (पटना जी.पी.ओ.) न्यू पाटलिपुत्रा कॉलोनी, पटना-800 013, बिहार
Regd Office House No -271, Road No. - 3E, Post Box No.-126 (Patna GPO), New Patliputra Colony, Patna - 800 013, Bihar
दूरभाष / Telephone - 0612 - 2260185, 2260069

PURCHASE ORDER						
Vendor Name & Address: S.S. ENGINEERS J-179, MIDC, BHOSARI, PUNE - 411026, MAHARASHTRA.			VENDOR COPY PO No: PO/HBL/12-13/083 Date: 15/10/2012 Type of PO: NORMAL Vendor Ref: HBL/TEN/12-13/07RF, DTD. 27/06/2012 Material Code: LPR Ref: HBL/PATNA/12-13/03, DTD. 25/05/2012			
Attn:	Mr.	S.S. BHAD				
TITLE:		Design, Engineering, Manufacture, Supply, Erection & Commissioning of additional equipment of Centrifugal Section including civil foundation work in the Boiling house section at HPCL Biofuels Limited Plant at Lauriya.				
LOT REF		N2, DTD. 03/09/2012				
Item no	Description	Quantity	Unit	Rate (Rs./unit)	Total Amount including taxes, Duties & levies (Rs)	Remarks
1	Design, engineering, manufacture, procurement, supply, transportation to site, transit and storage, insurance, storing at site, project management, civil work, civil foundation work, mechanical works, electrical works, instrumentation work, erection, installation, interfacing, testing, commissioning, performance testing, putting into successful commercial operation and handing over additional equipments, goods, and material, essential spares as listed complete in all respect on Lumsun Turnkey basis for enhancing the capacity of Centrifugal Section for enhancing the capacity of Boiling house from 1750 TCD to 3500 TCD at Lauriya as per the attached tender documents.	1	Lumpsum /Turnkey	18406586.00	18406586.00	INCLUSIVE OF TAXES, DUTIES AND LEVIES.
Sr No.	Detailed break up including tax is given below					
1	Supply Portion				15701186.00	
3	Works contract portion				1581800.00	
	Service portion				1123600.00	
	Total				18406586.00	
Sr No.	CENVAT Credit & Input Tax Credit break up is given below					
1	CENVAT Credit				1878720.00	
2	Input Tax Credit				327866.00	
Total Value of PO:		₹. One Crore Eighty Four Lakhs Six Thousand Five Hundred and Eighty Six only				
Delivery Period / Completion period:		Five months from the date of above referred LOI				
Delivery Location:		HBL Plant Lauriya at Village Lauriya, Lauriya-Bagaha Highway, Dist-West Champaran, Bihar - 845453.				
Delayed Delivery:		As per tender terms (enclosed)				
Payment terms:		Shall be as per the payments terms (section B) of the above referred tender.				
Taxes & duties:		Included as per tender sections, terms & Conditions (enclosed)				
Excise Duty & Cess & Freight:		Excise Duty & CST Extra at prevailing Rate				
Entry tax:		Included as per tender sections, terms & Conditions (enclosed)				
Third Party Inspection:		As per tender terms (enclosed)				
Others:		Other terms and conditions / attachments are as per the above mentioned Tender no. HBL/TEN/12-13/07RF Dated 27/06/2012				
Note:		All prebid reply, tender terms & conditions, sections of the tenders, all correspondences/letters ending with the LOI date shall be the part of this contract.				
Note : Please mention PO Number, Date, Vendor code, Material codes on all correspondence/invoice/delivery challan.						

Authorized Signatory
HEAD PURCHASE

7. It is seen from the Purchase Order that there is a detailed breakup, as stated by the Counsel for the first Respondent, of the 'supply' portion, 'works contract' portion and 'services' portion. However, the fact remains that the description of the tender read together with the General Conditions of the Contract and Special Conditions of the Contract establish that it is a lumpsum turnkey based contract.

8. It is the case of the 'Corporate Debtor' that the 'Operational Creditor' had delayed the performance of his obligations and the same was brought to the Notice of the 'Operational Creditor' vide Letter dated 11.08.2013. For better understanding of the case, the subject letter dated 11.08.2013 is reproduced as hereunder:



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1672

Evaporator-3 Nos, Injection pump-2 Nos, Centrifugal M/c- 3 Nos, Condensate heaters- 2Nos, DCH- 5Nos, are yet to be dispatched by you for Sugauli. Similarly, we find critical items like Vacuum crystallizer- 1 No., Evaporator-3 Nos, Injection pump-2 Nos, Centrifugal M/c- 3 Nos, Condensate heaters- 2Nos, DCH- 5Nos, are yet to be dispatched for Lauriya.

