# Yogesh Kundra vs Sew And Prasad -Joint Venture on 18 June, 2021

Note to the Registry:

Sub: Comp App (AT}HCH) {ins} No. 53/2021 on the file of NCLAT, Chennai Bench ~ Regarding.

By the Judgment dated 18.06.2021 in Comp App (AT}(CH} (ins} Na. 53/2021 on the file of NCLAT, Chennai Bench Justice Venugopal M, Member (Judicial) dismissed the Appeal. However, Shri. V. P. Singh, Hon'ble Member (Technical) opined that the Petition filed under section 9 is not maintainable and believed that 'Appeal' deserves to be allowed etc.

in view of the divergent opinion arrived at by the Hon' ble Members of the NCLAT, Chennal Bench, to resolve the case, the Office of the Registry of the NCLAT, Chennal Bench is directed to transmit the coples of the Judgement' in Comp App (AT}(CH} (Ins} No. 53/2021 on the file of NCLAT, Chennai Bench to the Registrar of the Principal Bench of NCLAT, New Delhi, requiring him to place the same before the Hon'ble Officiating Chairperson, New Delhi for nominating a Hon'ble Third Member to render his opinion/decision in the subject matter in issue.

Date . 18.06.2021
Sd/-

Justice Venugopal M
Member Gudicial}

National Company Law Appellate Tribunal, Chennai

(Appellate Jurisdiction)

Company Appeal (AT)(CHICINSOLVENCY)NO.S3 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of Order dated 26.04.2021 in CPCB) No.227/O/HDB/2017 passed by the Hon"bie National Company Law Tribunal, Hyderabad Bench,

Hyderabad)
In the matter of :

Yogesh Kundra

Suspended Directar

Gati Infrastructure Pyt. Ltd.

(Formerly known as M/s. Gati Infrastructure Ltd.)
Plot No.20, Survey No.12, Kothaguda, Rondapur,
Hyderabad -- 500 084

¥

L. Sew & Prasad Jomt Venture,
6-3-8711, Snehlata Greenlands Road,
Begumpet, Hyderabad 500 016

2. Nandiraju Prabhakar
Interim Resolution Professional
Gati Infrastrucutre Private Limited,
(Formerly known as M/s Gati Infrastructure Ltd.)
Plot No.20, Survey No.12, Rothaguda, Kondapur,
Hyderabad -- 500 O84

Present:

.. Appellant

... Respondents

For Appellant > Mr. RCV. Sinhadri, Sr. Counsel for Appellant

For Varsha Banerjec, Amir Bavani,

Advocates,

For Respondent No.l: Mr.V. Lakshmi Narayanan, Advocate
Por Ms Harshini Jothiram, Advocate

JUDGMENT

'Virtual Mode) Company Appeal (AT) (CH Ura Na SS of 2021 bs Venugopal MJ Intreduction:

1. The Appellant has filed the "Instant Appeal* before this 'Tribunal' being dissatishied with the Order dated 26.04.2021 in C.P.UBj227/O/HDB/2017 Hyderabad Bench, Hyderabad).

2. The 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad} while passing the 'Impugned Order' in CPUBNo.227/Y/HDB/2017) Uiled by the Fast Respondent/Petitioner' 'Operational Creditor') at Paragraph 29 to 31 had among other things observed as under:-

29. 0... "One exhibit that sets at naught all the controversies anc arguinents made on behalf of the respondent is Exhibit P-8 (page 112), in which forwarded message has been sent to the petitioner by one Shn CLL.

Rajan, which he had received from the Director of the respondent, namely, Shri Sunil Gupta. By the said e-mail communication dated 21.01.2015, Shri Suni Gupta had written to Shri C.L.Rajam as under:

> "Dear Sir, it was nice meeting other day regarding payments. Please note that we shall be making one crore payment every month starting with this month end. Farther we are signing long term PPA expected in April and thereafter lenders have agreed to release the funds. We have already signed minutes with PTC in this regard. Thereafter, we shall make full payment. With warm regards, Sun sent from may iPad."

30. The above document makes very Gear one point, viz.. Shri CLL. Rajam is one of the arbitrators as per Exhibit P-4 and Shri Sairam is also one of the arbitrators. What could be inferred from the above e-mail sent by Shn Sunil Gupta, Director of the Respondent/Company is that there was a meeting held between the Arbitrator and the Respondent in which the Company Appeal (AT) (CH Ura Na SS of 2021 bo Director of the respondent had not only categorically admitted the debt but also stated that payments would be made within dae course. This particular e-mail has been sent to Shri CL. Rajam, Arbitrator on 21.01.2015 at 08.13 PM. Shri C.L. Rajam has sent this particular mail to Shri Ramesh Gorripati of the petitioner ( company. There is no doubt that originally in the Settlement Agreement dated 14.12.2013, which was entered into between G) the petitioner, (2) M/s Amrit Jal Ventures Pvt. Ltd. CAS VPL), (in) M/s Mahendra Investment Advisors Pyt. Ltd. and Givj Shri Mahendra Kumar Agarwal, lability to pay an amount of Rs.10 Crores was vested with the respondent and the balance of Rs.23.98 Crores was to be paid by M/s Amrit Jal Ventures Pvt. Lid. CATVPL). It is also the fact that on 21.01.2015, Director of the respondent had categorically undertaken to make payment to the petitioner before the arbitrator appointed by both the parties. A statement made before the arbitrator of both the parties net only amounts to an admission but also that principle of estoppel operates on the respondent / company for deviating from their own stand. It is alsa important to note that this statement which is made voluntarily by the Director of the respondent / company amounts to novation of the contract and casts a liability on the part of the respondent to make the payment as claimed in the petition. In view of the same, taking into consideration the submissions made by the parties and the law involved in this case, we are af the considered view that the petitioners have made out their case on the aspect af limitation which has been triggered from the date of this e-mail, viz. 2LOL2G15 tl the date of fling, viz. 26.09.2017, which is within the period of three years.

31. Apart from that the said e-mail communication sent by the Director, who is an officer of the Board and whose statement binds the company with the required lability as clhamed im the petition would answer Issue Company Appeal (AT) (CH Ura Na SS of 2021 ws No.2, which gnes in favour of the petitioner. In view of the same the petition deserves to be admitted, ste."

and consequently, admitted the Petition under Section 9 of the Insolvency and Bankruptcy Code, declared 'Moratorium' and issued necessary directions therein. Resume of Facts:

> 3. According to the "Appellant', the "Corporate Debtor' Gormerly known as Gatti Infrastructure Ltd.) is a Company incorporated under the Provisions of the Carmpanies Act, 1956. The registered office is situated at plot No.20, Survey No.12, Rethaguda Kondapur, Hyderabad. The First Respondent is a Joint Venture Partnership firm of two compames registered under the Companies Act, 1956, its

registered office situated at 6-3-871, Snehlata Greenlands Road, Begumpet, Hyderabad.

4. The First Respondent Company/Joint Venture Partnership Firm does not fall within the purview of the definition of the term 'Operational Creditor' and therefore, no proceedings under the Insolvency and Bankruptcy Code can be initiated by the First Respondent. Furthermore, the First Respondent and the 'Corporate Debtor' had entered into an Agreement dated 12.08.2006 for the execution of various Civil and Hydro Mechanical Works on Chazaheen Hydra Electric Power Project at Sikkim which was supposed to be completed in the year 2009. But, namerous disputes arose with the execution of Agreement between the parties Le, the cost of rectifying, repairing, redoing the defects meluding compensation and delay in completion of the project of the Respondent for more than 10 years which resulted in a loss of excess stem of Rs.36,00,00,000/-.

S. Tea resolve all the disputes, the "Corporate Debtor® in a bona fide mariner had agreed to enter into a "Settlement Agreement' dated 14.12.2013 with First Respondent'SEW & Prasad Joint Venture, M/s. Amrit Jal Ventures Pvt. Ltd. (AFVPL) and other parties. In fact, as per Clause 2.3 of the "Settlement Company Appeal (AT) (CH Ura Na SS of 2021 Ae Agreement', the parties had categorically agreed that the "Corporate Debtor' shall pay a sum of Rs.10 Crores representing RA Bills, Dues, and part of interest amount to SPNI upon signing of the Agreement and upon payment of Rs.10 respect of Settlement Amount.

6. That apart, it was agreed that the SPIV can initiate any suit, auction or proceeding against only the Promoter (Amrit Jal Ventures Pvt. Lid.) to the exclusion of GIPL for recovery of balance sums of Rs.23.98 Crores in excess of Rs. 10 Crores with the Promoters had agreed to pay as per the terms of 'Settlement Agreement'.

7. The stand of the Appellant is that the 'Corporate Debtor' on 24122013, aself had paid a sum of Rs.1Q Crores as per the terms of the 'Settlement Agreement' to the Respondent and discharged its lability which had estopped the First Respondent by means of Clause 2.3 of the "Memorandum of Understanding" to commence any legal proceedings agamst the Appellant. Also that, a sum of Rs.4.38.62,120/- was paid to the Respondent by "AJVPL" as per the terms of the 'Settlement Agreement'.

8. Subsequently, First RespondenvSEW & Prasad Jomt Venture, M/s. Amit Jal Ventures Pvt. Lid. CATVPL) and other parties had failed to carryout the work in accordance with the requirernent of the project and numerous shortcomings and deficiencies were repeatedly pointed out by the "Corporate Debtor' to the First Respondent. During the period when the 'Corporate Debtor* had major concerns regarding the work carried out by the First Respondent on 29.05.2014, the First Respondent approached the 'Corporate Debtor' for issuance of Completion Certificate so that the same can be submitted to the other clients for "PQ purpose'. But the said certificate is read by the First Respondent to state that the present case is one of admitted dues. As a matter of fact, only on the specific request of the First Respondent, the 'Corporate Debtor' had issued Company Appeal

(AT) (CH Ura Na SS of 2021 Ft certificate and in fact, the "Corporate Debtor' at no point of time accepted the works as carried on by the First Respondent and raised issues to the First Respondent.

9. The specific plea of the Appellant is that as long as there is dispute, the proceedings under Section 9 of the Insolvency and Bankruptcy Code cannot be mitiated and further that the "Adjudicating Authority' has no jurisdiction to look mio the aspects of "Dispute" and render a finding in favour of one or the other person. In short, all such disputes are subject to applicable Civil Proceedings before the Competent Court of Jurisdiction, 1Q. 'The e-mail dated 21.01.2015 was addressed by Mr.Sunil Gupta in his capacity as the "Director of ATVPL' and the said e-mail in the absence of any lability af 'Corporate Debtor' being in existence cannot be read as an "Admission and/Acknowledgement of Liability by the "Corporate Debtor'. Besides this, the First Respondent was clearly aware that Mr.Suml Gupta was the Director of AJVPL, which was the only company liable io the First Respondent, moreover, the First Respondent had addressed the letter dated 22.03.2015 to ATVPL wherein Mr.Sunil Gupta was described as Director of AYVPL and added further, the e- mail dated 21.01.2015 being lability of AJVPL can only be required to be explamed by "AIVPL'.

[i. Avecording fo the Appellant, the "Corporate Debtor' (Formerly known as GATI Infrastructure Lid is a Company incorporated under the Provisions of the Companies Act, 1956. The Registered Office is situated at Plot No.20, Survey No.12. Kothaguda, Kondapar, Hyderabad. The First Respondent is a Joint Venture Partnership Firm two companies registered under the Companies Act, 1956, its registered office situated at 6-3-571, Snehiata Greenlands Road, Begumpet, Hyderabad.

I2. The First Respondent Company 'Joint Venture Partnership Firm does not fall withm the purview of the definition of the term of "Operational Creditor' Company Appeal (AT) (CH Ura Na SS of 2021 ot and therefore, no proceedings under the 'Insolvency and Bankruptcy Code* can he initiated by the First Respondent. Furthermore, the First Respondent and the 'Corporate Debtor' had entered into an Agreement dated 12.08.2006 for the execution af various Civil and Hydro Mechanical Works of Chazaheen Hydro Electric Power Project at Sikkim which was supposed to be completed in the year 2009, bot rumerous disputes arose with the execution of Agreement between the parties ie. the Cost of rectifying, repairing, redoing the defects including compensation and delay in completion af project by the Respondent for more than 10 years are resalted in a loss af excess sum of Rs.36,00,00,000.

13. To resolve all the disputes, the "Corporate Debtor' in a bona fide manner had agreed to enter into a "Settlement Agreement' dated 14.12.2013 with the First RespondenvSEW & Prasad Joint Venture, M/s. Amrit Jal Ventares Pvt. Lid. (ATVPL) and other parties. In fact, as per Clause 2.3 of the "Settlement Agreement', the parties had categorically agreed that the "Corporate Debtor' shall pay a sum of Rs. 10 Crores representing RA Bills due and part of interest amount to SPVJ upon signing of the Agreement and upon payment of Rs.10 Crores, the 'Corporate Debtor' shall have no further liability or obligation m respect of the Settlement Amount.

Id. That apart, it was agreed that the SPIV can initiate any suit, action or proceeding against only the Promoter (Anuit Jal Ventures Pyt. Ltd. to the exclusion of GIPL) for recovery of balance sums of Rs.23.98 Crores in excess of Rs.10 Crores which the Promoters had agreed to pay as per the terms of

'Settlement Agreement'.

1S. The stand of the Appellant is that the "Corporate Debtor', on Ih 2.2013 useIf had paid a sum of Rs.1Q Crores as per the terms of the 'Settlement Agreement' to the Respondent and discharged its ability which had estopped the First Respondent by means of Clause 2.3 of the "Memorandum of Understanding' to commence any legal proceedings against the Appellant. Also Company Appeal (AT) (CH Ura Na SS of 2021 teak that, a sum of Rs.4,38,62,120/- was paid to the Respondent by "AIVPL' as per the terms of the "Settlement Agreement',

16. The "Memorandum of Understanding' dated 20.05.2016 was entered Continental Infrastructure Lid. wherein the First Respondent had agreed that all the dues of the Respondent are transferred and agreed to be paid by "APVPL'. All the due and receivable of the First Respondent were transferred/assigned to SEW ar Infrastructure Ltd., as stated in the 'Memorandum of Understanding' and therefore, no debt of any nature remained duc and payable to the First Respondent.

iv, The First Respondent on 03.08.2017 had issued a "Demand Notice', as per Section 8 of the Cod, to the "Corporate Debtor' for the default committed by the "ATVPL* in repayment of instalments, in terms of the "Memorandum of Understanding' 'Settlement Agreement'. The "Corporate Debtor', on 10.08 2017 had addressed notice to the First Respondent invoking the Arbitration for the delay in completion of the project, hability by the "Corporate Debtor' and for the amount towards moturized door and restoration of land dump yards. The said Notice issued by the "Corporate Debtor' raised claims on account of inferior quality work carried on by the First Respondent and the said Notice proves the pre-existing dispute between the 'Corporate Debtor' and the 'First Respondent'and in regard to the claim for motorised door and restoration of land dump yards, The said claim was clearly stated to be subject to the completion of work to the satisfaction of the "Corporate Debtor'.

