



**IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI**

**CP (IB) No.4400/MB/2019**

*[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:

**MANOJ SETH**

S/o Shri Tribuwan Nath Seth

House No.60, 1<sup>st</sup> Floor

Phase-9, Mohali

SAS Nagar-160062

Punjab.

**...Operational Creditor**

*VERSUS*

**LARSEN AND TOUBRO LIMITED**

[CIN: L99999MH1946PLC004768]

L & T House, Ballard Estate

Mumbai- 400001

Maharashtra.

**...Corporate Debtor**

**Pronounced: 24.09.2024**

**CORAM:**

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

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

**Appearances : Hybrid**

Operational Creditor: Adv. Gursat Singh & Adv. Pranav Khanna

Corporate Debtor: Adv. Shyam Kapadia a/w Adv. Rashid Boatwalla &  
Adv. Samiksha Rajput i/b Manilal Kher Ambalal &  
Co.

**ORDER*****[PER: SANJIV DUTT, MEMBER (TECHNICAL)]*****1 BACKGROUND**

- 1.1 This Application bearing C.P.(IB) No. 4400/MB/2019 was filed by Shri Manoj Seth, the Operational Creditor, on 04.12.2019 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 Larsen and Toubro Limited, the Corporate Debtor.
- 1.2 The Operational Creditor and the Corporate Debtor entered into an Employment Contract on 26.03.2013 pursuant to which the Operational Creditor was appointed to the post of Senior Manager (Mechanical) as per the terms and conditions specified in the Employment Contract.
- 1.3 In or around 2017, the Operational Creditor was designated as the Project Manager for the Bharatpur-Gangapur-Hindaun Sewerage Project. A series of incidents occurred at the project site in February and April, 2018 resulting in injury to workers for which the Operational Creditor was asked to tender his resignation. The course of events that followed ultimately led the Operational Creditor to seek relieving from his job from 14.07.2018 and settlement of his employment dues. Since all efforts for amicable settlement of his dues failed, the Operational Creditor issued statutory Demand Notice under Section 8(1) of the Code to the Corporate Debtor on 30.01.2019. The Corporate Debtor replied to the said Demand Notice vide letter dated 23.02.2019.



- 1.4 The present Application was filed as the Corporate Debtor failed to clear the salary and other dues of the Operational Creditor pertaining to the period of his employment. The total debt claimed to be in default is Rs.7,04,508/- (Seven Lakhs Four Thousand Five Hundred and Eight Rupees) comprising principal debt of Rs.6,64,631/- (inadvertently mentioned in the Application as Rs.6,96,660/-) and interest of Rs.39,877/- @12% p.a. from September, 2018 till January, 2019. The date of default mentioned in Part-IV of the Application is 10.09.2018. The Operational Creditor has preferred the present Application seeking the commencement of CIRP in respect of the Corporate Debtor for the default in payment of aforementioned dues.

## **2. AVERMENTS OF THE OPERATIONAL CREDITOR**

- 2.1 The Operational Creditor was employed as Senior Manager (Mechanical) by the Corporate Debtor pursuant to the Employment Contract dated 26.03.2013. Subsequently, the Corporate Debtor implemented the ESOP Cash-Out-Allowance (hereinafter referred to as "ECAL") and Retention Pay Scheme, 2017 aimed at providing certain additional allowances/perquisites to staff/officers in a bid to retain good professional talent. In this regard, the Corporate Debtor *vide* letter dated 19.09.2017 notified the Operational Creditor of his eligibility for the benefits under the said Scheme.
- 2.2 Sometime in 2017, the Operational Creditor was appointed as the exclusive Project Manager for the Bharatpur-Gangapur-Hindaun Sewerage Project. On 23.09.2017, a near-miss incident occurred at the Gangapur Project site. However, no personnel were injured. Given the serious nature of the incident, the Operational Creditor in collaboration with the Corporate Debtor took



various corrective/remedial steps between October, 2017 and March, 2018 including procurement of specialised machinery, conducting safety instruction classes, carrying out mentoring/training exercises, conducting public awareness programmes and recruitment of specialised officers to monitor the project work execution.