7. Your senior representative Mr. Katiyar left from site with some assurances for providing four separate teams at each site one each at new pans station, new evaporator sets, old evaporator set and pumps & pipings but no progress. There is no monitoring from SSE's site over existing contractors itself.
8. We find there is no arrangement of power supply made by you at both the site even after almost 10 months after placement of PO. We have permitted to tap up our grid power and DG power on chargeable basis. But we find there is no seriousness on your part to connect the machines and expedite the work.
9. We would once again request you to depute you senior person Mr. Katiyar continuously at site, ramp up material and manpower, if you are really serious about completing the project before 30th Sep'13.
10. Till now you were taking the guise of outstanding payment for not supplying and slow work progress. However after series of discussions and payment reconciliation, it has been made amply clear that there was no outstanding payment with HBL. On the contrary, it is emerged that SSE had taken excess payment from HBL by arm twisting, stopping the supplies and works frequently.
11. As far as your payment as of date is concern, as we have discussed, till 31.7.13, there was no outstanding with HBL. On the contrary there was a recovery from SSE as per revised the payment terms. We have received some bills after 31.7.13, same are under processed and reconciliation. Please be assured that balance payment if any will be released as per the payment terms of PO.
12. Please also note that we find very difficult to contact your senior persons. For ex. Before writing this letter, undersigned tried to speak to all the three senior level people Mr. Bhad, Mr. Katiyar & Mr. Prakash. Left SMS messages. However, none of them bothered to return the call till writing this letter. This indicates of the level of seriousness about the commitments made by SSE.

We once again regret that there is lack of seriousness on SSE's part on fulfilling their PO commitments and commitments made by them during the meetings. It is matter of serious concern that they are not serious about consequential losses which their customer, HBL is going to face on account of their failure.

We once again earnestly request you to take your commitments seriously and not to take us at ransom at this critical juncture. You will appreciate that our huge stake is involved in this project and if you fail to complete the project before Sep'13, consequences will be disastrous. In case of your failure, we may not have any option but to take legal action as deemed fit and recover our losses.

Thanks you.

Truly yours



Gajanan P Hedao
Chief Manager Projects
HPCL Biofuels Limited
Cell No. 9471000270

Cc: M/s MITCON Consultancy & Engineering Services Ltd.
Kubera Chambers, Shivajinagar, Pune - 411005

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9. The issue raised in this Appeal needs to be adjudicated on the touchstone of the ratio laid down by the Hon'ble Supreme Court in a catena of Judgements with respect to 'Pre-Existing Dispute'.

10. It will be relevant to refer to para 51 of the Judgment of the Hon'ble Apex Court in **'MobiloX Innovations (P) Ltd.' Vs. 'Kirusa Software (P) Ltd.'** (2018) 1 SCC 353:

"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 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 a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

11. In the instant case, the correspondence on record evidences that there indeed was a delay in the performance of the Contract and the final Notice was issued on 01.12.2013 by the 'Corporate Debtor' to complete the works. The letter dated 02.01.2014 is detailed as follows:

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ANNEXURE-60



एचपीसीएल बायोफ्यूल्स लिमिटेड

HPCL BIOFUELS LIMITED

(A wholly owned subsidiary company of Hindustan Petroleum Corporation Ltd.)

पंजीकृत कार्यालय - प्लॉट नं. 171, पंच नं. 38, पंच नं. 134 (पंच नं. 134) नं. पंचनगर, पंचनगर, पंचनगर-400 013, भारत
Regd. Office - House No. 171, Road No. 38, Post Box No. 134 (Panch Nagar Colony), New Panch Nagar Colony, Pune - 400 013, India
दूरभाष - टेलीफोन - 020-220766, 220767

HBL/GPH/13-14/86

January 2, 2014

To

M/s S.S.Engineers
J-179, MIDC,
Bhosari, Pune - 411026, Maharashtra.