18. On 12.08.2017, the "Corporate Debtor' had issued reply to the Section 8 Demand Notice, issued by the First Respondent, whereim, the claim of the First Respondent was outrighthy rejected as a baseless and non-maintainable one. The First Respondent on 12.09.2017 had replied to the Notice invoking the Company Appeal (AT) (CH Ura Na SS of 2021 os Arbitration and failed to accept the appointment of Mr. Mano} Sen, "Engineer" as an Arbitrator'.

19. The "Corporate Debtor' on its failure to aceept the appointment of Mr.Manaj Sen as an 'Arbitrator' had approached the Hon'ble High Court of Telangana, Andhra Pradesh and filed an Arburation Application No.1 10/2017 (under Section 11 of the Arbitration and Concilation Act, 1996) secking appointment of an 'Arbitrator', but the same was dismissed as per Order dated 04.08.2020, as the "Agreement between the parties contemplates that the 'Arbitration' was to be conducted as per Rules of Conciliation and Arbitration of the International Chamber of Commerce. In fact, the dispute as raised by the 'Corporate Debtor being a special matter of Crvil Disputes cannot form the basis of the application ander Section 9 of the Insolvency and Bankruptcy Code. Furthermore, there being a pre-existing dispute in the instant case, the sare cannot be adjudicated under the Provisions of the Insolvency and Bankruptcy Code.

20. The Learned Counsel for the Appellant points out that the First Respondent fled an application under Section 9 of the Insolvency and Bankruptcy Code against the "Corporate Debtor' for default in regard to the repayment of debt of Rs.31,40.S57,776/- based on the 'Settlement Agreement' and claimed towards Motorised Door and Restoration of Land Dump Yards. Also that the First Respondent filed an application under Section 9 of the 1 & B Code, 2016 agaist the "APVPL' in the year 2017 itself! 2i. As a matter of fact, the "Corporate Debtor' filed a counter on L7.1L2017 before the "Adjudicating Authority' to the effect that it had not comumnitted any default and its obligation under the "Settlement Agreement' and as such, the application of the First Respondent is not taaintainable.

22. The "Corporate Debtor' filed an application challenging the maintainability and placed on record the "Memorandum of Understanding' as Company Appeal (AT) (CH Ura Na SS of 2021 MS entered into between the 'First Respondent' and "AJVPL' in terms of which the First Respondent seems to be a 'Creditor' even of 'AJVPL'. In fact, the 'Memorandum of Understanding' was withheld by the First Respondent before the "Authority' and in short, the application sought outright dismissal of the application under Section 9 of the Code, on account of suppression of material facts. However, this application was not adjudicated before passing of the 'gnpuened order'.

23. The Learned Counsel for the Appellant pomis out that in the meanwhile, Ms SEW Infrastracture Ltd. lormerly known as SEW Constructions Lid.) filed an application under Section 9 of the Code agaist Amit Jal Ventures Pvt. Ltd. he. "APVPL" for default im repayment of debts and under the '"Adjudicating Authority' in CPUIBINo.192/7/HDB2D17 as per order dated 07.08.2019 commenced CIRP Proceedings in respect of Arnrit Jal Ventures Pvt. Ltd. Besides this, the First Respondent filed an application under Section 9 of the Code in CLP.UBJNo 228/0/HDB/2017 against the Amrit Jal Ventures Pvt. Lid., hecause of the default committed in repayment of "debts", Pursuant to the cammencement of 'CIRP Proceedings' agaist the Amrit Jal Ventures Pyt. Lid. the First Respondent, fled an application in C.P.IB)No.228/0/HDB/2017 sscking withdrawal of 'CIRP Proceedings' initiated against Amrit Jal Ventures Pvt Lid. Based on the ground that the said proceedings were already initiated by the "Adjudicating Authority' in CPCBINo. 192/7/HDB 2017 and that the First Respondent had already fled its claim with the "Interim Reselution Professional'. The "Adjudicating Authority', after recording the First Respondent's submissions was pleased to allow the Application.

24, The First Respondent through letter dated 12.02.2020 addressed to the 'Resolution Professional' of Amrit Jal Ventures Pvt. Lid. Withdrew its claim from the CIRP Proceedings and that the said withdrawal was acknowledged by Company Appeal (AT) (CH Ura Na SS of 2021 the "Resolution Professional' through rts e-mail dated 14.10.2020 which resulted in the amendment of claims received in the matter of Amrit Jal Ventures Pvt. Ltd.

25. The First Respondent afterwards, before the 'Adjudicating intimated about its wihdrawal of claim from the CIRP Proceedings of "Amrit Jal Ventures Pvt. Ltd.

26. The *Adjudicatme Authority' had passed the 'impugned order' wherein it failed to consider that the "Corporate Debtor' had discharged its wbligation and has not committed any default arismg oat of the "Settlement Agreement'. Moreover, any obligation arising under the 'Settlement Agreement'

cannot be termed as an "Operational Debt' and the company cannot be termed as 'Carporate Debtor'. In reality, the "Corporate Debtor' owes no sum to the First Respondent who had waived off its right to intilate any legal proceeding against the "Corporate Debtor" and is estopped by means of Clause 2.3 of the 'Memorandum of Understanding'.

Appellant's Contentions:

27. The Learned Counsel for the Appellant submits that the "impugned arder' dated 26.04.2021 passed by the "Adjudicating Authority' CNational Company Law Tribunal, Hyderabad) in CLP.(1B)227/0/HDB/2017, is contrary to the ingredients of Section 9 of the Insolvency and Bankruptey Code, 2016. Further, it is the plea of the Appellant that the First Respondent'SEW & Prasad Joint Venture cannot fall with the definition of the term "Operational Creditor' and "Person' as prescribed under the Insolvency and Bankruptey Code.

28. The Learned Counsel for the Appellant takes a stand that the 'Adjudicating Authority' at the time of passing the 'impugned order' had failed to determine upon the issue raised by the "Corporate Debtor' in regard to the First Respondent not being a 'Creditor' of the Company. In this connection, the Learned Counsel forthe Appellant points out that W the First Respondent was not Company Appeal (AT) (CH Ura Na SS of 2021 id a 'Creditor' of the Company there was no case of the First Respondent ta be an 'Operational Creditor" of the Company and unfortunately, this aspect was not taken into account by the "Adjadicating Authority' at the time of passing the "impugned Order'.

29. The Learned Counsel for the Appellant projects an argument that the *Adjudicating Authority' while passing the 'Impugned Order' had failed to take into consideration the settled legal position that any alleged liability arising in furtherance of 'Settlement Agreement' is not an "Operational Debt', because of the fact that the same is not arising out of "Goods? or 'Services' rendered to the 'Corporate Debtor'.

30. The stand of the Appellant is that the "Adjudicating Authority' had failed to take into account all the relevant fact that the purported claim of the First Respondent does not fall within the anabit of Section S21) of the Code, since the 'Carporate Debtor' cannot be said to have defaulted in payment of 'Operational Debt' and in terms of the 'Settlement Agreement'.

31. According to the Learned Counsel for the Appellant, the essential requirements which are to be taken into account by the "Adjudicating Authority', while adjudicating an application under Section 9 of the Insolvency and Bankruptcy Code are laid down in paragraph 34 of the Hon'ble Supreme Court Decision reported in Mobilox Innevations Private Limited v. Aurusa Sofhware Private Lid. (2018) 1 SCC at page 353, which runs as follows:

> eet "4 34, Therefore, the Adjudicating Authority, therefore, when examining an application under Section 9 of the Act. will have to determine the following:-
>
> G) Whether there is an "operational debt' as defined exceeding Rs | lakh? (See Section 4 of the Act) Company Appeal (AT) (CH Ura Na SS of 2021 i2 Gi) Whether

the documentary evidence furnished with the application sherws that the aforesaid debt is due and pavable and has not yet heen paid? And

(i) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before relation to such dispute?

Hany one of the aforesaid conditions is lacking, the applicanion would have te be rejected, Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate af 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"

32. The Learned Counsel for the Appellant submits that the "Adjudicating Authority' while passing the "Impugned Order had entered into an adjudication of the disputes between the parties.

33. The Learned Counsel for the Appellant by referring to the paragraph 29 of the 'mmpugned Order' comes out with the plea that the 'Adjudicating Authority' had mentioned that e-mail dated 21.01.2015 was allegedly addressed by one of the Directors of the "Corporate Debtor' 'could be inferred' as admission of debt by the "Corporate Debtor', and in fact, such an inference being clearly outside the scope of the power exercised by the "Adjudicating Authority' under Section 9 of the Code. In short, the aforesaid 'e-mail' was interpreted by the *Adjudicating Authority', to arrive at a conclusion im regard to the novation of contract which "casts a Hability" on the "Corporate Debtor' to pay the alleged dues and these observations except that the present case, is a case of pre-existing dispute.

a Company Appeal (AT) (CH Ura Na SS of 2021 'cael wae

34. It is represented on behalf of the Appellant that the 'Adjudicating Authority' had failed to appreciate that the 'Corporate Debtor' had already discharged tts obligation arising out of 'Settlement Agreement' under Clause 2.3 and paid the entire sum of Rs.1Q Crores as agreed by the First Respondent. Moreover, itis the submission of Learned Counsel for the Appellant that the issue relates fo "Settlement Agreement" entered into between the 'Corporate Debtor', the First Respondent, No.l AJVPL and other parties and in reality, no Petition under Section 9 of the Insolvency and Bankruptey Code can lie under 'Settlement' because the 'Settlement of Agreement' is not for the "Goods' and "Services".

35. The Learned Counsel for the Appellant urges before this Tribunal that the First Respondent had filed a Petition under Section 9 of the Insolvency and Bankruptcy Code against APVPL which was subsequently withdrawn and also withdraw us claim in the Insolvency Proceedings of ATVPL only on 12.10.2020. As such, no proceedings under Section 9 of the Cade could have been intitiated by the First Respondent prior ig 12.10.2020 and therefore, the mstant Petition being before the date 12.10.2020, the "Impuened Order' is to be set aside on this score alone.

36. Advancing his arguments, the Learned Counsel for the Appellant pomts out that the "Agreement" or 'Contract' cannot be 'modified' or "novated' and based on an e-mail by a person who

was not a party to the 'Memorandum of Understanding' and has ne authority from the 'Company' to alter the 'terms' in the absence of all the parties to the "Memorandum of Understanding', 3?. Added further, placing on reliance on the said e-mail without prejudice is an ill-founded one, Since the First Respondent was clearly aware about Sunil Gupta, being the Director of the NTT of Amrit Jal Ventures Private Limited CAPVPL) which was the only company lable towards the First Respondent. Indeed, the First Respondent, in spite of having clear knowledge, ~ Company Appeal (AT) (CH Ura Na SS of 2021 ia which is evident from the letter dated 22.03.2015, has addressed by the First Respondent to ATVPL, malafidely placed reliance of the aforesaid e-mail to incur an obligation on the "Corporate Debtor',

38. The Learned Counsel for the Appellant proceeds to pot out that the 'Adjadicating Authority' had failed to appreciate that an e-mail from Mr Gupta, who in reality was the Director of "ATVPL* had agreed to pay the balance outstanding towards the First Respondent on behalf of "AJVPL' cannot be read in any manner to cast an obligation and/or lability of the "Corporate Debtor' and that too contrary to the terms of the "Settlement Agreement'.

39. The Learned Counsel for the Appellant submits that the said 'e-

& mail', even otherwise cannot be read as an 'Acknowledgement' as per Section 18 of the Limitation Act, 1963 and thus, the Petition Aled under Section 9 of the Insolvency and Bankruptcy Code, 2016, was clearly barred by the Law of limitation.

40. The Learned Counsel for the Appellant contends that the 'principle af estoppel is governed qua the First Respondent as per the unambiguous terms of the undertaking mentioned in the 'Settlement Agreement' as per Clause 2.7 whether the First Respondent categorically waived all its right to proceed agamst the "Corporate Debtor' in any manner.

41. The Learned Counsel for the Appellant forcefully takes a plea that it is a settled position that each Company is separate legal entity and district from its Parent or "Holding Company' and having the fill ownership over the Assets mentioned in its 'Books of Accounts', As a matter of fact, the "Corporate Debtor' has a totally distinct identity and assets from the "APVPL' cannot be forced to "CERP' for the default committed by its Parent Company.

42. [tis the version of the Appellant that in the present case, the 'dispute' has occurred to the breach of "Settlement Agreement' wherein the lability to .

repay the amount is stated im the 'Agreement' was on 'AJ VPL* and the 'Corporate Company Appeal (AT) (CH Ura Na SS of 2021 is Debtor' upon payment of Rs.10 Crores was duly discharged from us obligation. In short, it is the contention of the Appellant that the First Respondent is legally nat entitled to invoke the proceedings under the Insolvency and Bankruptcy Code either against the APVPL or the "Corporate Debtor' as per settled Law,

43. The Learned Counsel for the Appellant submits that the 'Insolvency and Banknipicy © Code' 2016 is nota 'Recovery Proceeding' and therefore, an Agreemont' is Lable to be dismissed and unless

re relationship between the parties to the dispute is not of "Corporate Debtor' and the "Operational Creditor' then, such other payments, defaults arising out of 'Settlement Agreement' would not come with the purview of the Insolvency and Bankruptcy Code.

44. The Learned Counsel for the Appellant emphatically points out that in the decision of Hon"ble Supreme Court in M/s. Innoventive Industries Limited vy CIC] Bank and Anr wherein the term 'Operational Debt of Default' and initiation of CIRP Proceedings and significantly, the 'Default' is very much absent, in the present case.

Appellant's Citations:

> 4$, ia) The Learned Counsel for the Appellant relies an the decision of Hon'ble Supreme Court in Mobiiox Innovations Pvt. Lid. v Kirusa Software Pvt. Lid. reported in (2018) | SCC page 353 wherein at paragraph 34 itis observed as under:
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> 34. "Therefore the adjudicating authority, when examiming an application under Section 9 of the Act will have to determine:
>
> (i) Whether there is an "operational debt" as defined exceeding Rs. | lakh?

(See Section 4 of the Act) Gi} Whether the documentary evidence furnished with the appheation shows t hat the aforesaid debt is due and payable and has not yet been paid? And Gu} 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?

Company Appeal (AT) (CH Ura Na SS of 2021 & pos Tfany one of the aforesaid conditions is lacking, the application would have to be rejected, Apart from the above, the adjudicating authority must follow the mundate 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 facters mentioned m Section 9(5) of the Act.

(6b) The Learned Counsel for the Appellant cites the decision of Hon"ble Supreme Court in Innoventive Industries Ltd. V ICICT Bank and Anr, (2018) | SCC page 407 wherein at paragraph 29 it is observed as follows:

> 29. "The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, an the accurrence of a default, to First deliver a demand notice of the unpaid debt to the operational debtor in the manner provided y « in Section 8(1) of the Code. Under Section &(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the Invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing -- Le. before such notice or mvyoice was received by the corporate

> debtor. The moment there is existence of such a dispute, the operational creditor gets out of the ditches of the Code.