2.3 Subsequently, on 08.02.2018 and 21.04.2018, couple of incidents occurred which resulted in injuries to workers. The Senior Management of the Corporate Debtor instructed the Operational Creditor to tender his resignation which was provisionally accepted on 07.05.2018. Following discussions between the Operational Creditor and the Corporate Debtor, the resignation was converted into a suspension lasting approximately 41 days during which the Operational Creditor was directed to stay at the project site. Subsequently, on 23.06.2018, the suspension was revoked and the Operational Creditor was instructed to resume duties after meeting the Senior Management.

2.4 Due to non-clearance of his dues for June, 2018 and non-payment of ECAL and Retention Pay Amount, the Operational Creditor *vide* email dated 06.07.2018 requested the Senior Management of the Corporate Debtor to relieve him from the job from 14.07.2018 and sought full and final payments. Although the purported full and final payments were credited to the Operational Creditor's account on 10.09.2018, certain inconsistencies were noticed and brought to the attention of the management of the Corporate Debtor on 13.09.2018. Subsequently, between 13.09.2018 and 29.11.2018, the Operational Creditor continued follow up with regard to his balance dues, but a representative of the Corporate Debtor informed the Operational Creditor on 26.12.2018 through email that no sums were due and payable to him



consequent to the resignation and that the Operational Creditor was free to take legal recourse.

- 2.5 In these circumstances, the Operational Creditor was left with no option but to issue the statutory Demand Notice to the Corporate Debtor under Section 8(1) of the Code on 30.01.2019. The Corporate Debtor provided a summary response to the said Demand Notice *vide* letter dated 23.02.2019 and stated that no payments were due and payable to the Operational Creditor. The Corporate Debtor's response to the Demand Notice did not meet the requirements of Section 8(2) of the Code. The Corporate Debtor neither raised any pre-existing dispute nor provided evidence of payment of salary dues to the Operational Creditor's bank account. The amount claimed to be in default in the Application consists of salary for the month of June, 2018; ECAL of Rs.83,000/-; Retention pay of Rs.4,42,500/- from July, 2017 to June, 2018 and notice period payment. The default occurred on 10.09.2018 when instead of the claimed amount of Rs.7,04,508/-, a meagre sum of Rs.25,073/- was paid to the Operational Creditor by the Corporate Debtor in full and final settlement of his dues. In the above circumstances, the Operational Creditor prays that CIRP may be ordered for the unpaid operational debt by the Corporate Debtor.

### **3. CONTENTIONS OF CORPORATE DEBTOR**

- 3.1 The Corporate Debtor in its Affidavit-in-Reply dated 31.08.2021 has opposed the Application mainly on the grounds that there is no debt due and payable by the Corporate Debtor to the Operational Creditor and that there is a pre-existing dispute with regard to the claim amount raised well before the issuance of Demand Notice by the Operational Creditor.



3.2 The Corporate Debtor received the Demand Notice on 15.02.2019 seeking payment of an amount of Rs.8,55,270/-, inclusive of Rs.6,96,660/- along with notice period recovery amounting to Rs.1,24,267/- and interest of Rs.34,345/- @ 12% p.a. from September, 2018 to January, 2019. The Corporate Debtor responded to the said Demand Notice on 23.02. 2019. It is pertinent to note that prior to the issuance of the Demand Notice, the Operational Creditor had sent a legal notice dated 05.01.2019 demanding Rs.7,28,480/- comprising ECAL of Rs.83,000/-, Retention amount of Rs.4,42,000/-, notice period recovery of Rs.87,480/- and salary of Rs.1,23,000/- for the period from 24.05.2018 to 23.06.2018. The Corporate Debtor responded to the said legal notice on 25.01.2019. This shows that the Corporate Debtor on multiple occasions prior to the receipt of the Demand Notice explicitly disputed the claim amount of the Operational Creditor. For example, the Corporate Debtor has *vide* its correspondences dated 01.11.2018, 30.11.2018 and 26.12.2018 informed the Operational Creditor that in light of his resignation, he was not entitled to ECAL or Retention Pay as per the letter dated 19.09.2017 read with Clause 15 of the Employment Contract. Therefore, it is evident that a dispute existed between the parties well before the issuance of the Demand Notice on 30.01.2019. Hence, based on this aspect alone, the Application is liable to be dismissed. Reliance is placed on the judgment of the Hon'ble Apex Court in ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd [(2018) 1 SCC 353]***. It is a settled position in law that pre-existing dispute is enough for rejecting an application under Section 9 of the Code filed by the operational creditor, as held by the Hon'ble NCLAT in ***Gajendra Parihar vs. M/s Devi Industrial Engineers and Anr. [2020 SCC OnLine NCLAT 274]***.