Attn: Mr. S.B.Bhad

SUBJECT: BOILING HOUSE EXPANSION WORK AT SUGAULI & LAURIYA- POOR PERFORMANCE

REFERENCE: VARIOUS PO PACKAGES RELATED TO BOILING HSE EXPANSION

- 1.. PO/HBL/12-13/090 DTD. 1/11/2012, JUICE HEATER & EVAPORATOR SECTION AT SUGAULI
- 2.. PO/HBL/12-13/092 DTD. 1/11/2012, PAN & CRYSTALLIZER SECTION AT SUGAULI
- 3.. PO/HBL/12-13/084 DTD. 15/10/2012, CENTRIFUGAL SECTION AT SUGAULI
- 4.. PO/HBL/13-14/100, DTD. 08/08/2013, ADDITIONAL JOB OF BOILING HSE AT SUGAULI
- 5.. PO/HBL/12-13/091 DTD. 15/10/2012, JUICE HEATER & EVAPORATOR SECTION AT LAURIYA
- 6.. PO/HBL/12-13/093 DTD. 15/10/2012, PAN & CRYSTALLIZER SECTION AT LAURIYA
- 7.. PO/HBL/12-13/083 DTD. 15/10/2012, CENTRIFUGAL SECTION AT LAURIYA
- 8.. PO/HBL/13-14/101, DTD. 08/08/2013, ADDITIONAL JOB OF BOILING HSE AT LAURIYA

Dear Sir,

Please refer our letter HBL/GPH/13-14/61 dtd 8.12.13 and our various earlier letters, e-mail correspondence and minutes of meetings. As already conveyed to you that you have not carried out the work due diligently in all the aforesaid PO packages which were awarded to you for expansion of Boiling house capacity at our both the locations Sugauli and Lauriya. We regret very much that you have been continuing to do the same inspite of our several warnings to you, resulting in inordinate delays and losses to us. As already conveyed to you, please once again note the following:

1. You have been raising the issue of so called outstanding payment. However, same has been made clear to you several times that payments are being made by us as per the PO terms in stipulated time. We have sent you the payment statements and proved many times that your claims of outstanding payments are false. We have noted with serious concern that you have not been honouring your offered payment terms which are reflecting in PO.
2. You were supposed to raise the bills on monthly basis as per PO clause 7.b of GTC. As per completion schedule, you should have not raised more than five bills/invoices for each package. However you have not followed the same and raised several bills/ invoices, raising partial invoices for incomplete equipments in several stages. This has resulted in voluminous reconciliation and



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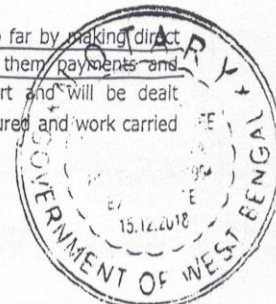
Certified to be True Copy

For S.S. ENGINEERS

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- complications at every stage of work. This proves your financial incapability and violation of clause no. 1 of Part B of ITB where financial capability was pre-requisite condition to quote.
3. You have not submitted bank guarantees which was committed by you in your original offer and same was the payment terms of original PO. Finally you have compelled us to change the payment terms as suitable to you. Even after change of PO terms, you have kept dishonouring the same and hold supplies/ work at every stage in guise of so called pending payments, which has finally resulted inordinate delays and slippages on your part.
 4. Your bank guarantees against security deposits are expired but you have not renewed the same inspite of our repeated follow ups and warnings to you.
 5. Completion period of various packages was between 3-5 months from date of LOI of respective POs. However you have failed to complete the supply and work in all the packages of new equipments even after lapse of more than a year causing huge losses to us.
 6. As per the clause 29.3 of terms and condition for erection and commissioning of PO, providing electric power for construction was in your scope. However, you could not provide the same during entire execution of work till date. Finally, to get the work progressing in the interest of project, we had to provide you the erection power also on risk and cost basis. It is pertinent to note that you have not even provided cables to connect the electric power to your erection equipments. You have used the our cables and our electrical team for operating your erection equipments.
 7. As per the clause no. 8.4.3 of POs, you were supposed to submit monthly progress report for initial three months and subsequently every fortnight. We find you have not even submitted single progress report during entire period of execution till date. There was no monthly progress reporting from your side. There was no action plans on your side to mitigate the delays. You have not met a commitment of meeting dead line of completion even for single mile stone which your representative had committed during site review meetings. This proves you have not handle the PO packages awarded to you due diligently, also proves laxity on your part and further proves your incompetency in handling such a turnkey projects.
 8. All neighbouring mills & mills in Bihar have started before 13.12.2012. However you could not complete the work in packages awarded to you till date and could not start our both plants with new equipments supplied by you till date. Finally we had to start our mills with our old equipments at lesser capacity on 23rd Dec'13 & 24th Dec'13 respectively.
 9. You have made incomplete supplies of many equipments and you have forced us to get the same completed by making direct payment on your risk and cost basis at both the locations For. ex. SS tubes of evaporator set and pans,, Pipe lines, pipe fittings and valves, plates, structure etc. for Evaporators, pans, heaters etc. were supplied incomplete. We were forced to purchase the major portion of balance material on risk and cost basis as you have not supplied the same in time and made us land in crisis at every stage of work. This is gross violation of terms of contract and clear case of backing out on your part. Please note that material procured by us directly or on your advice and payment made directly or on your advise will be debited to you as per the provision of PO including clause no. 5.f of GTC.
 10. You had not supplied more than 70% of SS tubes of evaporator sets and pans till Mid of Nov'13, which was the vital part of major equipments required for sugar manufacturing line. Since there was no response from your side, finally we were forced to procure the same through some other party on risk and cost basis but it was too late as you just kept silent on this. Due this Evaporator sets are still incomplete. This is purely backing out on your part from your PO commitment.
 11. We could complete the erection work of equipments to the extent possible so far by making direct payments to your erection contractors as you had turned down to make them payments and compelled us to make the same directly. This is backing out on your part and will be dealt appropriately by us as per the provision of PO. Please note that material procured and work carried