(c) The Learned Counsel for the Appellant seeks in aid of the decision of the Hon'ble Supreme Court in BLK. Educational Services Pvt. Lid. v Parag Gupta & Associates (2019) 11 SCC page 633 wherein at paragraph 42 it is observed as under:

> under Sections 7 and 9 of the Code from the inception of the Code, Article [37 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."
>
> First Respondent's Submissions:
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> 46. The Learned Counsel for the Pirst Respondent contends that the 'Debt in default' are bvo-fold Ui) As per the agreement for execution of numerous Company Appeal (AT) (CH Ura Na SS of 2021 i?

Civil and Hydro Mechanical Works af 989MW Chuzachen Hydro Electric Power Project, Sikkim. on 12.08.2006 r/w the Settlement Agreement dated 14.12.2013 aad GO A-sum of Rs.2.05 Crores due from the monies retained far work which was already completed long back, and the project was commissioned on 11.03.2013 as per the admission of the Corporate Debtor itself. That apart, it is projected on the side of the First Respondent, that any one of the 'debts' are found to be due and in default by this 'Tribunal', the present 'Appeal' is Hable to be dismissed, as the amount of more than Rs.] lakh would be dee, in default and payable as an "Operational Debt'.

47. ltis represented on behalf of the First Respondent that Section 5(2 1) of the | & B Code defines "Operational Debt' meaning a claim in respect of the Provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the ime being in force and payable to the Central Government, any State Government or Local Authority. Further the word 'claim' mentioned in Section 5¢21) of the Code is defined as per Section 3(6) af the Code, which reads as under:

> (a) "aright to payment whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured:
>
> ib} Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unseeured;"

48. According to the First Respondent Section 3] 1) of the Code defines the term "debt" to mean a lability or obligation in respect of a claim which is duc from any person and includes a financial debt

and operational debt and that from a conjoim readme of the ingredients of Section (21) with Section 3(6) and Section 3¢) 1) of the 1 & B Code, 2016 if is quiet clear that in all cases where a Company Appeal (AT) (CH Ura Na SS of 2021 i8 right to payment arises m respect of provision of "Goads' or services' such debt (liability in regard to the claim) would be an Operational Debt.

49. 'The Learned Counsel for the First Respondent contends that as per Agreement dated 12.08.2006, the Applicant/Operational Creditor had provided services to the "Corporate Debtor', for which amounts were duc to the 'Operational Creditor' and in fact, the money payable for the services rendered were crystalized in the form of a "Settlement Agreement' dated 14.12.2013.

SQ. The Learned Counsel for the First Respondent adverts to the 'Settlement Agreement' dated 14.12.2013 between the Appellant/Gati Infrastructere Private Limited, First RespondenSEW Prasad Joint Venture, Coastal Project Limited and others whereby and whereunder the clauses 2.1 to 3 and 6 read as under:

> 2.1 "All amounts (including principal or interest) that are due and payable to SPIV for the purpose of Settlement of Clatms shall not exceed the ageregate of the amounts set out in Schedule [ hereta (Settlement Amount"), and SPIV has agreed that payment of the Settlement Amount shall result m full and final payment and settlement of all payments as duc (present & future) im respect of the Construction Contract. Nothing contained in this Agreement shall however discharge SPIV from its continuing obligations under the Construction Contract, meluding obligation in respect of provisions pertaining to defects lability in Clause 27 of the Construction Contract and SPIV shall be bound by such provisions of the Construction Contract in accordance with the terms thereof, 2.2 GIPL hereby confirms that on or after the date of this Agreement, it shall not raise any claims against SPIV other than clans, of any, arising pursuant to continuing obligations under the Construction Contract of the nature described in Clause 2.1] above.

Company Appeal (AT) (CH Ura Na SS of 2021 iS 2.3 Out of the aggregate Settlement Amount, GIPL shall pay an amount af Rs. 10 Crores representing RA bills due and part of interest ameunt b SPJV upon the signing of this Agreement. Upon payment of Rs. 10 crores, GIPL shall have no farther ability or obligation in respect of the Settlement Amount. SPV may initiate any suit, action or proceeding against only the Promoter (to the exclusion of GIPL) for recovery of such balance Settlement Amounts in excess of Rs. 10 Crores. It is mutually agreed and understood amongst the Parties that GIPL shall arrange the payment of Rs. 10 Crores within 2/3 working days of execution of this Agreement.

24 Notwithstanding anything contained in any document/agreement/ understanding the Settlement Amount (fo the exclusion of the amount set out in Clause 2.3 above) shall be treated as a repayment obligation of the Promoter (to the exclusion of the GIPL) and become due and payable by the Promoter to SPIV. Such amounts shall be paid by the Promoter in 12(twelve) equal monthly instalments (EMD fram the commercial operation date of the project which shall be end of February, 2014 and the same shall carry no interest. However, in case of any delay'default in the

payment of any EMI or in the final instalment, and such default is not remedied by the Promoter within a period of 30 Ghirty) days from the date an which such amounts became due and payable, the Promoter shall pay interest on such defaulted amounts for the periad of delay @ [8% p.a. 2.5 SPIV hereby confirms to GIPL. and the Promoter that all dues relating to its Subcontractors mechiding Coastal and dues relating to the workers engaged by SPIV and its sub-contractors have been settled im full and remainder of dues, of any payable to its sub-contractor and/or workers shall be settled in fall by SPIV. SPIV hereby undertakes to immediately on execution of this AGREEMENT and receipt of initial payment of Company Appeal (AT) (CH Ura Na SS of 2021 Rs. 10 cr from GIPL inform the concerned department of the Government in Sikkim. In writing of the same and withdraw any communication to the contrary that may have been sent to Government of Sikkim.

Clause 2.4 to SPIV GIPL. agrees that Promoter is eligible for recovering of trued up amounts to the extent paid by them to SPIV fram GIPL as a shareholder in GIPL and in the manner as is agreed upon between GIPL and Promoter in the existing shareholder agreement dated September 5, 2013 between GIPL and ATVI.

2./ SPIV shall not demand or receive any payment, prepayment, repayment, redemption or any distribution im respect or on account of any Settlement Amount payable to them under this AGREEMENT other than to the extent and in the manner set out in this AGREEMENT and SPIV urevocably agree not to take any legal action or proceedings ar make any claim against the GIPL in relation to the Settlement of Claims. In any cureumstance, once the payment obligations af GIPL as set out in Clause 2.3 above has been satisfied in full,

3. The Guarantors hereby undertakes to execute an [instrument/Deed of Guarantee] in form and manner acceptable to SPIPV wherein the Guarantors shall, gvfer ala, guarantee as a primary obligator, the repayment obligations of under this AGREEMENT and undertake that whenever any Settlement Amount is not paid as per the terms of this AGREEMENT, as may be applicable the Guaranters shall immediately pay that amount as uf he were the principal debtor.

6. The provisions of this Agreement shall become effective automatically and without any further action on and from the date on which (1) all parties have affixed their signatures to this Agreement; and (4) GIPL has made Company Appeal (AT) (CH Ura Na SS of 2021 2d the payment of an amount of Rs.10 Creres to SPIV in accordance with Clause 2.3 hereof."

Si. The Learned Counsel for the First Respondent proceeds to put forward a plea that in the instant case, "the right to payment' and "hability to pay' arose in connection with the Provision of services as per Agreement dated 12.08.2006, In short, in the present case an obligation to pay arises on account of 'email?' and that of the 'Settlement Agreement' which do acknowledge the Prowision of services, thereby making the 'debt' an admitted "Operational debt'.

52. The crystalline stand of the First Respondent is that as per Clause 2.6 of the "Settlement Agreement' the "Corporate Debtor® absolved of its liability for the entire amounts due, but was just required to pay it to the 'Promoter Group', after the "Promoter Group' paid the same to the

Respondent. Also that, the 'Promoter Group' was also mandated to execute the "Guarantee Agreement' in favor of the Respondent and that the release of the "Corporate Debtor' from. tts lability to the Respondent alone was itself dependent on the execution of 'Deeds of Guarantee' and the corresponding payment of monies owed by the "Promoter Group'.

43. The Learned Counsel for the First Respondent contends that when discussions took place between the parties to the "Settlement Agreement' in the presence of Arbitrators (Mr.C.L.Rajan and Mr Sairam) as recorded in the said Agreement, if was agreed by Mr.Sunil Gupta (Finance Director of the "Corporate Debtor') that the entire amounts would be settled and that a sum of Rs.1 Crore per month would be released from the next month and that the same was recorded in the 'e-mail' addressed by Mr.Sunil Gupta (Finance Director) to the 'Arbitrators' on 21.01.2015 which 'e-mail' was marked and forwarded to the Respondent.

S4. The Learned Counsel for the First Respondent submits that Mr.Suni Gupta (Finance Director) of the Appellant/Respondent/Company wrote fram the Company Appeal (AT) (CH Ura Na SS of 2021 'gatiinfra' domain name email id, represented the Gan Infra and said that they would pay the amounts. Moreover, it is the contention of the Learned Counsel for the First Respondent that "AJVPL" is an Investment Company, incapable of holding "Power Purchase Agreement' in its name. In this connection, the Learned Counsel for the First Respondent comes out with the plea that in respect of a case where in response to e-mails "claiming monies' responses are issued with assurances to repay the monies owed and that the e-mails can be treated as 'Acknowledgements' which will form the basis of admission of an application under Section 9 of the Cade.

55. The Learned Counsel for the First Respondent urges before this "Tribemal' that there are two sets of arnounts in question (1) a sum of Rs.19.5 Crores is payable under the "Settlement Agreement' and GD a sum of Rs.2.3 Crores retained for the work which was completed long ago. Besides this, even Clause 2.3 and 2.7 is applicable, the same will not apply to a sum of Rs.2.3 Crores owed to the Respondent.

S46. Continuing further, the Learned Counsel for the First Respondent points out that a 'Certificate of Merit' dated 24.09.2015 that all work was completed to the satisfaction of the "Corporate Debtor' was issued by the Appellant certifying that the First RespondentSEW & Prasad Joint Ventures had executed the work of "Civil Works for implementation of 110 MW Chuzachen Hydra electric Power Project in East Sikkim, India" under M/s.GATI Infrastructere Pvt. Limited valued at Rs. 199.94 Crores vide Agreement dated 12"

> August 2006. The work was completed in all respects and to our satisfaction and the project was commissioned by 11" March, 2013, from then on running satisfactorily. The work consists of construction of Dams, Tunnels, Power House, Surge Shaft, Switch Yard, Tall Race Channel, etc. Therefore, if is represented on behalf of the First Respondent that the hability in respect of Rs.1.98 Crores for which demands were made by the First Respondent to the Appellant, to release Cr a many Appeal (ATS (CH) thud Naw S3 of 2031 bh had at least a sum of Rs.i Crore only, as per letter dated 23.01 2015 and to release the balance sum of Rs.1 Crore and 95 Lakhs only,

immediately, as per letter dated 23.08 2017 and this was not cisputed at any point of time, before the issuance of notice as per Section 8 of the [&B Code,

57. The emphatic plea of the First Respondent is that once the sum of Rs.1.95 Crores has been admitted and a surn of Rs.5 Lakhs was already released as part payment, leaving the balance of Rs.1.95 Crores, in reality, there cannot be any preexisting dispute.

58. The Learned Counsel for the First Respondent contends that the 'Memorandum of Understanding" dated 20.05.2016 requires monies ta be paid to third parties only and in fact, there is no amount due and payable to the First Respondent'Petitioner Operational Creditor. Farther, the Learned Counsel for the First Respondent refers to the order of the "Adjudicating Authority' ONCLT, Hyderabad Bench} in CLP.UBJNo.192/7/HDB/2017 dated 07.05.2019 between M/s. SEW Infrastructure Limited, Telangana, India (the First Respendent im Company Appeal (AT)CHCINS) No.33 of 2021 on the file af NCLAT, Chennai Bench) v Arm Jal Ventures Private Limited wherein was held that the "Memorandum of Understanding' dated 20.05 2016 was deemed to have been cancelled and that the "Corporate Debtor' carmot take any protection under this 'Memorandum of Understanding', which was deemed to have been cancelled due to its awn default.

$9, The Learned Counsel for the First Respondent points out that the Arbitration Petition No. L10/2017 filed before the Andhra Pradesh High Court was dismissed on 04.08.2020 and the dispute raised on behalf of the Appellant is only a 'moonshine' one, raised after the "Form-3 Notice' and that there is no pending list concerning with any purported dispute between the parties.

60. The Learned Counsel for the First Respondent submits that the 'debt is not barred by limitation im as much as the Application under Section 9 Company Appeal (AT) (CH Ura Na SS of 2021 of the 1 & B Code, 2016 was filed before the 'Adjudicating Authority' by the First Respondent Operational Creditor' i the year 2017, well within 3 years fram the date of acknowledgement of 'debt' issued on 21012015 by the "Corporate Debtor' (through e-mail, First Respendent's Decisions:

61. ti) The Learned Counsel tor the First Respondent cites the judgment of this 'Tribunal' in Ashok Agarwal Vs Amitex Polymers P limited (Comp App (AT) Uns) Neo. 60872020 dated 05.02. 2021 ) (reported in MANUSNE 0034/2021) wherein at paragraph 7. 13.39,40,47 48, itis observed as under:

Para, 7. "The Learned Counsel for the Appellant/Operational Creditor brings to the notice of this Tribunal that there is an admitted "Debt' of Rs.

7 350.000/- (Rupees Seven Lakhs Fifty thousand only) towards Principal! amount, in respect of Goods received by the Respondent/Corporate Debtor admitted to be paid in the 'Settlement Agreement dated 16.8.2018.

According to the Appellant. a Civil Smit in CLS. Na. 6912 of 2016 was filed by the appellant against the Respondent/Corporate Debtor and Another and during the pendency of the said suit, the 'Settlement Agreement dated 16.85.2018 was entered into and executed between the Respondent''Corporate Debtor and the Appellant/Operational Creditor and further that the 'Corporate Debtor had promised and assured to pay the whole sum.

Para. 13. The Learned Counsel for the Appellant takes a stand that during the pendency of the Company Petition, Appellant/Petitioner numerous cheques as detailed in the 'Reply' but the said cheques were dishoncured, which unerringly points out that the 'Debt' was due, the same being admitted by the Respondent. That apart, the Cormpany Petition was 'Heard' in which the judgment was reserved on 22.1.2020. In reality, during the inter period, viz. "Reservation Judgment' on 221.2020 and passing of the judement on 8.6.2020, the Respondent/Corporate Debtor deposited a sum of Rupees Six Lakhs in the accounts of the Appellant which shows that the Respondent/Corporate Debtor admitted its lability, as recorded in its (1) 'Settlement Agreement', (2) Undertaking", (3) 'Court Decree', (4) Issuance of Cheques'.