- 3.3 The Corporate Debtor refers to Clause 15 of the Employment Contract dated 26.03.2013 which governs the termination of the contract. This clause stipulates that either party may terminate the contract by providing three months' written notice, with the option for the Company/Corporate Debtor to pay three months' salary in lieu of notice. If the employee gives a notice period shorter than three months, the Company/Corporate Debtor reserves the right to adjust any accrued leave or recover any shortfall in notice pay. Further, the Company/Corporate Debtor retains the discretion to terminate the contract without notice or salary in lieu thereof, if it deems the employee's continued employment to be detrimental to its interests. In such cases, all benefits and allowances shall stand forfeited and the employee would be entitled to receive only statutory benefits as applicable at the time of termination. Simultaneously, the Corporate Debtor had addressed a letter to the Operational Creditor on 26.03.2013 outlining the terms and conditions regarding sanction of ECAL and Retention Pay which entitled the Operational Creditor to quarterly ECAL payments and an annual Retention Pay. It was explicitly stated in the said letter that in the event of the Operational Creditor resigning or abandoning or terminating or giving cause for termination or leaving or disassociating in any manner prior to the date of payment of ECAL and Retention Pay, the said payments shall be forfeited. Thereafter, the Corporate Debtor issued another letter to the Operational Creditor dated 19.09.2017 with respect to ECAL and Retention Pay by which ECAL payment and Retention Pay were revised to Rs.83,000/- (payable at the end of each quarter) and Rs.17,70,000/- (25% of the amount to be disbursed annually in a span of 4 years ending on 30.06.2021) respectively. The said letter also made it clear that all future



payments due on account of ECAL and Retention Pay shall be forfeited for employees who resign and/or are serving notice period on or before the date of payment of ECAL and Retention Pay.

- 3.4 It is admitted that while the Operational Creditor was in charge of various sites for Bharatpur-Gangapur-Hindaun Project areas, safety lapses took place on three occasions viz., 23.09.2017, 08.02.2018 and 21.04.2018. While warnings were issued after the initial incidents, the third lapse resulting in serious injury to workers was not promptly reported by the Operational Creditor. Later, while assuming responsibility in relation to the safety lapses, the Operational Creditor tendered his resignation on 24.04.2018 which was accepted by the Corporate Debtor on 07.05.2018. Considering the representations made by the Operational Creditor, he was placed under suspension by the Corporate Debtor *vide* its email dated 14.05.2018. During suspension, the Operational Creditor was being investigated for the safety lapses at site and was informed in clear terms *vide* its email dated 14.05.2018 that no remuneration would be paid to the Operational Creditor for the period of suspension and further that any such payment would be subject to the final decision of the Corporate Debtor.
- 3.5 However, upon review, the suspension was revoked on 23.06.2018 allowing the Operational Creditor to resume duties. Thereafter, the Operational Creditor by way of email dated 06.07.2018, while referring to his previous resignation email dated 24.04.2018, notified the Corporate Debtor of his intention to resign. Accordingly, the Operational Creditor was relieved of his duties on 14.07.2018. Subsequently, the Corporate Debtor settled the Operational Creditor's dues by paying an amount of Rs.25,073/- as full and final settlement





in September, 2018. The Operational Creditor refused to accept the settlement amount offered by the Corporate Debtor as per its records and instead, repeatedly demanded additional amounts through various communications. These demands allegedly included amounts for ECAL, Retention Pay, salary from 24.05.2018 to 23.06.2018 and recovery amounts for the notice period.