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- out by us directly or on your advice and payment done directly or on your advice to your contractors and vendors will be debited to you as per the provision of PO including clause no.5.f of GTC.
12. We find that equipments supplied by you and bought out material like valves, pumps supplied by your vendors are of extremely poor quality. At every stage of erection and commissioning, we have been facing series of issues. Pans supplied by you are still not commissioned due to unmatched outlet flanges, poor quality of erection work, poor project management by you, your poor supervision and poor co-ordination. There is no one competent at site from your side to co-ordinate with your vendors who supplied bought out items like pumps, valves etc. Please note that co-ordination with your sub-vendors is purely in your scope as per the PO. However skeleton staff provided by you are not even have your sub-vendors contact details to call them for commissioning and take up the issues being faced with them. At every small stage of work, our HBL team has to get involved and get the work progressing. This is the violation of clause 15.1.2 of terms and condition of erection and commission of PO on your part.
 13. Please note that Centrifugal machines supplied by you are still not commissioned. There is no seriousness on your part to complete the pending work and commission them. There is no follow up from your side.
 14. You have provided inadequate manpower for electrical erection work. Still your electric cabling work is not complete. Cable of 1 No. Injection pump motor is laid by our elect. team to start the same. No cables have been laid to another pump till date. Similarly cabling work for many equipments are still balance at both the locations. We had to deploy additional manpower on your risk and cost basis for getting work progressing. This is the violation of clause 1.2 of SCC of PO.
 15. Electrical Panels supplied by you are of poor quality. You have forced our consultant for to give you unconditional clearance but now we find there are several anomalies in panel. Even for heavy motors like Injection pump motors and raw juice pump motors there is no VFD provided. For such a size of motors, as per standard practices VFDs are necessary. You have not even kept provision for integration of MCC panels with DCS system. This is also the violation of clause 1.2 of SSC of PO. Please note that necessary deductions on account of VFDs will be made from your payments.
 16. Raw juice pumps supplied by you are not working at both the sites. We have been operating our old pumps at lesser capacity. Shaft of 1 No. Pump is broken and other pump is tripping frequently at Lauriya. Similarly both the pumps at Sugauli are also not working.
 17. Condenser nozzles supplied by you were not fitting properly at both the locations. We had to modify them by turning in our workshop at both the sites. Please note that none of the Pans is operational till date at Lauriya. Only one pan is on line at Sugauli out of four.
 18. You have not responded our single mail regarding the insulation of equipments and pipe lines provided by you. From this, it is evident that you have backed out from your commitments and you do not have any sensitivity about heat losses and HMBD of the our plants. As there is no insulation over equipments and pipe lines, entire plant is unstable. Considering your backing out and no response, finally we had to arrange the purchase order on some other party on your risk and cost.
 19. You have backed out from supplying instrument cable from MCC to DCS at last moment leaving it into mess. This is violation of clause 1.2 of SCC of PO on your part. As on today, you are silent on the same. You have not even submitted us cable schedule. This proves neither you are serious in completing the work nor rendering your any co-operation to us for doing so.
 20. Erection of your evaporator sets, vertical crystallizers and DCH section are still incomplete. Erection of DCH is not even commenced as on date at both the sites. You have neither supplied the structure for the same nor responded to our mail indicating requirement of the same till date.
 21. There is no compliance of statutory requirements on your part. We find that you do not have any record available with you for wages, PF contributions/ challans etc. for the labourer working under you and your contractors. This is violation of clause 3.13, 3.15 & 6.e.3 of PO.