Company Appeal (AT) (CH Ura Na SS of 2021 g ed :

> oS & Para, 39, Decree:
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> For a fuller and better appreciation of the controversies centering arcund the present case, it is worthwhile, for this Tribunal to refer to the 'Consent Decree' dated 25.10.2018 m C.S. No. 6912 of 2016 passed by the ADL. District Judge/Q3-South East/Saket Court Complex, New Delhi, in the matter of Ashok Agarwal Proprictor of M/s. Shree Marketing, G- 349, Preet Vihar, Vikas Mare, New Delhi 110002 -Plainuff (Appellant) V. Amitex Polymers Private Limited.17 Tribhuan Complex Ishwar Nagar, Friends Colony, New Delhi 110065 -Ist defendant (Respondent) which runs as under:
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> "It is ordered that suit of the present matter has been settled between the plaintiif and the defendant at the total amount of Rs. 750,000 (Rupees Seven Lac Fifty Thousands only) to be paid in monthly instalments as per the settlement agreement dated 16.08.2018, Ex, P-
>
> { starting from 20.08.2018 Cotal six months). In case of default of any installment, a penalty of RS. 5000 per installment per month shall be paid by the defendants fram 15.11.2018 onwards. Statement of counsel for the plaintiff and AR of defendant are recorded separately. Court fee be refunded to the plaintiif as per Section 164A of the Court Pee Act.' Para. 40. In the instant case, the Appellant/Petitioner has come out with a plea that the Respondent/Corporate Debtor had admitted to pay a sum of Rs. 7,350,000" towards the Prinenpal sum in respect of goods received by the Respondent/Corporate Debtor, as per 'Settlement Agreement dated 16.8.2018 ete. Furthermore, Rs. 1,35,Q00/- towards 'Penalty' of Rs.S,000/-

per instalment per month as per "Undertaking' given by the Respondent/Corporate Debtor and the same was recorded by the Learned Additional District Judge, Saket Court, New Delhi in Civil Suit No. 6912 of 2016 in the case of Ashok Agarwal v. Amntex Polymers Pvt. Ltd. (Respondent/Corporate Debtor) and Another. Therefore, the total dues claimed by the Appellant/Operational Creditor as per Consent Decree' passed by the Competent Court of law is Rs. $,85,000/- as seen from Part IV of Application wherem the "Particulars of Operational Debt' were mentioned, many Appeal (ATS (CH) thud Naw S3 of 2031 of this "Tribunal! Para, 47. Section 3(10) of The Insolvency and Bankruptcy Code 2016 defines 'Creditar and even in the said definition a 'Decree Holder cannot be excluded to file an Application under the Code. Going by the definitiom 3(10) of 'Creditor, it includes 'Financial Creditor, 'Operational Creditor.

Para. 48. Be that as it may, in the light of detailed qualitative and quantitative discussions and also this Tribunal keepmg im mind the entire conspectus of the attendant facts and circumstances of the mstant case in a holistic fashion comes to a resultant conclusion that the impugned order passed by the National Company Law Tribunal, New Delhi Bench dated $.6.2020 as an incorrect and invalid one in the eye of law. Viewed in that perspective, this Tribunal to prevent aberrational justice and to promote substantial cause of justice set aside the impugned order in IB [89S dated 8.6.2020 passed by the National Company Law 'Tribunal, New Delhi Bench. Resultantly the Appeal succeeds."

62. 'The Learned Counsel for the First Respondent relies on the judgment im Pedersen Consultants India Pyt Limited V Nitesh Estates s Limited in Comp App CAT) (Ins) No. 720/2019 dated 24.07.2019 (Reported in MANU/NL/O328/2019) wherein at paragraphs 7-13, i is observed as follows:

> Para 7. "In the said case, the Hon'ble Supreme Court held as to what are the relevant facts to be examined by the Adjudicating Authority while examining an application ander Section &:
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> 34, Therefore, the adjudicating authority, when examining an application under Sectiom 8 of the Act will have to determine:
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> G} Whether there is an "operational debt" as defined exceeding Rs.
>
> 1 lakh? (See Section 4 of the Act) Gi} 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 Company Appeal (AT) (CH Ura Na SS of 2021 a?

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."

&. From the aforesaid decision, itis clear that the existence of dispute must be pre-existing Le. it must exist prior to issuance of the demand notice or invoice. Tit comes to the notice of the Adjudicating Authority that the 'operational debt is exceeding Rs. | lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt or the demand notice of the unpaid 'operational debt', the application under Section 9 cannot be rejected and is required to be admitted.

9. In "Imnoventive Industries Ltd. v. FCICT Bank and Anr. MANU/SC/1063/2017 : 2018) 1 SCC 407", the Hon'ble Supreme Court while explaining the provisions of Section 9 observed and held:

> "27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insalvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes duc and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 30.1), which in turn tells us that a debt means a hability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" fo mean a right to payment even if i is disputed.
>
> The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate msolvency resolution process may be triggered by the corporate debter itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors.
>
> A financial creditor has been defined under Section 5 as a person to whom a financial debt is owed and a financial debt is defined in Section 3¢8} to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an Company Appeal (AT) (CH Ura Na SS of 2021 operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(2 1) means a claim in respect of provision of goods or services.
>
> 28. When it comes to a financial creditor triggerme the process, section 7 becomes relevant. Under the explanation te Section 70), a default is in respect of a financial debt owed to any financial eredifor of the corporate debtor-it need not be a debt awed to the applicant financial creditor. Under Section 7(2), an application is ta be made under sub-section (1} i such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule

4. the apphteahon is made by a financial creditor in Porm | accompanied by documents and records required therein. Porm | is a detailed form in 5 parts, which requires particulars of the applicant in Part 1, particulars of the corporate debtor in Part U, particulars of the proposed interim resolution professional in part I, particulars of the financial debt in part IV and documents, records and evidence of default m part V. Under Rule 4(3), the applicant is to dispatch a copy of the application fled with the adjudicating authority by registered post or speed past to the registered office of the corporate debtar. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information uulity or on the basis of evidence furnished by the financial creditor, is important. This i must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case u may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority, Under sub-section (7), the adjudicating authority shall then Company Appeal (AT) (CH Ura Na SS of 2021 communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands m contrast with the scheme under Section' where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8C1) of the Code, Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or capy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing Ls. before such notice or imvokce was recerved by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

1Q, Prom the aforesaid findings, itis clear that the claim means a right to payment even if it is disputed. Therefore, merely because the 'Corporate Debtor has disputed ne claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute.

11. In the present case, as we have observed that there is ne record to suggest pre-existence of dispute with regard to the services rendered by the Appellant, we hold that the application under Section 9 should not have been rejected by the adjudicating Authority on the ground that the dispute about the quantum of payment cannot be determined.

12. The Respondent disputed that the alleged debt is not the arnount as shown in the form. However, on mere dispute of amount, the application under Section 9 cannot be rejected, as in

terms of Section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The Hon'ble Supreme Court in "Innoventive Industries Lid. v. [CIC] Bank anc Anr." (Supra) noticed the definition of "clatm' and held that even if the right of payment is disputed, the Code gets tigeered the moment default of rupees one lakh or more (Section 4). In the circumstances, in absence of any re-existing dispute, it was not open for the Adjudicating Authority to reject the application under Section 9.

3. For the reasons aforesaid, we set aside the impugned order dated Sth October, 2018 and remit the case to the Adjudicating Authority to admit Company Appeal (AT) (CH Ura Na SS of 2021 Wo the application under section 9 after notice ta the Respondent, so that the Respondent may get an opportunity to settle the matter prior to the admission of the application."

63. du) The Learned Counsel for the First Respondent refers to the judgment of the Hon'ble Supreme Court in Asset Reconstruction Company (india) Limited Vs Bishal Jaiswal and ors (reported in MANU/SC/0279/202 1) wherein at paragraphs 7-9, itis observed as under:

> Para. 7. "From the above, it is clear that the principle of Section 9 of the Limitation Act is to be strictly adhered to, namely, that when time begins ta ran, itcannot be halted, except by a process known to law. One question that arises before this Court is whether Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgement of debt made in writing and signed by the corporate debtor, is also applicable Under Section 238A, given the expression "as far as may be" governing the applicability of the Limutation Act to the IBC.
>
> Para 8. The aforesaid question is no longer res IMtegra as two recent judgments of this Court have applied the provisions of Section 14 and Section 18 of the Limitation Act to the IBC. Thus, in Sesh Nath Singh v.
>
> Baidyabati Sheoraphuli Co-operative Bank Lid. Crvil Appeal No. 9198 of 2019 (decided on 22.03.2021), afler setting out the issues that arase in that case in paragraph 47. and after referring to Section 238A of IBC, held:
>
> 46. Similarly Under Section 18 of the Limitation Act, an acknowledgement of present subsisting Hability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgement is stgned. However, the acknowledgement must be made before the period of limitation expires.

6&7. As observed above, Section 238A of the IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in the Company Appeal (AT) (CH Ura Na SS of 2021 a4 ws NCLTYNCLAT. All the provisions of the Limitation Act are applicable to proceedings m the NCLT/YNCLAT, to the extent

feasible.

63. We see no reason why Section 14 or 18 of the Limitation Act, 1963 should not apply to proceeding Under Section 7 or Section 9 of the IBC. OF course, Section 18 of the Limitation Act is not attracted in this case, since the impugned order of the NCLAT does not proceed on the basis of any acknowledgement.

9, Nearer home, in Laxm: Pat Surana v. Union Bank of India, Civil Appeal No. 2734 of 2020, a judgment delivered on 26.03.2021, this Court, afier referring to various Judgments of this Court, including the judgment in Babulal Vardharyi Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., MANU/SC/A0589/2020 (2020) 15 SCC] ['Babulal™], then held:

> 35. The purport of such observation has been dealt with in the case of Babulal Vardharji Gurjar UD) [Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Lid. MANUSSC/0589/2020 (2020) IS SCC 1]. Suffice it to observe that this Court had not ruled out the application of Section 18 of the Limitation Act to the proceedings under the Code, if the fact Situation of the case sa warrants, Considering that the purport of Sectignm enacted, is clanificatory in nature and being a Code, which included as law 238A of the procedural had been given retrospective effect; which included apphcation of the provisions of the Limitation Act on case-to-case basis. Indeed, the purport of amendment in the code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. Tt will not be a case of giving new lease to time barred debts under the existing law CLimntationm Act) as such.
>
> 36. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After Company Appeal (AT) (CH Ura Na SS of 2021 ws ey a ws :
>
> Ma enactment of Section 238A of the Code on 06.06.2018, validity whereof has been upheld by this Court, if is not open to contend that the limitation for filing application Under Section 7 of the Cade would be limited to Article 157 of the Limitation Act and extension of prescribed period in certain cases could be only Under Section 3 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the procesdings initiated under the Code. Section 18 of the Limitation Act reads thus:
>
> 18, Effect of acknowledgement in writing.-(1} Where, before the expiration of the prescribed period for a suit or application im respect of any property or right, an acknowledgement of lability in respect of such property or right has been made in

writing signed by the party against whom such property or right is clanmed, or by any person through whom he derives his tile or lability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the ime when it was signed; but subject ta the provisions of the Indian Evidence Act, 1872 C1 of S72), oral evidence of its cemtents shall not be received.

Explanation. -Por the purposes of this section, ~

(a) an acknowledgement may be sufficient though if omits to specily the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet vome or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed ta.a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and (c} an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or night

37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action Under Section 7 of the Cade.

However, Section 7 comes into play when the corporate debtor many Appeal (ATS (CH) thud Naw S3 of 2031 commits "default". Section 7, consciously uses the expression "default" - not the date of notifying the loan account of the corporate person as NPA. Further, the expressimm "default" has been defined in Section 3(12) to mean nonpayment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantees in respect of loan transaction, the right of the financial creditor to mitiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non- payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their lability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgements, it is net passible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgement in writing signed by the party against whom such right to initiate resolution process Under section 7 of the Code enures. Section [8 of the Limitation Act would come into play every fime when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be. acknowledge their Labdity to pay the debt. Such acknowledgement, loan however, be, mast be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings Under Section 7 of the Code. Further, the acknowledgement must be of a Hability in respect of which the fmancial creditor can initiate action Under Section 7 of the Cade."

Company Appeal (AT) (CH Ura Na SS of 2021 Ws

64. dv) The Learned Counsel for the First Respondent adverts to the decision of the Hon*ble Supreme Court in Sesh Nath Singh & oars Vs Baidyabati Sheoraphul Co-operative Bank Limited and oars €eported im MANUYSC/0205/2021) wherein at paragraph No. 66-68, it is observed as follows:

> Para 66. "Similarly Under Section [8 of the Limitation Act, an acknowledgement of present subsisting Hability, made im writing in respect of any right claimed by the opposite party and signed by the party against whom the cght is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgement must be made before the period of limitation expires.
>
> Para 67, As observed above, Section 238A of the IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Section 6 or [4 or 18 ar any other provision of the Limitation Act to proceedings under the IBC in the NCLIYNCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible, Para 68. We see no reason why Section [4 or 18 of the Limitation Act, 1963 should nat apply to proceeding Under Section 7 or Section 9 of the IBC. OF course, Section [8 of the Limitation Act is not attracted in this case, since the impugned order of the NCLAT does not proceed on the basis of any acknowledgment."

65. (v) The Learned Counsel for the First Respondent points out the decision of Hon"ble Supreme Court in Lakshmipat Surana Vs Union Bank of India (reported in MANUYSC/O22 1/2021) wherein at paragraph 35-37, nt is observed as under:

> Para 35. "The purport of such observation has been dealt with in the case of Babulal Vardharp Gurjar (I) (supra). Suffice it to observe that this Court had not ruled out the application of Section 18 of the Limitation Act te the proceedings under the Code, if the fact situation of the case so warrants. Considering that the purport of Section 238A of the Code, as enacted, is clarificatory in nature and being a procedural law had been given retrospective effect; which included application of the provisions of Company Appeal (AT) (CH Ura Na SS of 2021 ws the Limitation Act on case-to-case basis. Indeed, the purport of amendment in the Code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. It will not be a case ef giving new lease fo time barred debts under the existing law (Limitation Act) as such.
>
> Para 36. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as faras may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings

or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After enactment of Section 238A of the Code on 06.06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing application Under Section 7 of the Code would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only Under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code, Section 18 of the Limitation Act reads thus:

18. Effect of acknowledgment of the prescribed im writing.--(1) Where, before the expiration right, an acknowledgment period for a suit or application in respect of any property or been made in writing of lability in respect of such property or right has right is signed by the party against whom such property or lability, clanmed, a or by any person through whom he derives his title or the acknowledgment fresh period was of limitation shall be computed from the time when so signed, (2) Where the writing containing the acknowledgment evidence may be given is undated, oral provisions af the Indian of Evidence the time when i was signed: but subject to the contents shall not be Act, [872 (1 ef 1872), oral evidence of its received.