3.6 In its Written Submissions, the Corporate Debtor points out that during the course of hearing on 29.01.2024, reference was drawn to Annexure-C of the Application at Page No.27 where the Operational Creditor had admittedly shown to have received Rs.70,921/- for 'Suspension Days 22 Days of June May Already Paid'. Consequently, after deducting this amount, the alleged payable amount comes down to Rs.5,22,788/-. Further, it is an established fact that Rs.4,42,500/- towards ECAL and Retention Pay Scheme is not payable to the Operational Creditor. Therefore, on reducing the claimed amount against ECAL and Retention Pay, the alleged claim comes to Rs.80,288/- (Rs.5,22,788-Rs.4,42,500). Since the present Application was filed before the notification of the Ministry of Corporate Affairs, the applicable threshold in terms of monetary jurisdiction would be Rs.1 Lakh. However, it is evident that after aforesaid adjustments, the claimed amount does not meet the prescribed threshold, thereby rendering the present case not maintainable for adjudication before this Tribunal. Further, it is pointed out that the Corporate Debtor has already agreed to pay Rs.77,700/- towards full and final settlement in response to the Demand Notice dated 30.01.2019 and hence no due remains to be payable to the Operational Creditor.

3.7 Lastly, the Corporate Debtor is a solvent company which is completely capable of paying of its legitimate debts and fulfilling its obligations. The intent of the



Operational Creditor is to 'recover' his alleged dues of Rs.6,96,660/- by filing the present Application for initiation of CIRP proceedings. However, it is trite law that NCLT cannot be used as recovery forum and the provisions of the Code cannot be turned into a debt recovery proceeding, as held by the Hon'ble NCLAT in ***Yash Nachrani Vs. Pardari Construction Pvt. Ltd. And Anr. [2023 SCC OnLine NCLAT 1099]***. The Operational Creditor has erroneously proceeded against the Corporate Debtor for non-payment of the alleged claim amount. Therefore, the Demand Notice dated 30.01.2019 issued to the Corporate Debtor as well as the present Application pursuant to the same against the Corporate Debtor are completely baseless and without merit and ought to be dismissed.

#### **4. REJOINDER BY THE OPERATIONAL CREDITOR**

- 4.1 The Operational Creditor rebuts the dispute raised by the Corporate Debtor, asserting that it is merely a tactic to evade the debt owed by it. The fact that the Corporate Debtor revoked the suspension of the Operational Creditor and instructed him to resume duties indicates eligibility for ECAL and Retention Pay. Despite the submission of resignation letter by the Operational Creditor, it was converted into suspension and later revoked. Therefore, the Operational Creditor does not fall under the proviso/clauses of letters dated 26.03.2013 and 19.09.2017, as contended by the Corporate Debtor. Moreover, as the suspension lasted until 23.06.2018, the Operational Creditor was entitled to ECAL and Retention Pay for June, 2018.
- 4.2 It is submitted that the Operational Creditor was in charge of various sites for Bharatpur, Gangapur and Hindaun Project area only for the reasons of his



merit and performance delivered by him. The Operational Creditor was one of the meritorious employees of the Corporate Debtor and his work as project manager was recognised in magazines. Further, even after the near miss incident at Gangapur project site, there were corrective measures taken by the Operational Creditor which form part of the Sustainability Report, 2017 published by the Corporate Debtor. It is submitted that the Operational Creditor had to resign solely because of the influence of the Senior Management of the Corporate Debtor. In relation to the same, the Operational Creditor had emailed to the HR of the Corporate Debtor Mr. Rahul Jhawar on 20.09.2018 stating that the Operational Creditor did not resign on his own wish. The Operational Creditor also challenges the claim made by the Corporate Debtor and asserts that no investigation was conducted during his suspension and no supporting documents had been placed on record by the Corporate Debtor.

4.3 The Operational Creditor submits that his resignation was prompted by the Corporate Debtor's failure to pay salary, ECAL and retention pay for June, 2018. Even after revocation of his suspension, the Operational Creditor had carried out his duties in the best interest of the Corporate Debtor. Despite this, the Operational Creditor was not compensated, leading to his resignation. The meager payment of Rs.25,073/- as full and final settlement is highly disproportionate to the owed amount of Rs.7,04,508/-.

4.4 The resignation of the Operational Creditor was intentionally converted into a 'suspension' of 41 days and even after the suspension was revoked, the Operational Creditor had carried on with his duties. It is submitted that an email dated 05.10.2018 written to HR head shows that the Operational Creditor left no stone unturned to apprise the Corporate Debtor regarding the unpaid



amount and the atrocities that he had to face due to this. The forced suspension period endured by the Operational Creditor caused severe mental distress. Being the sole breadwinner of his family, the Operational Creditor was suddenly left with no earning to pay the recurring daily household expenses. The Operational Creditor contends that no notice period could ever take place as the situation was arbitrarily managed by the Corporate Debtor by converting his resignation into 'suspension' which was revoked afterwards *vide* email dated 23.06.2018. It is submitted that the claim amount being asked by the Operational Creditor does not fall under pre-existing dispute.