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22. You have made several defaults and you are least bothered about the completion of work and commissioning of equipments supplied by you even after the lapse of more than a year of award of contracts for new equipments. Hence we find this is the fit case for termination of POs placed on you as per the clause no. 12 of GTC.
23. Please refer clause 23 of SCC "OWNER'S RIGHT TO WITHHOLD PAYMENT", which provides us every right to hold your payment as you have committed default in making short supply and not made the same good, defective supply not rectified by you, defective work not remedied by you and violated statutory norms.

There are several defaults committed by you at both the sites and not completed the work in stipulated time which has caused us huge losses. Considering your non-seriousness, finally, we had to start operating our old equipments and start crushing at low rate though same was not viable to us. We are losing recovery and huge revenue due to low power generation due to low crushing than anticipated.

Please once again note that we have already lost half of the crushing season so far but still most of the equipments supplied by you are not complete and are not ready for commissioning. Please note that we have already given you the notice for commissioning and performance trial. Deadline for commissioning is already over and dead line for performance trial is expiring on 10th Jan'14 & 14th, Jan'14 at Lauriya and Sugauli respectively. Please note that you were supposed to provide us the trial for two pans and other allied equipments during last season itself and performance trial of complete sets in all packages during this season. However, you have failed in your commitment last year and this year also. Hence, please treat this second and last chance and no further chance will be given in case of your failure in completing the work and presenting us successful trial. Please refer clause 21 of SCC of POs.

Please once again note that since there is no seriousness in completing the work on your part and we are running into heavy losses due to laxity on your part, we are forced to get the various work done and procure material on risk and cost basis to minimize the losses. Cost incurred by us will be debited to you as per the provision of purchase order as per clause 5.f of GTC and action as deemed fit will be initiated by us to recover the production losses from you in due course of time on account of delays and other defaults on your part.

Thanks you.

Truly yours

Gajanan P Hedao
Chief Operating Officer



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12. From the aforementioned letter dated 02.01.2014, the Appellant/‘Corporate Debtor’ raised several issues summarized as hereunder:

- Erection and commissioning of electric power was not done.
- No monthly Progress Report was submitted in violation of Clause 8.4.3 of the Purchase Order.
- Not met a single deadline of completion.
- On account of delay in execution, the ‘Corporate Debtor’ had to start their own mills with old equipment and lesser capacity on 23.12.2013 and on 24.12.2013 respectively.
- On account of incomplete supply of equipment, the ‘Corporate Debtor’ was forced to get the same completed by making direct payments, in gross violation of the terms of the contracts.
- Non-supply of 70% of SS Tubes of evaporator and sets and pans.
- Extreme poor quality of the equipment supplied by the ‘Operational Creditor’ namely valves, pumps etc.
- Poor supervision, poor coordination, poor quality of erection work in violation of clause 15.1.2 of the terms and conditions of the contract.
- Centrifugal machines supplied are still not commissioned and no follow up on behalf of the ‘Operational Creditor’.
- Inadequate manpower used for electrical erection work. Raw juice pumps supplied are not working at both the sides.
- Condenser nozzles are not fitted properly at both the locations.
- Violation of clause 1.2 of SCC in terms of non-supply of instrument cables from MCC to DLS.

- Incomplete erection of evaporator sets, vertical crystallizers and DCH sections.
- Lapse of more than one year of award of contract for new equipment and still there are several defects and defaults. Hence, clause 23 of 'owners right to withhold payment' has been invoked.