Explanation. -For the purposes of this section,--

(a} an acknowledgement may be sufficient the exact nature though it amits to specify payment, delivery, of the property or right, or avers that the time for accompanied by a performance or enjoyment Company Appeal (AT) (CH Ura Na SS of 2021 ws has not yet come or is or is coupled with refusal to pay, deliver, perform or permit to enjoy, other than a persem a claim to set off, or is addressed to a person entitled to the property or right ib) duly the authorised word "stened" means signed either personally or by an agent execution of a in this behalf: and (c) an application for the application in respect decree or order shall not be deemed to be an of any property or right.

Para 37. Ordinarily, upon declaration of the loan accounvdebt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action Under Section 7 of the Code. Hawever, Section 7 cames ite play when the corporate debtor Cornmits "default". Section 7, consciously uses the expression "default" -- not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3C12) to mean non-payment or "debt" when whole or any part or instalment of the amount of debt has become duc and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect or loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corpurate guarantor), would get ingeered the moment the principal borrower commits default duc to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their lability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in

writing signed by the party against whom such right to initiate resolution process Under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor}, as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to me, for institution of the Company Appeal (AT) (CH Ura Na SS of 2021 a7 ws proceedings Under Section 7 of the Code. Further, the acknowledgment must be of a Hability in respect of which the financial creditor can initiate action Under Section 7 of the Cade,"

66. O71) The Learned Counsel for the First Respondent seeks in aid of the decision of this Tribunal in Sandeep Jindal Vs State Bank of India (reported in MANU/NL/O138/2021) wherein at paragraph 44-46, itis mentioned as under:

Para 44, "Hon'ble Supreme Court in Sesh Nath Singh & Ant. Vs. Baidyabati Sheoraphul: Cooperative Bank Ltd. and Anr. in Civil Appeal No. 9198 of 2019 delivered on 22.08.2021 has observed as follows:

Para 67 ~ As observed above Section 228A of the IBC makes the provisions of the Limitation Act, as far as may be. applicable to proceeding before the NCLT and NCLAT. The [BC does not exclude the application of Section 6 or 14 or 18 ar any other provision of the Limitation Act to proceedings, under the IBC in the NCLT?Y NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLTYNCLAT, to the extent feasible.

Para 45, Hon'ble Supreme Civil im Laxmi Pat Surana Vs. Union Bank of India & Anr. In Civil Appeal No. 2734 of 2020 delivered on 26.03.2021 has observed as follows:

"Para 36. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable, For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as Code as the case may be. Afier enactment of Section 238A of the Code on 06 06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filme application under Section 7 of the Code extension the of the On Act of the limited and would be limited to Article 157 of the Limitation Act and extension of be prescribed period in certain cases could be only under Section 5 of the imitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code.

Company Appeal (AT) (CH Ura Na SS of 2021 ws Para 46, In view of the above Hon'ble Apex Court Judgments, being law of land under Article 141 of the Constitution of India, Section 18 of the Limitation Act, 1963 read with Article 137 of

the Limitation Act, [963 is ab imitio applicable to Section 7 of the Insolvency and Bankruptcy Code, 2016"

V7. (vn) The Learned Counsel for the First Respondent brings it to the notice of this 'Tribunal' the judgement made in the matter of Joseph Jayananda V Navalmar UK Limited vide Comp App CAT) dns) No. 7418/2020 dated 07.04.2021 (reported in MANU/NL/O13 1/2021) wherein at paragraph $B 1.8 and 5B 1.9, itis observed as follows:

Para 5B LS. "It is essential to mention that after the matter was reserved for Order, the Hon'ble Supreme Court setled down the law relating to the Limitation Act's appheability to the Insolvency proceedings, which is very much relevant for this case. In Civil Appeal No. 2734 of 2020, Laxmi Pat Surana v. Unuon Bank of India Hon"ble Supreme Court has held:

"38. The purport of such observation has been dealt with in the case of Babulal Vardbrayt Gurjar dD (supra). Suffice it to observe that this court had not ruled out the application of section 18 of the Limitation Act to the proceedings under the Code, if the fact situation of the case warrants. Considering that the purport of section 238A of the Cade, as enacted, it is clarificatory in nature and being a procedural law had been given retrospective cifect:

which included application of provisions of the Limitation Act on case to case basis. Indeed, the purport of amendment in the Code was not too reopen or revive the time-barred debts under the Limitation Act. At the same time, accrual of fresh period of Limitation in terms of section 18 of the Limitation Act is on its own under that Act. [t will not be a case of giving new lease to time-barred Debt under the existing law (Limitation Act) as such.

36. Notably, the provisions of the Limitation Act have been made applicable to the proceedings under the Code, as for as may be applicable. For, section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings ar Appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Company Appeal (AT) (CH Ura Na SS of 2021 wo Tribunal, as the case may be. After enactment of section 238A of the Code on 6 June 2018, validity whereof has been upheld by this court, it is net open to contend that the Limitation for filing application ander section 7 af the Code would be limited te article 137 of the Limitation Act and extension of prescribed period in certain cases would be only under section 5 of the limitation act. There is no reason to the Adjudicating proceedings or Appeals before exclude the effect of section 18 of the Limitation Act to the proceedings initiated under the Codle. « - - -

37, Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financna Creditor to initiate action under secticm 7 However, section 7 commits default. Section 7, consciously uses the

expression default-not the date of notifying the loan account of the corporate Debtor as NPA Further, the expression "default" has been defined in section 3(12) te mean no- payment or "debt" when whole or any part or instalment of the amount of Debt has become due and payable and is not paid by of the Cade.

the Debtor or the corporate Debtor, as the case may be. In cases where the corporate person had offered a guarantee im respect of loan transaction, the right of the financial Creditor to initiate action against such entity being a corporate debtor (corporate guarantor), gets tnggered the moment the principal borrower commits default due to non-payment of the Debt. Thus, when the principal borrower andor the (corporate} guarantor admit and acknowledge the liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of Limitation due to (successive) acknowledgements, fis not possible to extricate them from the renewed Limitation accruing due to the effect of section IS of the limitation Act. comes into play when the Corporate Debtor Section [8 of the Limitation Act gets attracted the moment acknowledgement in writing signed by the party against whom such a right to initiate resolution process under section 7 of the Code enures. Section 18 af the limitation act would come into play Company Appeal (AT) (CH Ura Na SS of 2021 4g every time when the principal borrower and/or the corporate guarantor (corporate Debtor), as the case may be, acknowledge the liability to pay the Debt. Such acknowledgement, however, must be before the expiration of the prescribed period limitation including the fresh period of Limitation due to acknowledgement of the Debt, from time to time, for mstitttion of the proceedings under section ? of the Code. Purther, the acknowledgement must be of a liability in respect of which the financial Creditor can initiate action under section 7 of the Code. "

(emphasis supplied) Para 5.B. 9. Based on the above observation of the Hon'ble Supreme Cort, itis clear that Section 7 of the | & B Code cores tc play on nan- payment of "debt" when whole or any part or instalment of the amount of Debt has become due and payable and is not paid by the Corporate Debtor. When the Corporate Debtor acknowledges the Labiuity before the expiration of three years, from that point fresh period of Limitation u/s. 18 of the Limitation Act starts. But such acknowledgement must be before the expiration of the prescribed period of Limitation, including the fresh period of Limitation due to acknowledgement of the Debt, from time to time for the institution of proceeding under Section 7 of the Code. In the instant case the Appellant has contended that during the years 2002 to 2019, Mr. Andrea Colombo and Fernando Poletti were handling the Respondent No. 2 Company's operations, Mr. Andrea Colombo was removed from the company directorship with effect from 1 April 2019 for the act or non-Compliance. As a counterblast to his removal, he issued the aleged demand notice dated 12 June 2019. In addition to the acknowledgement in the Corporate Debtor's yearly balance sheets, the debts owed by the Corporate Debtor to the Operational Creditor were reconciled on a yearly basis between them. The Debt was acknowledged every year through the communications addressed by the Corparate Debtor to the Operational Creditor. This communication contains the outstanding Debt and an acknowledgement that the same were due and payable. It is the case of ranning account were Operational Creditor used to give advance payment for obtaining services of the Corporate Debtor. After the removal of

Mr. Andrea Colombo from the directorship of Company Appeal (AT) (CH Ura Na SS of 2021 al Respondent No. 2 Company, the demand notice was raised by Mr. Andrea Colombo. Before the removal of Mr. Andrea Colombo, every year account was reconciled, and the amount due and payable to Mr, Andrea Colombo as a creditor was shown in the balance sheet of the Corporate Debtor. The limitation period started after the General Agency Agreement's termination, when demand was raised, and the default was committed by the Corporate Debtor. Therefore, the limitation period is regularly getting extended by implication of Section 18 of the Limitation Act. Thus, itis clear that the Debt is net barred by Limitation."

68. (vii) The Learned Counsel for the First Respondent refers to the judgment of this 'Tribunal' in Narayan Singh Patania V Value Labs LLP vide Comp App CAT) Uns) No. 1415/2019 (reported in MANU/NL/0036/202 1) for the proposition that an Acknowledgement through emails can form a basis for admission under the [& B Code, 2016.

Admission:

69. itis to be pointed out that an 'admission' mast be certain, definitive, not vague and a confiised one. In fact, an 'admission' is an admissible one, even though when made, if was not against a person's interest. To put it precisely, an 'adnussion" must be "unequivecal' and 'comprehensive' im the considered opinion of this "Trbunal'. In law, an 'admission' is a piece of evidence. It is to be remembered that an 'admission' ts binding on the 'maker' and constitutes a 'waiver' of proof.

Acknowledgement:

70. An 'acknowledgement' ought to be m writing and signed by the person making an 'acknowledgement'. In law, an 'acknowledgement' is to be either one from which an absolute promise to pay can be inferred or an unconditional promise to pay the specific 'debt' or there must be a conditional promise to pay the 'debt' and evidence that the condition has been performed.

Company Appeal (AT) (CH Ura Na SS of 2021 Fi. Furthermore, to treat a writing signed by a person as an 'acknowledgement' the person acknowledging must be conscious of his lability and the commitment should be made towards that liability.

72. An 'acknowledgement' of lability is to be within the substantive period of Limitation. An 'acknowledgement' has to be before the expiration of the specified period of Limitation. Legally speaking, an 'acknowledgement' does not create a new right of action. It is a mere acknowledgement of Hability in respect of the right in question, as opined by this "Tribunal'.

Novation:

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3. As per Section 62 of the Indian Contract Act, 1872 there ought to be a whole substitution of a "new contract' in place of the origial/old onc. By an agreement

between the parties, a "new contract' can be replaced in place of an old/earlier one, Discussions:

74. At the outset, this 'Tribunal' points out that the First Respondent/ Apphcant'Operational Creditor had filed an application before the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench) Qinder Section 9 of the L.& B Code rw Rule 6 of | & BLAAA) Rules, 2016) seeking to initiate 'Corporate Insolvency Resolution Process' im respect of the 'Appellant/Respondent/Corporate Debtor'. As a matter of fact, im the said application under Part-[V 'Particulars of Operational Debt', the total amount of debt is mentioned as Rs.36.01 Crores 1e., Settlement Amount of Rs.33.98 Crores + Amount withheld against Motorised Door and Restoration of Land (Dump Yards which is Rs.2.03 Crores}. Farther, uf is stated that the details of the transaction on account of which debt fell due are made mention of in the Agreement dated 14.12.2013. In fact, the debt is payable in instalments due on various dates, Company Appeal (AT) (CH Ura Na SS of 2021 a3

73. Itcomes to be known that the First Respondent/Operational Creditor in Col.No.2 of Part IV of the Application had stated that the arnount claimed th be in default was Rs.31.40,37,776/-Gnclusive of interest) as on 03.08.2017 and further that multiple defaults had occurred in the repayment of the mstalments and that the default im repayment of last instalment occurred on 01.02.2015,

76. Besides the above, the First Respondent/Operational Creditor in the application under Section 9 of the Code under Part-IV at SI.No.6 had mentioned that the "Operational Debt" became due on account of the G) Agreement for execution of various Civil and Hydro Mechanical Works of Chuazachen Hydro Electric Power Project, Sikkim dated | 38 August, 2006 between M/s. Gat Infrastructure Private Limited and M/s SEW & Prasad ~ Joint Venture, Gi) Agreement dated 14° December, 2013 reached between M/s. Gati Infrastructure Private Limited, M/s. SEW & Prasad -- Joint Venture and other parties.

77. Inthe Counter fled before the "Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench m C.P.No.227/HBD/2017) the Appellant/Respondent had averred inter alia at Paragraph 3 that for the execution of various Civil and Hydro Mechanical Works towards Implementatian of Chuzachen Hydro Electric Power Project, the Respondent and the Petitioner herein executed a construction agreement on 12.08.2006. Admittedly, thereafter various disputes arose with respect to execution of work, cost over and run and payment of RA Bills. Further, it was mentioned that for resolution of the said dispute, a settlement agreement dated 14.12.2013 was entered upon by Petitioner, Respondent, M/s. Arnrit Jal Ventures Private Limited and other parties wherein Respondent has made the payment of 10 crores as per the terms of settlement agreement, etc.

78. Moreaver, at Paragraph 4 of the Counter filed by the Appellant' Respondent before the 'Adjudicating Authonty' in C.P. No.227/HDB/2017, it was averred that as per clause 2.3 of settlement agreement dated 14.12.2013, the Company Appeal (AT) (CH Ura Na SS of 2021 ~ Respondent liability (Appellant) was limited to Rs. 10 Crores and the payment of the same was

made on 24.12.2013 and was admitted by the Petitioner (First Respondent) and henee the Respondent (Appellant) has no farther hability or obligation in respect of construction agreement dated 72.08.2006 and the settlement agreement dated 14.12.2015. Alse that, there is no 'debt' or 'default' subsisting between the Petitioner (First Respondent) and the Respondent (Appellant), the present Petition is not maintainable.

79, The stand taken by the "Appellant? im the Counter filed before the 'Adjudicatine Authority' tn C\P.No.227/HDB/2017 is that as per Clause 2.7 of the "Settlement Agreement' dated 14.12.2013 the First Respondent/Applicant/ Petitioner had agreed that once payment obligation of the Appellant/Respondent as per clause 2.3 is complied with, the First Respondent/Petitioner shall not demand or receive any payment of any settlement amount except to the extent and in the manner set out in the Agreement, etc. According to the averments of the Appellant/Respondent in ts Counter before the "Adjudicating Authority' (CP. No 227/HDB/2017), the present claim raised against ut by the First Respondent/Petitioner is in fundamental breach of "Settlement Agreement' dated I4412.2013, particularly Clause 2.7 and further that the -- First Respondent/Petitioner's action is to be treated as repudiation of the said Agreement.