**5. ANALYSIS AND FINDINGS :**

5.1 We have heard the Counsel for both the parties and duly considered the pleadings along with the materials available on record. It is now proposed to deal with the main issues arising in the matter.

5.2 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' 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 found to be lacking, the application would have to be rejected [***Mobilox Innovations Private Limited*** (supra)]. It is also 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.

- 5.3 It is noticed from the record that the Operational Creditor was serving as Senior Manager (Mechanical)/Project Manager with the Corporate Debtor under the terms of the Employment Contract dated 26.03.2013 and that the amount claimed to be in default in the present Application relates to unpaid salary, ECAL and Retention Pay, etc., in accordance with the terms and conditions of employment of the Operational Creditor with the Corporate Debtor. Therefore, we find that the claimed amount of employment dues (excluding interest) falls within the definition of 'operational debt' under Section 5(21) of the Code.
- 5.4 It is now proposed to examine whether the documentary evidence led by the Operational Creditor shows 'operational debt' exceeding the threshold under Section 4 of the Code and was due and payable by the Corporate Debtor to him which had remained unpaid and whether there was any pre-existing dispute raised by the Corporate Debtor before the receipt of the Demand Notice under Section 8(1) of the Code. In this connection, it is noticed from the record that the total amount claimed in column (2) of Part-IV of the Application is stated as "*Rs.704,508/- comprising of Rs.6,96,660/- along with interest of Rs.39,877/- @12% p.a. from September, 2018 till January, 2019 collectively*". As per column (1) of Part-IV, total amount of debt due from the Corporate Debtor is shown at "*Rs.6,96,660/- consisting of salary for the month of June, 2018 along with ECAL and Retention Pay from July 2017 till June 2018 as well*".



as the notice period payment". However, it is observed from perusal of Annexure-C on Page 27 of the Application that the Operational Creditor has provided calculation of amounts due from the Corporate Debtor under two scenarios. In the first scenario (Case A), the Operational Creditor has calculated his dues at Rs.5,48,260/- (excluding interest) and in the second scenario (Case B), he has calculated the unpaid dues at Rs.6,64,631/- (excluding interest). Notably, neither of these amounts matches with the claim amount shown in Part-IV of the Application viz., Rs.6,96,660/-. A perusal of the Corporate Debtor's response to the Demand Notice vide letter dated 23.02.2019 reveals that the claim raised by the Operational Creditor in the Demand Notice was for Rs.8,55,270/-. As per the legal notice dated 05.01.2019 sent by the Operational Creditor to the Corporate Debtor, the former had sought payment of outstanding dues of Rs.7,28,480/- from the latter. All these discrepancies or variations in the claimed amounts indicate that the amount of unpaid debt is far from being a crystallised debt.

- 5.5 Be that as it may, it is noticed that the amounts claimed in the Demand Notice as well as the Application fall under four heads- Retention Pay (Rs.4,42,000), ECAL (Rs.83,000), salary for June, 2018 and the notice period recovery amount. It is observed from the record that the aforesaid claims of the Operational Creditor were never admitted (except notice pay recovery) at any stage by the Corporate Debtor. As a matter of fact, in its email dated 01.11.2018, the Corporate Debtor had categorically informed the Operational Creditor that "*in terms of the ECAL/RP reference letter ... dated 19<sup>th</sup> September, 2017 read with Clause No.15 of the Offer Letter (Employment Contract) .. dated 26.03.2013 you are not entitled for payment of either E-CAL*