13. As against these disputes raised, the first Respondent/'Operational Creditor' stated in their Reply that despite several requests and reminder letters from 2013 to 2017, the 'Corporate Debtor', instead of paying the due amounts, raised these baseless allegations and disputes. It is the case of the 'Operational Creditor' that there is no 'Existence of Dispute' prior to the issuance of Demand Notice. In their email dated 08.04.2013, in relation to the Minutes of the Meeting, the 'Operational Creditor' had clarified that work progress is subject to prompt payments. July 31, 2013 was decided as the commissioning date subject to immediate and prompt payment made by the 'Corporate Debtor'. The 'Operational Creditor' had always shown their willingness to commission and perform their obligations and their senior personnel were stationed at the site of the 'Corporate Debtor' and additional staff always visited from time to time. It was only because of pendency of payment of the dues that the 'Operational Creditor' had faced difficulties in executing the ongoing Project. The 'Corporate Debtor' was making *ad hoc* payments but not as per the bills raised. The Learned Counsel relied on the emails dated October 12, 2013, November 2, 2013 and November 14, 2013 to buttress his contention that despite repeated reminders, the 'Corporate Debtor' never responded. The 'Corporate Debtor' engaged contractors on their own to commission the plant after the receipt of all the supplied

material from the 'Operational Creditor' without their approval or consent and made exorbitant payments to such contractors. No consent has been given to the 'Corporate Debtor' to make such payments to the subject contractors directly and therefore such an act was at their own risk. Letters dated May 05th, 2014 and May 07th, 2014 were addressed to the 'Corporate Debtor' seeking supporting documentation of the work undertaken by the contractors engaged by the 'Corporate Debtor', but there was no response. The 'Operational Creditor' only accepted the debit of Rs.1,25,80,121/- against 5% entry tax which was also accordingly been deducted in calculating the principal amount of 'Operational Debt' of Rs.13.69 Crores. Except these debits, none of the debits have been accepted or consented to by the 'Operational Creditor'. It is also their case that fraudulent debit notes were raised by the 'Corporate Debtor' as Purchase Orders were placed with Power Former Engineer for repairs of centrifugal machine, which was never part of the 'scope of work' of the first Respondent.

14. It is strenuously contended by the Learned Counsel that the conduct of the 'Corporate Debtor' in awarding fresh Purchase Order in August 2013 at the fag end of the completion of the previous 6 orders, while at the same time, complaining against their performance, is self-contradictory and goes to show the malafide intention of the 'Corporate Debtor'. It is the case of the 'Operational Creditor' that all equipment supplied was of good quality and all the valves which were procured were from a vendor mandated by the 'Corporate Debtor' only. If the 'Corporate Debtor' was dissatisfied with the quality of work or substandard material supplied, there are no substantial reasons as to why new contracts were awarded at the fag end of the previous

6 contracts. 87% of the material and services were already completed as per the billing breakup and therefore the question of short supply or purchase of additional material by the 'Corporate Debtor' does not arise. It is also vehemently contended that the 'Operational Creditor' was constrained to stop supply to the 'Corporate Debtor' only on account of failure of payments of pending principal dues which amounts to more than Rs.13 Crores. The 'Corporate Debtor' continued to raise various debit notes unilaterally without any supporting documentation, for which the 'Operational Creditor' cannot be held responsible.

15. The 'Operational Creditor' vide email dated 02.02.2014 i.e. one month after the aforementioned letter sought for release of payment. Once again the 'Corporate Debtor' on 04.02.2014 and on 28.02.2014 reiterated the poor performance of the 'Operational Creditor' on account of which huge losses were incurred.

16. On 29.03.2014, it is the case of the 'Corporate Debtor' that the 'Operational Creditor' had abandoned the site and therefore, the 'Corporate Debtor' had to take over the Project and make all the relevant payments to the vendor. The material on record shows that on 28.04.2014 another letter was addressed by the 'Corporate Debtor' to the 'Operational Creditor' citing all the inadequacies in the performance of the contract. On 19.06.2014, the 'Operational Creditor' once again raised the payment for Rs.13.34 Crores.

17. Section 8 of the Code reads as hereunder:

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.

18. It is clear from Section 8(2)(a) that ‘Existence of a Dispute’, (if any, or) record of the pendency of the Suit or Arbitration Proceeding filed before the receipt of such Notice or invoice in relation to such dispute should be brought to the notice of the ‘Operational Creditor’ within 10 days of receipt of the Demand Notice. In this case, the Demand Notice under Section 8 of the Code claiming a sum of Rs.13.69 Crores was issued on 25.07.2018. On 07.08.2018, the ‘Corporate Debtor’ responded to the Demand Notice referring to various communications, Minutes of the Meeting and submitted that there was a ‘Pre-Existing Dispute’. Though we are conscious of the fact that the ‘Corporate Debtor’ responded to the Demand Notice belatedly, the fact remains that the Appellant raised the issue of ‘Existence of a Dispute’ in

their Reply filed before the Adjudicating Authority with all the supporting documents.