80. The primordial stand of the Appellant is that the Appellant/Respondent can be held liable anly if there is a debt due to the First Respondent/Petitioner and in fact, the whole debt is assigned to SEW Infrastructare Lid. vide MOU dated 20.05.2016. Besides this, there are numerous disputes existing between the Appellant/Respondent and the First Respondent/Petitioner and a "disputed debt cannot be entertained under the T& B Code, 2016.

Company Appeal (AT) (CH Ura Na SS of 2021 AS 8i. Be it noted, that by means of an Agreement dated 12.08.2006, the First Respondent/Petitioner/Operational Creditor had provided services to the Appellant/'Corporate Debtor, for which amounts were due to be paid. In fact, in in the Agreement dated 14.12.2013 CSettlement Agreement').

82. in this connection, it is not aut of place for this "Tribunal' to make a pertinent mention about the relevant recitals of Clause 2.4 of the Agreement dated 14.12.2013 CSettlement Agreement') between the parties which reads as under:

> "Notwithstanding anything contained in any document/agreement/ understanding, the Settlement Amount (to the exclusion of the amount set out in Clause 2.3 above) shall be treated as a repayment obligation of the Promoter Go the exclusion of the GIPL) and become due and payable by the Promoter to SPPV. Sach amounts shall be paid by the Promoter m 12 (twelve) equal monthly instalments GEMD from the commercial operation date of the Project which shall be end of February, 2014 and the same shall carry no interest, ete."

83. Also that, Clause 2.6 of the aforesaid Agreement dated 14.12.2013 (Settlement Agreement) reads to the effect:

> "Upon the Promoter paying the Settlement Amounts as set out in Clause 2.4 to SPIV, GIPL agrees that Promoter is eligible for recovering of trued up amounts, to the extent paid by them to SPIV form GIPL as a shareholder in GIPL and in the manner as is agreed upon between GIPL and Promoter in the existing shareholder agreement dated September 4, 2013 between GIPL and APVL"

a8 $4, A mere running of the eye of the contents of Settlement Agreement' dated 14.12.2013 entered into between the parties unerringly points out that it contains different promises of the "Corporate Debtor' and its Promoter group and according to the [* Respondent/' Operational Creditar' many promises were not fulfilled by the 'Corporate Debtor'. Besides this, as per Clause 2.6 of the 'Settlement Agreement'? dated 14.12.2013, the "Corporate Debtor' was not released of its hability for the whole amount due, However, the "Corporate Company Appeal (AT) (CH Ura Na SS of 2021 AG Ae Debtor* was only obligated to pay to the Promoter group, after the Promoter group paid the same to the First Respondent/"Operational Creditor'. Suffice it for this Tribunal to potat out that the "Corporate Debtor's absolvent from its lability te the First Respondent/"Operational Creditor' was on account of the execution of 'Guarantee Deeds' and the matching payment of amounts duc to be paid by the Promoter group.

85. Tt is worthwhile to make mention of the e-mail dated 21.01. 2015 addressed by MrSunil Gupta (Finance Director) of the Appellant' Respondent/Corporate Debtor addressed to the "Arbitrators' viz. ShriC.L. Rajan and Mr.Sairam wherein it was mentioned that ...0..... etenes "rerarding payments, please note that we shall be making one crore payment every month starting with this month and, further we are signing long term PPA expected in Apml and thereafter lenders have agreed to release funds. We have already signed minutes with PTC in this regard. Thereafter we shall make full payment."

86. As a matter of fact, the "Appellant'/Corporate Debtor' on 24.09.2015 through tis President and Director Projects had issued a "Certificate of Merit' to the First Respondent/'Operational Creditor' among other things mentioning that it had executed the work of Civil works for implementation of 110 MW Chuzachen Hydro Electric Power Project. In East Sikkim, India" under M's.GATIL Infrastructure Pyt. Limited valued at Rs.199.94 Crores vide Agreement dated 12° August 2006. The work was completed in all respects and to our satisfaction and the Project was cormmissioned by 11 March, 2013, from then on running satisfactorily, ete." and the issuance of said certificate to and in favor of the First Respondent/Petigooner'Operational Creditor is not a favorable circumstance to and in favor of the Appellant/Corporate Debtor, in the considered opinion of this "Tribunal".

Company Appeal (AT) (CH Ura Na SS of 2021 A?

87. A cursory glance of the "Demand Notice' dated 03.08.2017 issued by the First RespondertOperational Creditor' addressed to -- the TPs "Appellant'/'Corporate Debtor' shows that the amount claimed to be in default was Rs.3140.37,.776/ im respect of the 'unpaid operational debt'. The 'Appellant'/Corporate Debtor' an 12.08.2017 had sent a reply te the Section & 'Demand Notice' issued by the First Respondent/*Operational Creditor' denying the existence of Operational dues and termed the "claimés)' as 'a false, wrongful and mala fide one',

88. Corting to the aspect of Arbitration Application No. 110 of 2010, the same Fed by the Appellant/Corporate Debter came to be dismissed by the Hon'ble High Court of Andhra Pradesh.

Position in 1 & B Code:

> 89, Itmust be borne in mind that for admission of an 'Application' under Section 9 of the 1 & B Code, 2016, the precise sum of the claim is not relevant. The exact/precise claim of the amount can be determined by the 'Interim Resalution Professional'/ Resolution Professional' daring the course of 'Corporate Insolvency Resolution Process'. After all, an "Adjudicating Authority' is not required to conduct an in-depth enquiry into the allegations, since the proceedings under the | & B Code are summary in nature and not lke a Civil Suit.
>
> 90. tis an axiomatic principle in Law that an 'Operational Creditor' on the occurrence of a default in payment of an "Operational Debt" by the 'Debtor' is ertitled to initiate the "CIRP* under Section 8 of the [ & B Code. The 'onus of proof is on the "Corporate Debtor' to exhibit that Hability to pay the "debt has already been disputed by the 'debtor' by producing necessary record of pendency of "suit? or "Arbitration Proceedings' filed before the receipt of the natice from the "Operational Creditor' or an invoice in relation to such dispute.

Company Appeal (AT) (CH Ura Na SS of 2021 Ag G1. One cannot brush aside an important fact that, in the present case, the duc amount of the 'Operational debt' exceeds Rs.One lakh and therefore, the initiation of "CIRP* by the First Respondent/'Operational Creditor' against the Appellant/Corporate Debtor' by means of filing of an Application before the' 'Adjadicating Authority' (National Company Law Tribunal, Hyderabad) in C.PIB No.227/9/H DB/2017 cannot be found fault with, especially when a sum of Rs.5 Lakhs was partly paid and for release of atleast Rs.1 Crore a letter dated 23.01.2013 was addressed to the "Appellant? by the First Respondent/ 'Operational Creditor' and further on 23.05.2017 a request was made to the 'Appellant' by the First Respondent/'Operational Creditor' to release the balance seam of Rs, 1,95,00,000"- immediately,

92. Before the "Adjudicating Authority', C.P.No<1Bj227/9/HDB/ 2017 was filed on 26.09.2017 by the First Respondent'Applicant/Operational Creditor, In the case on hand, the e-mail addressed by Mr.Sunil Gupta, Finance Director of the 'Appellant' was on 21.01.2015, which net only saddles the Company tacitly, but also constitutes a 'valid and legal acknowledgement' in the eye af Law. Viewed in that perspective, the fling of Section 9 Application under the 1 & B Cade, 2016 by the First Respondent/'Operational Creditor' before the 'Adjadicating Authority" is well withm the prescribed period of 'Limitation' and resultantly, the 'Debt' is not barred by Limitation.

93. On a careful consideration of respective contentions advanced on either side, in the light of qualitative and quantitative discussions mentioned supra, bearing in mind the facts and circumstances of the present case in an holistic fashion and this 'Tribunal', ongoing through the 'Impugned Order' of the "Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench) in C.P.No B22 7/HDB/2017 dated 26.04.2021 comes to a consequent conclusion that the

'admission of application' under Section 9 of the [& B Code, Company Appeal (AT) (CH Ura Na SS of 2021 2016 (Piled by the [* Respondent/*Operational Creditor') is free from legal flaws.

The instant "Appeal? fails.

Result:

> G4. In fine, the Company Appeal (ATIUNS)\CH) No.$3 of 2021 is dismissed. Ne coasts. LA.WNei 22/202 Stay Application), LA No. 1235/2021 {seeking exemption fram filing typed copies of Dim Annexures} and LA.No. [24/2021 (secking exernption from filimg certified true copies of the 'impugned order' dated 26.04.2021 of the "Adpadicating Authority') are closed.
>
> f {Justice Venugopal M] Member (ludicial 18.06.2021 SE Company Appeal (AT) (CH Ura Na SS of 2021 NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI {APPELLATE JURISDICTION} COMPANY APPEAL {(AT}(CH](INSOLVENCY} NO. 53 OF 2021 {Under Section 61 of the Insolvency and Bankruptcy Code, 2016) {Arising out of order dated 26 April 2021, passed by the Adjudicating Authority /National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP (1B) No.227/9/HDB/2017)} IN THE MATTER OF:
>
> 1.

Yogesh Kundra Suspended Director Gati Infrastructure Pvt. Lid.

(Formerly known as M/s. Gati Infrastructure Lid.} Plot No.20, Survey No.12, Kothaguda, Kondapur, Hyderabad ~ 500 084 Versus Sew & Prasad Joint Venture, 6-3-871, Snehlata Greenlands Road, Begumpet, Hyderabad 500 016 Nandiraju Prabhakar Interim Resolution Professional Gati Infrastrucutre Private Limited, {Formerly known as M/s Gati Infrastructure Ltd.) Plot No.20, Survey No.12, Kothaguda, Kondapur, Hyderabad ~ 500 084 Present:

> Appellant Respondents For Appellant > Mr K.V. Simhadri, Sr. Counsel for Appellant For Varsha Banerjee, Amir Bavani, Advocates.
>
> For Respondent No.1 Mr V Lakshmi Narayanan, Advocate For Ms Harshini Jothiram, Advocate Company Appeal {AT} {CHM ins.} Noe. 53 of 2022 1 of 26 JUDGMENT {Virtual Mode} [Per; V. P. Singh, Member (T)}] { had the opportunity fo go through the judgement authored by my esteemed brother, Justice M. Venugopal, Member (Judicial). But with utmost humility and honour to brother Justice Verugopal, l wish to record my dissent ar the following points.

1, Pre-existing dispute 2, Dehbtor- creditor relationship between the Corporate Debtor and operational Creditor.

3. Maintainability of the Petition against the Corporate Debtor, Le, Gati Infrastructure Private Limited 'GIPL'.

Brief facts as stated in Appeal Appellant Mr Yogesh Kundra, suspended Directar of the Appellant/Corporate Debtor Gai Infrastructure Private Limited {in short "GIPL), has challenged the impugned order dated 26 April 2021 passed by the Adjudicating Authority under Section 9 of the 1&B Code in CP (1B) No. 22 fOfHDB/2017. The original parties status im Company Petition represents them in this Appeal for the sake of convenience.

om Operational Creditor, Le. SEW and Prasad JV fin short "SPIV) (Respondent No. 1} and Corporate Debtor {in short CD') 'Gati Infrastructure Private Limited' (in short 'GIPL') agreed and executed an Agreement on 12 August 2006 to perform various civil and hydro-mechanical works of 99 MW Company Appeal {AT} (CH}ins.) No. 53 of 20271 2 of 26 power project in Sikkim. The project was to be completed by March 2008, but it was delayed and finally cormmissioned in 2013.

y

3. On aceount of delay in completion of the project, Corporate Debtor GIPL, Respondent No.1 Amrit Jal Venture Private Limited (in shart 'AJVPL} along with other parties entered into a Settlement Agreement dated 14 December 2G13, by which Corporate Debtor, Le. GIPL sereed to pay £10,00,00, 000/-iten crores) to Respondent No.l (SPIV) as full and fimal settiement of its liabilites towards Respondent No.l. Le. SPUV. Further, Respondent No.1 alse agreed not to initiate any legal proceedings against the CD. Given Agreement, 'AJVPL'' decided to pay the remaining settlement amount to Respondent No.1.

4, The Appellants contends that under the terms enshrined in Clauses 2.3 and 2.7 of the Agreement dated 14 December 2013 mentioned above, the Corporate Debtor paid <10 {fen} crores to Respondent No.1, resulting in the due discharge of Corporate Debtor's liability towards Respandent No.l. Hawever, "AJVPL' paid only = 4,.38,62,120/- to Respondent No.1 and failed to pay the balance amount.

a. Respondent No.] approached CD on 21 July 2014 for further payment sesinst the withhold amount of = 2.03 crores, which was to be paid after completion of wark to the satisfaction of the Carporate Debtar.

&. On 22 March 2015, Respondent No.l, based on the Settlement Agreement dated 14 December 2013, wrate to Mr Sunil Gupta, Director of AJVPL, that the amount due from 'AJVPL' to the Respondent No.1 'SPJV' is Company Appeal {AT} (CH}ins.) No. 53 of 20271 3 of 26 to be paid to 'Sew Infrastructure Ltd', thereby admitting that the lability of Corporate Debtor GIPL stoad satisfied in terms of Settlement Agreement.

7. On 20 May 2016, another 'MOU' was entered between Respondent No.1, AJVPL, Sew Infrastructure Ltd and Intercontinental Infrastructure Ltd. As per MOU, it was agreed that 'AJVPL' would clear all the outstanding dues af Respornlent No. 1 (SPUV). After that, the entire dues of

Respondent No. 1 (SPIV}) was assigned to 'Sew Infrastructure Lid' (in short, 'SIL).

8, After that, on 3 August 2017, Respondent No.1 (SPJV) changed its earlier stand and issued the demand notice U/S 8 of the I&B Code,2016 against the Corporate Debtor (GIPL), claiming default towards the payment of instalment as per the Settlement Agreement {the MOU) by AJVPL.

9. On 10 August 2017, Corporate Debtor sent a reply to the demand notice of Respondent No.1 {SPIV}, invoking 'Arbitration' for the delay in. completing the project; losses suifered by the Corporate Debtor; and the amount towards motorised door and restoration of land dump yards.

10. Respondent No.l alse filed an Application being CP (IB) No.8 /9/HDB/2017 under Section Y of IBC against 'AJVPL for the same claim. However, on 1/7 September 2019, after admission of Petition, Respondent No.1 applied for withdrawal of the above Campany Petition initiated against "AUVPL'), which was allowed by the Adfudicating Authority.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 4 of 26 1]. Arbitration Application Ne. 110 of 2017 fled by Corporate Debtor (GIPL) under Section 11 before the Hon'ble High Court was alsa dismissed on 4 August 2020.

i2. After that, Respondent No. 1 (SPJV]}, by tts letter addreased to RP of AJVPL, withdrew its claim from the said CIRP, which was also acknowledged by RP vide its emai dated 14 October 2020.