*or RP and hence the same is not payable. However, the notice pay recovery should be for 8 days' shortfall. Accordingly, your F&F will be revisited and the excess amount recovered towards notice pay will be refunded".* This was followed by another email dated 30.11.2018 sent by the Corporate Debtor to the Operational Creditor reiterating that ECAL, Retention Pay and salary for the period of suspension were not payable to him. This email also brings out that on 04.07.2018, the Operational Creditor had met and informed the Senior Management of the Corporate Debtor that he had decided to proceed with his resignation dated 24.04.2018, as he had got an offer from a competitor at a higher remuneration and requested for being relieved by 14.07.2018. Once again, the Corporate Debtor *vide* email dated 26.12.2018 categorically informed the Operational Creditor *"that the amounts you claim (by way of ECAL, Retention Pay and salary for period of suspension) are not payable consequent upon your resignation"*. Further, as regards salary for the period of suspension which lasted till 22.06.2018, the Corporate Debtor had *vide* email dated 14.05.2018 clearly informed the Operational Creditor that *"no remuneration will be paid to you for this period..."*.

- 5.6 It will be pertinent at this stage to take note of the relevant terms of the Employment Contract and other communications dealing with grant of ECAL and Retention Pay. For instance, Clause No.15 of the Employment Contract reads as under: -

*"This contract may be terminated at any time by either party giving 3 months' notice in writing to that effect to the other, subject however, to the Company's right to pay 3 month's salary in lieu of such notice to you. Further, in the event of your*



*giving a notice of termination shorter than the above period of 3 months, the Company shall have at its sole discretion, the right to adjust any leave due to you and/or recover from you such amounts towards notice pay for the shortfall in the period of notice....”.*

It is noticed from the record that the Corporate Debtor *vide* separate letter dated 26.03.2013 addressed to the Operational Creditor with regard to sanction of ECAL and Retention Pay had made it clear that *“in the event that you resign or abandon or terminate or give cause for termination or leave or disassociate in any manner your employment prior to the date of payment of ECAL and Retention Pay, the above payments shall be forfeited”*.

- 5.7 Similarly, the letter dated 19.09.2017 addressed by the Corporate Debtor to the Operational Creditor also clearly stated that all future payments due on account of ECAL and Retention Pay shall be forfeited for employees who resign and/or are serving notice period on or before the date of payment of ECAL and Retention Pay. Since the notice period of three months in the case of the Operational Creditor had already commenced on 24.04.2018 (date of resignation letter) and he was serving notice period before the due date of payment of ECAL and Retention Pay viz., 30.06.2018, payment of ECAL and Retention Pay was liable to be forfeited in accordance with the terms of the Employment Contract and the aforesaid communications dated 26.03.2013 and 19.09.2017. Consequently, there was nothing due and payable by the Corporate Debtor to the Operational Creditor by way of ECAL and Retention Pay and hence the question of any default on this count does not arise at all. Further, once the period from 24.04.2018 to 14.07.2018 was adjusted towards





notice period recovery in terms of Clause No.15 of the Employment Contract, it can by no means be said that any salary for the month of June, 2018 was due and payable by the Corporate Debtor which remained unpaid. Similarly, the claim of interest made by the Operational Creditor at the rate of 12% per annum is legally untenable, because there was no provision in the Employment Contract for payment of interest by the Corporate Debtor for delayed payment of employee's dues.

- 5.8 Thus, it emerges that the Operational Creditor has failed to discharge the onus of proving that operational debt exceeding the threshold under Section 4 of the Code was due and payable by the Corporate Debtor and had not yet been paid. On the other hand, the Corporate Debtor has placed on record sufficient documentary evidences including series of email correspondences to establish that there was a real pre-existing dispute between the parties with regard to the quantum of debt which pre-dated the issuance of Demand Notice dated 30.01.2019. The reply dated 23.02.2019 containing unequivocal denial of Operational Creditor's claims clearly amounted to a notice of dispute. The defence raised by the Corporate Debtor cannot be held to be moonshine. The dispute in question is far from being spurious, hypothetical or illusory. We find merit in the contention of the Corporate Debtor that the provisions of the Code cannot be turned into a debt recovery mechanism and that where operational creditor seeks to initiate insolvency process against a corporate debtor, it can only be done in clear cases where no real dispute exists between the parties. However, in cases like the present one where operational debt is disputed, proceedings under Section 9 of the Code cannot be initiated at the instance of the Operational Creditor.