19. It is pertinent to note that on 09.07.2016, '*prior to the issuance of the Demand Notice under Section 8 of the Code*', the 'Operational Creditor' invoked Arbitration pursuant to the 8 project orders issued by the 'Corporate Debtor', which itself substantiates the 'Existence of a Dispute'. In the 'Notice' invoking Arbitration, the 'Operational Creditor' has stated that there is an outstanding of Rs.18,12,21,452/- and has further stated that they are ready to settle the disputes through Arbitration. A brief perusal of the documents on record evidence that the 'Operational Creditor' admitted that the contract was on lumpsum turnkey basis and stated in the Arbitration 'Notice' that the 'Corporate Debtor' had raised issues relating to non-adherence of the terms of the contract.

20. The Hon'ble Apex Court in '**K. Kishan' Vs. 'Vijay Nirman Co. (P) Ltd.'** (2018) 17 SCC 662, has observed as follows:

"19. After referring to Section 8, the judgment in Mobilox Innovations case went on to hold that what is important is that the existence of the dispute and/or a suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.

20. The adjudicating authority, therefore, when examining an application under Section 9 of the Code, will have to determine the following: (Mobilox Innovations case, SCC p. 394, para 34)

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

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid

*debt is due and payable and has not yet been paid?
and*

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

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

21. In para 38, this Court cautioned: (*Mobilor Innovations case, SCC*

“38.... We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.”

Finally, the law was summed up as follows: (*SCC p. 403, para 51*)

“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)(ii)(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 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 a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

22. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardise an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the arbitral award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the award. Such a case would clearly come within para 38 of *Mobilox Innovations*, being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in *terrorem* to extract this sum of money of rupees two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.....

27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicatory process under Sections 34 and 37 has taken place."

21. The facts of the present case are being examined in the light of the law laid down by the Hon'ble Supreme Court, though the Learned Counsel for the 'Operational Creditor' has strenuously contended that the issuance of further work orders and the Notice issued by the 'Operational Creditor' invoking Arbitration does not amount to 'Existence of a Dispute', the nature of communication on record with rival contentions clarify the 'Existence of a Dispute' between the parties *prior* to issuance of the Demand Notice. It has been time and again held that 'it is enough that a 'dispute exists' between the parties.

22. The communication between the parties as noted in para 10 read together with the Arbitration invoked by the 'Operational Creditor', we are of the considered view that there is an 'Existence of a Dispute' between the parties which is a genuine dispute and not a spurious, patently feeble legal argument or an assertion of fact unsupported by evidence. Therefore, we are of the opinion that the ratio laid down by the Hon'ble Apex Court in the aforementioned '**Mobilox Innovations (P) Ltd.**' (*Supra*) and '**K. Kishan**' (*Supra*) is squarely applicable to the facts of this case.

23. It is the case of the 'Operational Creditor' that the 'Corporate Debtor' has not filed their Balance Sheets and has categorically raised this issue in their Reply to the Appeal. We are also conscious of the fact that the 'Corporate Debtor' has not filed the Balance Sheets to examine the question of limitation referring to the observations of the Hon'ble Supreme Court in '**Asset Reconstruction Company (India) Limited**' Vs. '**Bishal Jaiswal and Ors.**' AIR 2021 SC 5249 and in '**Dena Bank**' Vs. '**C. Shivakumar Reddy and Ors.**' (2021) 167 SCL 453 (SC). Though both sides have

strenuously argued regarding whether 'C' Forms, issued in acknowledgement of completion of sale, would amount to 'Acknowledgement of Debt' as envisaged under Section 18 of the Limitation Act, 1963, we do not wish at this juncture, to go into those aspects as we are of the considered view that there is a 'Pre-Existing Dispute' between the parties and we allow the Appeal.

24. This Appeal is allowed and the Order of the Adjudicating Authority dated 12.02.2020 is set aside. The Adjudicating Authority will now close the proceedings. The Corporate Debtor is released from all rigours of law and is allowed to function independently through its Board of Directors with immediate effect.

25. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
10th January, 2022

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