Privity of Contract /Debtor-Creditor relationship between the Corporate Debtor and Operational Creditor.

13. The Appellant contends that the Settlement Agreement dated 14 December 2013 was entered between Corporate Debtor 'GIPL', Respondent No. | Operational Crediter SPJV, the halding Company of the Corporate Debtor, ie. 'AdVPL, Mahendra Investment Advisors Private Limited (MIAPL), Arbitrators Mr Sail Ram and Mr C L Rajan.

id, Clause 2.3 of the said 'Agreement' explicitly provides that the Corporate Debtor {GIPL) shall pay = ten crores ta Respondent No.l {SPJV}). Upon payment of < ten crores, the Cerporate Debtor "GIPL' shall have no further Respondent No.1 (SPJV) could initiate action or proceeding against only the 'AUVPL' to exclude Corporate Debtar 'GIPL' from the recovery of the balance settiement amount. It is an admitted fact that the Corporate Debtor 'GIPL paid = ten crores on 24 December 2013 in terms of the settlement. Therefore, upon payment of £ 10 Crores, no further lability rermaimed on the part of the Corporate Debtor 'GIPL'. Thus, there was no debtor-creditor relationship in Company Appeal {AT} (CH}ins.) No. 53 of 20271 5 of 26 terms of the Agreement between. the Corporate Debtor (GIPL) and Respondent No.1 (SPUV) as of date.

15. The Appellant further contends that the Adjudicating Authority failed ta consider all the relevant facts and material on record. The Appellant emphasised Clause 2.3 and Clause 2.7 of the Settlement Agreement dated 14 December 2013.

is. Clause 2.5 mage 107 of Appeal Paner Book) of Settlement Agreement dated 14 December 2013 reads as under:

> "Out af aggregate settlement amount, GIPL shall pay an amount of ¢ 10 crores representing RA bills due and part Agreement. Upon payment of ¥ 10 crores, GIPL shall have no further Uability or obligation in respect of the settlement amount. SPJV may initiate any suit, action or proceeding against only the promoter {to the exclusion of GIPL) for recovery of such balance settlement amounts in excess of * 10 crores, Ii is mutually agreed and understood among the parties that GIPL shall arrange the payment of € 10 crores within 2/3 working days of execution of this Agreement."

Clause 2.7 of Settlement Agreement dated 14 December 2013 ig as under:

> "SEIV shall not demand or receive any payment, prepayment, repayment, redemption or any distribution in respect, or_en aerount of any settlement amount payable to them under this Agreerent other fhan to the extent and in the monner set out in this Agreement and Company Appeal {AT} (CH}ins.) No. 53 of 20271 6 of 26 the SPUV irrevocably agreed not to take any legal the GIPL in relation to the settlement of claims. In any circumstance, once the payment obligations of GIPL as set out in clause 2.3 above has been satisfied in full."

iv. The Appellant contends that as per Clause 2.3 of the Settlement Agreement dated 14 December 2013, the Carporate Debtor's lability was limited to = 10 fen) crores. However, it is undisputed that the said & 10 {ten} crores payment was made on 24 November 2013. Thus the Corporate Debtor had no further Nability or obligation regarding the Contract Agreement dated 12 August 2006 and Settlement Agreement dated 14 December 2015. Accordingly, as there is mo "debt" and 'default' subsisting between the Operational Creditor, i.e. SPUV and Respondent Corporate Debtor, Le. GIPL, a petition under Section @ against the Corporate Debter GIPL is not maintainable.

18 The Appellant has also pleaded that the debt owed to Respondent No.1 Was assigned to 'Sew Infrastructure Ltd', which is evident from the letter dated 22 March 2015 as addressed by Respondent No.1 and as per Memorandum of Understanding (MOU) dated 20 May 2016. Copy of MOU is annexed with the Petition.

ig, tis evident that the 'MOU' dated 20 May 2016 was executed between 293 Party, Intercontinental Infrastructure Ltd-3s Party and 'Sew-Prasacd JV-

4h Party.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 7 of 26 20, The MOU reads as under;

> "The Fourth party had earlier executed through the First party various civ works relating ta Chuzachen Hydroelectric Project, located at Rongl, Bust Sitkun for 'Gati

Infrastructure Private Limited.

in respect of the said project works executed for GATTI Infrastructure Private Limited various amounts are due to the Fourth party, and subsequently, these dues are transferred fo and agreed to be paid by the Amrit.jal Venture Private Limited, the Second Party. The dues receivable by the Fourth Partu have been transferred/ assigned to the i' Party. There are other business/ ICD transactions between the I® Party and the 2 Party, On account of these items, huge amounts are payable by the 2! Party to the 1% Party, and the details of the same are available in various agreements/dacuments executed' exchanged between the P* Party, 2° Party and 4 Party. **** Aceardingly, this Memorandum of Understanding iwitnesseth as under

1. Against the outstanding dues payable towurds Party ftransferred to the 1° Party), the 2°¢ Party shail make payments up to ¢ & crores only to the 38 Party under intimation to the 1% Party.

2. Payments made as per above clause will be treated as payments made to I Party and the I* Party will confirm and issue receipts to the 2°" Party, after obtaining confirmation fran the 3° Party.

3. As and when amounts are received from the 2° Party, the 3 Party shall avform the same ta the [st Party to enable it to adjust the account of the Qe Company Appeal {AT} (CH}ins.) No. 53 of 20271 8 of 26 Party in its books af accerunts of the Second Party cid issue the recegots to the 3°¢ Party,

4. As and when amounts are received from the Second Party, the third Party shall adjust the same against the amount due from the first party and issue receipts to the first Party.

S. Upon payment of € 8 crare by 2 Party to the 3r¢ Party the obligation of all the parties under this Memorandum of Understanding stand fulfilled.

fverbatim copy) 2i. The Learned Counsel for the Respondent-1/Operational Creditor submits that MoU dated 20 May 2016 (Annexure-4, page 17 of the Counter} was entered between the parties to transfer an amount of § 8,00,00,000 feight ereres} to M/S Intercontinental Infrastructure Lid by AJVPL, as M/S SEW Infrastructure Lid was its Creditor. However, since AJVPL failed to pay the said amount of 2 eight crores, the MOU has been terminated. Therefore, the said MOU as such is notin existence,

22. Respondent No. 1 claims that the Settlement Agreement in the form of MOU, dated 2O May 2016, stood terminated because of non-payment of eight crores as per the terms of the Agreement. It is pertinent to mention that the non-payment of the remaining amount given the terms of settlement dated i4 December 2013 is the basis af the Section 9 petition itself. The same is the Situation with the terms of settlement dated 20 May 2016, wherein one of the Party to the

Agreement committed breach of the terms of MOU and failed to make the payment of ¢ eight crores. Haw can Respondent No. claim that Company Appeal {AT} (CH}ins.) No. 53 of 20271 9 of 26 after the violation of the terms of settlement dated 14 December 2013, the said Agreement is not terminated and gives Respondent No. 1 the right to file Petition u/s 9 of the Code. Per contra breach of the terms of St MOU dated 20 May 2016 has resulted in the termination of the MOU and making it non-

existent.

23. The Operational Creditor relies on the following email communications ta demonstrate that the Respoandent/Corporate Debtor had agreed te pay yarious amounts which were earlier agreed to be paid by AUVPL an behalf of the Respondent.

§3} Email communication addressed from Corporate Debtor's email ID, viz, anil kavadiya@eatiinira.com, to the office bearers of one Ltd.

Qi} email comnninication dated 17 October 2018 and 11 November 2018 proposing payment schedule.

24. Based on the above mentioned 'MOU, the dues receivable to Operational Creditor 'Sew-Prasad JV' have been transferred /assigned to the ist Party, Le. Sew Infrastructure Lid Gn shart 'SID} wef 20 May 2016. Therefore the question of maintainabilty of the Petition by Operational Creditor 'SPJV' arises. Based on the assignment of debt to SEW Infrastructure Lid, 'SPJV' does not remain an Operational Crediter of the Corporate Debtor 'GIPL'.

25. Tt is pertinent te mention that 'SEW Infrastructure Lid' filed an Application on 7 May 2019 tinder Section 9 of the Inselvency and Bankruptcy Company Appeal {AT} (CHHIns.} Na. 53 of 2021 10 of 26 Code 2016 against the holding Company of the Corporate Debtor, Le. "AUVPL'. The Adjudicating Authority adimittedd the Application, being CP (1B) No 192 /7/HDB/ 2017. After that, on 17 September 2019, Respondent No. | fled an Application seeking withdrawal of CIRP initiated against AUVPL, which was allowed. The ssid withdrawal was acknowledged by the RP, vide its emul dated 14 October 2020. Qn 12 October 2021, vide its letter, addressed to the RP of AUVPL, the Operational Creditar 'SIL withdrew its claim from the said CIRP proceedings.

26. Based on the above, it is clear that there was no debtor-creditor relationship between Operational Creditor "SPJV' and the Corporate Debtar' GIPL on the date of filing of the Petition, ie. on 21 September 2017 under Section 9 of the 1&B Cade, 2016.

Pre-existing dispute & Maintainability of Petition

27. The Appellant contends that the Petition under Section 9 of the Code is not maintainable om account of the pre-existing dispute. The Corporate Debtor's Learned Counsel submits that an Agreernent dated 12 August 2006 was entered between the Corporate Debtor and Respondent No. 1 to execute various civil and hydro-mechanical works. Various disputes arose with the execution of

the Agreement between the parties, i.e., rectifying, repairing, redoing the defects inchiding compensation and delay in completion of the project by Respondent Na. 1 for more than ten years, which in turn cause loss te the Corporate Debtor. However, in a unified manner, the Corporate Debtor, to resolve all the disputes, agreed to enter into a Settlement Agreement dated Company Appeal {AT} (CH}ins.) No. 53 of 20271 11 of 26 Stated and recorded the Agreement between the parties that the Corporate Debtor shall pay < ten crores representing R A Bills due and part of the interest amount to Respondent No. i, Le. SRIV. After the payment of = ten 3, the Corporate Debtor had no further Hability or obligation resarding the Settlement Amount. Further, it was agreed that the SPJV could initiate any suit, action or proceeding against only the promoter (Amrit Jal Venture Private Limited! to the exclusion of "GIPL'.} To recover the balance settlement amount of [ 23.98 crores in excess af = ten crores, the promoter agreed to pay in terms of the Settlement Agreement.

28. However, subsequently, AJVPL paid only £4,38,62,122 to Respondent No, 1, SPUV, ard failed to make any further payments as agreed by the Settlement Agreement. This non-payment of the remaining amount by AJVPL is the basis of the instant Section UY petition. Upon failure of AUVPL to pay in terms of the Settlement Agreement is itself a disputed issue and the absence of a determination of the said issue by a court of competent jurisdiction in favour of Respondent No. 1, proceedings under Section 9 for alleged non- payment of this amount is untenable. Any alleged breach on account of non- implementation of the terms of settlement cannot be considered 'default' regarding payment of "operational debt". However, the Corporate Debtor GIPL bas duly discharged its lability qua Respondent No. 1, SPUV arising out of the settlement agreement.

29. Warther, as regards the claim towards the withheld amount, it is evident that the Corporate Debtor never admitted this amount, given the pendency of warks by Respondent No.1. The case of Respondent No.1 is selely based on Company Appeal {AT} (CH}ins.) No. 53 of 20271 12 of 26 account of issuance of a merit certificate, which was explicitly Issued at the instance of Respondent No.1, as evident from a bare reading of the email dated 29 May 2014. (Page 236 of Appeal Paper Book.}.

30. It is evident from the email sent by Mr Ramesh on behalf of "Sew fufrastructure Lid" dated 29 May 2014, 07:28 that the Operational Creditor requested for merit certificate because it was required for submission to other clients for PQ purpose. It is stated in the mail that "as directed by surnjeev Upadhayay Saah, we are enclosing the format of work completion certificate and work done certificate. Therefore, we request you fo kindly issue the certificate at the earliest, as we require the same for submission te other clients for PQ purpose."

31. The Appellant contends that given nom-performance of the terms of Agreement by Respondent No.1, the Corporate Debtor also issued notice dated 10 August 2017 invoking Arbitration for the delay in completing the project, lasses suffered by the Carporste Debtor. Respondent No.1 has failed to address the issues as raised in the said notice. Its only response regarding the said notice is not relevant in light of the dismissal of Section 1] Application of the Corporate Debtor,

32. It is Ul-founded in as much as the order dated 4 August 2090 passed by the Hon'ble High Court in Arbitration Case is on account of proceedings being premature and can in no manner be read to

make out a case of admitted Operational Debt.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 13 of 26

33. The alleged claim regarding the lability of the Corporate Debtor to pay % 2.03 crores to Respondent No. i was subject to the completion of work to the satisfaction of the Corporate Debtor, as evident from the letter dated 21 July 2014.

34. The Appellant has annexed the copy ofa letter dated 21 July 2014 (page 188 of the Paper Book}, which shows that the Corporate Debtor wrote a letter te the Operational Creditor 8PJV in response to its request for releasing the withheld amount. it is stated in the letter that;

> "Dear Sa This has reference to a letter No. SEWSTW/ F.CHEP-DIL/ SR- O649 DT I2 July 2014; vide which you have sought part payment agamnst withhold amount of * 2.03 crores.
>
> in view of the above, it is intimated that the payment against withheld amount af * 2.03 crores shall be made after the completion of work, to the satisfaction of GIPL.
>
> Therefore, it is requested to kindly speed up the pace of the work and complete their pending works at site."

fverbatim copy}

35. The Appellant has annexed the copy of the letter sent by Operational Creditor SPIV to Corporate Debtor dated 23 January 2015 (Page 187 of the Appeal Paper Book}, a correspondence relating to release of withholding amount. It is stated in the letter that;

> "in continuation to our letter ist cited abave, we bring to your kind notice the following;
>
> Company Appeal {AT} (CH}ins.) No. 53 of 20271 14 of 26 the pending works of Adit-1, Adit-IV, Valve House, Surge Shaft and Range Dam mentioned in your letter 2° cited above, have already heen completed as per the instructions and to the satisfaction of GIPL representatives. The pending works of Adit area have been completed except sifting of plant and machinery which shall commence upon receipt of substantial amount of payments.
>
> AS you are well awere, an ammount of * 2 crares was withheld Y : i} against the above pending works, out of which ¥ 35 lakhs was released, As we have already completed almost all the pending works except sifting of equipment and machinery. It is requested to release at least Rupees one crore from the pending dues and oblige."

fverbatim copy}

36. Based on the above correspondence, it is clear that the withhold amount was to be released subject to work satisfaction by 'GIPL', However, the contract work was not completed until 23 January 2015: therefore, the Operational Creditor wrote to the Corperate Debtor that he has already completed almost all the pending works except sifting equipment and machinery. In the circumstances request was made for releasing at least Rupees ONE COTS,

37. Further, the Operational Creditor/ Respondent No.1 vide its letter to the Corporate Debtor dated 23 May 2017 (page 189 of the Appeal Paper Bouk} while mentioning the Settlement Agreernent dated 14 December 2013 and demanding the release of the pending amount from the Cerporate Debtor.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 15 of 26 Still, no reference was made about the merit certificate relating to the completion of work to the satisfaction of the Corporate Debtor. In this letter, the Operational Creditor 'SPJV' has stated that:

> "The pending work relating to the clearing of areas utilised by us have been complete long back and the project is successfully running for the last feu years. The amount of € hwe crores was withheld far completing the above- works. Qut of the abave-mentioned amourt of &, 5 lakhs was released till now and the balance is still pending to be released. We have made several requests if vain.
>
> Hence we once aqain request you to kindly release the balance amount of rupees ene crere ninety-fwe lakhs immediately, "

fverbatim copy}

38. However, on perusal of the letter dated 23 January 2015, it is clear that work was nat completed until then; that's why the Operational Creditor wrote to the Corporate Debtor that he had camaleted most af the works and only work relating ta shifiine of equipment and machinery is left. Therefore the Operational Creditor requested the Corporate Debtor to at least release one erere rupees fram the withheld amount.