- 5.9 We observe that the only defence presented by the Operational Creditor to support his claim for ECAL and Retention Pay is that following the third safety lapse at Gangapur project site on 21.04.2018 resulting in serious injury to workers, he was forced to resign by the Senior Management of the Corporate Debtor. In this connection, the Operational Creditor has annexed to the Application his emails dated 08.05.2018, 20.09.2018 and 02.11.2018 addressed to the Senior Management of the Corporate Debtor stating that he had not resigned out of his own wish, but was instructed by the Senior Management to tender his resignation for not providing timely information on the said accident. However, at the same time, it is observed that the Operational Creditor has also placed on record his emails dated 24.04.2018 and 27.04.2018 (titled “apology mail”) addressed to the Senior Management of the Corporate Debtor owning responsibility for his failure to prevent that accident, despite implementing various safety measures at site and admitting that after introspection, he had realised that he needed to “*correct immediately*” his behavior and personality so as “*to align with management policies and EHS (environment, health and safety) objective*”. The questions whether the Operational Creditor resigned voluntarily or he was forced to resign by the Corporate Debtor and if such resignation was not voluntary, what would be the effect of such forced resignation on the Operational Creditor’s entitlement to ECAL and Retention Pay are issues requiring enquiry and investigation and appreciation of oral testimony as well as detailed documentary evidence which are beyond the scope of summary jurisdiction of this Tribunal.
- 5.10 The Operational Creditor also contends that the Corporate Debtor failed to point out any pre-existing dispute or provide evidence that salary dues had



been paid. It is noticed that the Operational Creditor in his Affidavit under Section 9(3)(b) of the Code annexed to the Application has stated that the response provided by the Corporate Debtor to the Demand Notice *“is a generic document unsubstantiated with any evidence whatsoever and does not deal with any pre-existing dispute”*. However, on careful perusal of the Corporate Debtor’s reply dated 23.02.2019, we find that the Corporate Debtor has categorically and unequivocally denied that any amounts as claimed were due and payable to the Operational Creditor. It is pointed out that even in response to the legal notice dated 05.01.2019 sent by the Operational Creditor demanding payment of these amounts and cautioning the Corporate Debtor about civil and criminal proceedings on the failure to pay, the Corporate Debtor *vide* letter dated 25.01.2019 had reiterated that no such amounts were payable under the terms of the Employment Contract. According to the Corporate Debtor, the Operational Creditor’s claims are without basis and are clearly disputed. However, the Corporate Debtor fairly concedes that only a sum of Rs.77,760/- was payable to the Operational Creditor towards refund of the excess notice period recovery amount.

5.11 Therefore, it is clear that the liability to pay the dues claimed by the Operational Creditor had been consistently denied by the Corporate Debtor while furnishing its reply to the emails as well as legal notice/ statutory Demand Notice sent by the Operational Creditor. As a matter of fact, the reply of the Corporate Debtor *vide* letter dated 23.02.2019 bears testimony to the fact that a real and substantial dispute existed between the parties with regard to the quantum of debt well before the issuance of the Demand Notice dated



30.01.2019. Thus, the contention raised by the Operational Creditor on this count is found to be self-serving and untenable and is accordingly dismissed.

5.12 In view of aforesaid discussions and 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. Further, it is found that in response to the Demand Notice dated 30.01.2019, the Corporate Debtor *vide* its reply dated 23.02.2019 has made out a case of pre-existing dispute with regard to the operational debt claimed to be in default and the said reply can be treated as a notice of dispute from the Corporate Debtor to the Operational Creditor. Section 9(5)(ii)(d) of the Code mandates that the Adjudicating Authority shall reject the application, if a notice of dispute has been received by the operational creditor. In these circumstances, we are of the considered view that the present Application filed by the Operational Creditor deserves to be rejected in terms of Section 9(5)(ii)(d) of the Code.

### **ORDER**

In view of the aforesaid findings, this Application bearing C.P.(IB) No.4400/MB/2019 filed under Section 9 of the Code by Mr. Manoj Seth, the Operational Creditor, for initiating CIRP in respect of Larsen & Toubro Limited, the Corporate Debtor is **rejected**.

However, this order should not be read as expressing any views on the merits of the claims/ disputes raised and the rejection of this Application shall not



cause any prejudice to the right of the Applicant to pursue such other legal remedies as may be available in accordance with law.

**Sd/-**

**SANJIV DUTT  
MEMBER (TECHNICAL)**

Deepa & JNK

**Sd/-**

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