39. The Operational Creditor reltes only on the 'merit certificate' issued to the Corporate Debtor. But on perusal of documents filed by the Appellant, it appears that merit certificate was given to the Operational Creditor only for PQ purpases, for submission to other clients showing completion of the work. SH, if was issued only on request for submission to ather cherits. Therefore the Operational Creditor requested the Corporate Debtor for issuing the Company Appeal {AT} (CH}ins.) No. 53 of 20271 16 of 26 certificate at the earliest, as it is required the same for submission to other clients for PQ purposes.

40. The Appellant further submits that the issue raised by the Corporate Debtor being a subject matter of civil disputes, cannot form the basis of an Application under Section 9 of the Insolvency and Bankruptey Code 2016. Therefore, the present case being a case of pre-existing dispute, cannot be adjudicated under the provisions of IBC.

41. The Appellant further contends that by MOU dated 26 May 2016 (page 227 of Appeal Paper Book), executed between Respondent No.1 /Operational Creditor, Le. 'SPIV', AJVPL, Sew Infrastructure Lid and Intercontinental Infrastructure Lid, as per which it was agreed that "AUVPL" would clear all the outstanding dues of Respondent No.1, which were later assigned to Sew Infrastructure Ltd.

42. Further, the Learned Counsel for Respondent No. 1 SBIV' emphasised the letter issued by Corporate Debtor ta the Operational Creditor, SPUV, dated 10 August 2017. A copy of the letter is annexed with the Petition. (Page 221 of Appeal Paper Book). This letter was issued after the issuance of demand notice in Form 3, dated 3 August 2017. The letter reads as under:

> 'TI. You have been unfortunately delaying the completion af project constructions despite lapse of more than 10 years. Whe have also executed a settlement agreement dated 14 December 2013 agreeing to discharge your obligations as mandated under the construction contract, but tl date you have net completed their pending works.
>
> Company Appeal {AT} (CH}ins.) No. 53 of 20271 I? of 26
>
> 2. In spite of repeated reminders from our side, there are various outstanding works which are yet te be completed for which certain amount had been withheld by us which is known £0 You.

a On your representation that you would complete the work, we had released a sum of ¥ & lakhs in geod faith.

However, you have failed and neglected to carry aut the pending works and subsequently abandoned the projects site without any reasons and justification contrary to your obligations as stipulated in the said construction contract dated f2 August 2006, 4, in respect of the works completed by you, varicus defects, deficiencies, faults, shortcemings and problems have been cropped up. We have beer repeatedly requesting you to rectify, replace and repair the damage and defective work but you have neglected to rectify the sume, despite your continuing liabiity under the construction contract referred abave for the reasons best known to you,

5. The following are the incomplete works, deficiencies, defects and shortcomings that needs to be attended by you inumedintely;*** &, The cost of rechfying, repairing, redoing the defects are estimated to be mt excess af * 36 creres which includes the compensation for delay and alse rectifying the defects. We reserve the right to quantify further claims in due course, Since, you have failed and neglected to attain to them, despite repeated requests and reminders, we are entitled to recover the same amount from you and get the work dane by same other contractor.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 18 of 26 fi Sirtee you have mot been responding to our varinus communications and requests, ive have no other option except fo inveke clause 37 fgoverning lauis-,-Arbitration and Dispute Resolution) of the construction agreement dated 12 August S006, In terms of clause 37 Le., Gali ofrastructure Lia, hereby appoint Mr Manoj; Sen, an

engineer for referring the aforesaid disputes to him for resolution of the issues in hand." fverbatim capy)

43. The Learned Counsel for the Respondent emphasised the contents of the email dated 24 January 2015 sent by the then Director of AJVPL, purportedly to acknowledge the debt by the Corporate Debtor GIPL. In resporise fo it, the Appellant contends that this email was sent on behalf of AJVPL, which was addressed to the Arbitrator under terms of Settlement Agreement on behalf of AJVPL, Le. the entity Hable ta pay. This email was madafidely read to make the Corporate Debtor GIPL Hable. The contents of the email is reproduced below for ready reference;

> "from:
>
> To cis Cemmahendradgaticom, chairman, eavapitalfortunes.com, saireoniadcapitalfortunes. com Subject; Payment Plan "dear Sir, ii was nice meeting other day, regarding payments, please note that we shall be making ane crore payment every month starting with this month end. Further, we are signing long-term EPA expected in April and thereafter lenders have agreed ta release funds. We have already signed. minutes wath PTC in this regard. Thereafter we shall make full payment With warm regards".

{verbatim copy} Company Appeal {AT} (CHHIns.} Na. 53 of 2021 19 of 26 44, tis pertinent to mention that the email mentioned above was sent by Mr Sunil Gupta, who happened to be Director of "AJVPL', and addressed to Mr C L Rajaram, who was Arbitrater. Therefore, this email dated 24 January 2015 carmot be treated as an acknowledgement of the debt by the Corporate Debtor GIPL. However, this fact carmot be ignored that the holding Company of the Corporate Debtor GIPL is 'AJUVPL'. Thus, the above-stated email cannot be interpreted as acknowledging the debt by the Corporate Debtor (GIPL'.

45. Itis also essential to mention that a letter dated 22 March 2015 sent by Respondent No. | and addressed ta AGVPL {Page 71 of Appeal Paper Book}. It is noteworthy that in the said letter, Respondent No.1 refers to the Settlement Agreement dated I4 December 2013 and further states that the said amount duc from AJVPL te Respondent No.l is to be paid to 'Sew infrastructure Ltd', thereby admitting to the fact that the Hability of the Corporate Debtor "GIPL' stands satisfied in terms of Settlement Agreement and alse imples that Respondent No.1 agreed tu the fact that the email dated 24 January 2015 was from holding Company of Corporate Debtor 'AJVPL' and not from the Corporate Debtor 'GIPL''. Contents of the letter are reproduced below for ready reference;

Mr Sunil Gupta Director Amrit Jal ventures private limited wh Dear Sir, subject: no objection for release the funds directly to Sew infrastructure Ltd.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 20 of 26 In reference to the abave subject, we hereby agree to the adjustment of funds to the tune of ¢ 18 crores to be paid to SEW infrastructure Ltd against the outstanding as per the full and final settlement dated 14 December 2013. We further confirm that the total outstanding amount shall be reduced by * 18 crares once the same is paid to

SEW infrastructure Ltd.

Thanking you, unth regards for Sew-Prasad Joint Venture fAuthorized Signatory)"

fuerbatim copy)

46. The Learned Counsel for the Appellant argues that the Corporate Debtor did not issue the Completion Certificate in view of pending works to be carried on by Respondent No.l, 'SRIV. However, in light of repeated request and assurance of Respondent No.1] as regards issuance of certificates for future bidding purposes salely as can be inferred from an email dated 29 May 2014 (page 236 of the Appeal Paper Book}, Corporate Debtor issued the merits certificate in terms of the format as shared by Respondent No.1,

47. In the instant case, if is evident that 1* contract agreernent entered between Respondent No. 1, SRJV, and Corporate Debtor GIPL on 12 August 2006 to complete civil and hydre-mechanical work contract. However, there was a delay of more than ten years in the compietion of the project. Then, to resalve all the disputes, a Settlement Agreement in the form of the MOU dated i4 December 2013 was executed. Clause 2.5 read with Clause 2.7 of the said Agreement provided immunity to the Corporate Debter from ary suit, Company Appeal {AT} (CH}ins.) No. 53 of 20271 21 of 26 proceeding, or action subject to the payment of f ten crores to the Operational Creditor /Respondent Noa. 1. The Corporate Debtor made a payment of 2 ten crores and complied with the terms of the settlement.

48. Further, "MOU" dated 20 May 23016 was executed between SEW infrastructure Ltd, Amrit Jal Venture Limited, Intercontinental Infrastructure Ltd and Respondent No. 1, Le. Sew ~Prasad JV. Given the terms of MOU dated 20 May 2016, if was agreed that AJVPL should make payment of © eight erores to Intercontinental Infrastructure Lid under intimation to "SEW infrastructure Ltd". Tt was further agreed that upon payment of f eight crores by AJVPEL to Intercontinental Infrastructure Lid, the obligation of all the parties under this Memorandum of Understanding stands fulfilled.

49, Undisputedly AUVPL falled to make the payment as per the terms of MOU, Accordingly, consequences of the breach of the terms of MOU dated 14 December 2013 and further viclation of the terms of MOU dated 20 May 2016 cannot be determined in a summary jurisdiction given to the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.

50. Before the issuance of the demand notice, several correspondences are showing the existence of a dispute between the parties. The alleged claim regarding the liabihty of the Carporate Debtor te pay £ 2.03 crores to Respondent No.t SPUV was subject to the completion of wark toa the salisiaction of the Corpurate Debtor GIPL.

In response to the letter of the Operational Creditor dated 12 July 2014 for releasing the amount of = 2.05 crores, the Corporate Debtor intimated that the payment against the withhold Company Appeal {AT} (CH}ins.) No. 53 of 20271 22 of 26 amount could be made after the completion of work. It was suggested by the Corporate Debtor to speed up the pace of the wark and complete their pending assignments at the site, Si. Further, the Operational Creditor, in its letter dated 23 January 2015, wrote to the corporate debtor for releasing ¢ two crores, which were withheld against their pending works. In this letter, the Operational Creditor contended that it has already completed almost all the pending works except the shifting of equipment and machinery. Therefore the request was made to at least release nmipees one crore frorn the pending dues.

52. Based on the above discussion, [ beheve that the Appellant has proved a pre-existing dispute priar to issuance of the demand notice under Section 8 of the Insalvency and Bankruptcy Cade 2016.

Sa. Hon'ble Supreme Court in Mobilax Innovations (P) Lid. uw Kirusa Software (P} Ltd., (2018) 1 SOC 383: 2017 SCC OnLine SC 1154 : (2018) 1 SCC (Cru) SJ i at page 403 has held:

"81. it is clear, therefore, that ance the operational Creditor has fied an application, which is otheruise complete, the adjudicating autharity must reject the Application under Section QSN2Hd} if notice af dispute has been received by the operational Creditor or there is @ record of dispute in the myformation utility. [fis clear that such notice must bring to the notice af 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 Company Appeal {AT} (CH}ins.) No. 53 of 20271 23 of 26 investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important te 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 fo 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.

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56. Going by the aforesaid test of "existence of a dispute", it is clear that without going inte the merits of the dispute, the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties,

> which may or may not ullimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got up and motivated to evade liability."

fverbatim copy} a4. In the abeve-mentioned case, Hon'ble Supreme Court has held that all that the Adjpudicating Authority is to see at the stage of admitting/rejecting the Application is whether there is a plausible cantention that requires further investigation and that the dispute is not a patenthy feeble legal argument or an assertion of fact unsupported by evidence. However, in doing so, the authority does not need to be satisfied that the defence is likely to succeed.

Company Appeal {AT} (CH}ins.) No. 53 of 20271 24 of 26 Therefore, so long as a dispute truly exists in fact and is not spurious, hypothetical or imaginary, the Adjudicating Authority has to reject the Application. Moreover, the existence of the dispute must be pre-existing, ie.

it must exist before the receipt of the demand notice or Invoice.

SS. In the instant case, the claim under the Settlement Agreement, falls within the anrbit of the term 'dispute' about "the existence of debt". The alleged claims regarding the Corporate Debtor's Hability ta pay = 2.03 crores to the Operational Creditor was subject to the completion of work to the satisfaction of the Corporate Debtor. The Operational Creditor relied on the merits certificate to show the completion of work ta the satisfaction of the Carporate Debtor. However, the Appellant pleaded that the merits certificate was issued at the instance of the Operational Crediter, which was obtained for submission in other entities. Given the law laid down by the Hon'ble Supreme Court in the case of Mobilox (supraj, the Adjudicating Authority does not need to be satisfied at the admission /rejection stage that the defence is likely to suceeed.

56. The Appellant is relying on the Settlement Agreement dated 14 December 2013. Based on that, the Appellant is claiming that alter payment of 2 fen crores as per terms of the settlement, no further lability could be imposed on the Corporate Debtor. The Corporate Debtor's hability based on. their terms of setilerment cannot be determined in a summary proceeding under the Insolvency and Bankruptey Code, 2016.

57. This Petition is filed by the Operational Creditor SPJV, who has assigned its debt to "SEW Infrastructure Lid". The maintainability of the Company Appeal {AT} (CH}ins.) No. 53 of 20271 25 of 26 Petition after the assignment of debt to "SEW Infrastructure Lid" is also questionable. The Appellant is relying on the MOU dated 20 May 2016. The entire due amount agreed to be paid to the Operational Creditor "SEW-Prasad JV', or its Assignee by the 'Amrit Jal Venture Private Limited' and not the Corporate Debtor.

38. Further, the dues receivable by the 'SEW and Prasad JV' is assigned to SEW Infrastructure Ltd. However, the Qperational Creditor claims that given the MOU dated 20 May 2016, = sight crores was paid to Intercontinental Infrastructure Lid by AJVPL. But AUVPL failed to pay the said amount of 3 eight crores; the MOU has been terminated. Whether the MOU dated 20 May 2016 is valid or not is a disputed question and needs further investigation. Such disputed question cannat be

decided under the summary jurisdiction exercised by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016. There is no debtor-creditor relationship between the Operational Creditor 'SPYV' and the Corporate Debtor 'GIPL'. Therefore, the Petition fled U/S Sec Gis not maintainable on this ground also.

59. Based on the above discussion, I think that Appeal deserves to be allowed, and the impugned order of admission of Petition fled U/S 9 of the il&B Code, 2016 deserves to be set aside.

iV. PB, Singh] Member (Technical) NEW DELHI 18 JUNE, 2021 pks Company Appeal {AT} (CH}ins.) No. 53 of 20271 26 of 26