

2. Brief facts of the case necessary to be noticed for deciding the appeal are:

- i. The corporate debtor (erstwhile M/s. SB Electro Structural) and R-1 Daga Power Systems & Engineers Pvt. Ltd. entered into a Joint Venture/Consortium Agreement to submit a bid for supply erection installation testing and commissioning, engineering supply erection of 132KV D/C four conductors lines along with two similar work of Orissa Power Transmission Corporation Ltd. ('OPTCL') a Government of Orissa undertaking.
- ii. The corporate debtor and operational creditor submitted a bid, corporate debtor as lead member of consortium. Certain terms and conditions were also agreed between both the Joint Ventures/Consortium Members.
- iii. Letter of award dated 20.08.2018 was issued by OPTCL to the corporate debtor, Joint Venture with M/s. Daga Power Systems & Engineers Limited. The letter of award detailed the scope of work, total contract prize was ₹32,40,50,555/-. One of the works included in the scope of work was supply of all equipment and materials for the transmission lines.
- iv. An Internal Agreement dated 04.01.2019 was entered between lead partner/corporate debtor and the R-1, wherein corporate debtor was obliged to execute the erection and civil work and the R-1 was to execute the supply component.

- v. Contract Agreement was executed on 22.01.2019 by the OPTCL, where total value of the execution of work was ₹32.40 crore. The Agreement dated 22.02.2019 has bifurcated the supply component of the work, erection component of the work and component of works contract for line, total being ₹32,40,50,554.87/-. The work was to be completed within 24 months.
- vi. On 16.09.2019, SB Electro Structural Partnership Firm was merged with the corporate debtor wherein all business along with the assets and liabilities were transferred to the corporate debtor.
- vii. On 11.02.2020 an Addendum to the Internal Agreement dated 04.01.2019 was executed between the corporate debtor and the R-1 thereby amending certain terms. Payments against the supply components which was R-1 responsibility was to be released only from receipt of amount from OPTCL.
- viii. On 23.04.2020, the work order was amended whereby total value of the contract was enhanced from ₹32.40 crore to ₹36.88 crore, by which enhancement, supply component was enhanced to ₹18.90 crore, including GST and other components to ₹21.32 crore including GST.
- ix. The R-1 as per Internal Agreement between the corporate debtor and operational creditor for discharging his supply obligation made supplies to the corporate debtor by tax invoices consignee being OPTCL. Tax invoices were issued by the operational creditor in the name of corporate debtor and the supply was made accordingly to OPTCL.

- x. OPTCL has released payments towards supply agreement. Both the JV Partners carried out their respective obligations. Invoices were raised by operational creditor from 30.04.2019 to 30.10.2021. Corporate debtor had made ad hoc payments against the invoices from time to time. Certain correspondence took place between the parties.
- xi. On 25.07.2022, R-1 issued a notice claiming payment of outstanding amount of ₹3.19 crore from the corporate debtor.
- xii. Letter dated 01.10.2022 was issued by the corporate debtor to the R-1 informing that corporate debtor has received an amount of ₹11,38,65,869/- from OPTCL against supply of materials for the bill raised up to 04.06.2022, and out of which corporate debtor has paid amount of ₹9,86,39,711/- to R-1 and liability to the balance payment to R-1 is ₹1,52,26,153/-.
- xiii. Letter dated 01.03.2023 was written by R-1 to the OPTCL that R-1 has not received the payment towards the supply made by it.
- xiv. On 31.03.2023, notice under Section 8 was issued by the operational creditor, claiming principal amount of ₹3,19,92,738/- along with the interest totalling to ₹4,28,70,269/-. Notice dated 31.03.2023 was served, but no reply was sent by the corporate debtor.
- xv. On 23.05.2025, Section 9 application was filed by the operational creditor, claiming an amount of ₹4.28 crore as operational debt towards the principal and interest. Date of default was mentioned as

31.10.2021. Reply was filed by the corporate debtor. Corporate debtor pleaded that operational creditor was entitled for only 60% profit sharing. Date of default dated 31.10.2021 is erroneous subsequent to which ₹10,00,000/- each was paid on 02.06.2022 and 04.06.2022. Claim of interest was denied.

xvi. Adjudicating authority heard the parties and by the impugned order has admitted Section 9 application. Adjudicating authority held that operational debt has clearly been proved. Adjudicating authority has also relied on acknowledgement of liability by the corporate debtor vide its letter dated 21.10.2022. Ledger account of the operational creditor maintained by the corporate debtor was also relied. Adjudicating Authority also held that operational creditor has raised invoices upon the corporate debtor for the Financial Year 2019–20 to 2021–2022. Corporate debtor had availed Input Tax Credit on the GST account paid against such invoices. Existence of debt and default was held. In paragraphs 8, 11 & 12 following was observed:

“8. Upon perusal of Section 5(21) of the Code, it is observed that the Operational Creditor had supplied materials to OPTCL in terms of Clause 3.2 of the Internal Agreement dated 04.01.2019 and had raised invoices upon the Corporate Debtor for the Financial Years 2019-20 to 2021-22. It is further noted that the Corporate Debtor had availed Input Tax Credit on the GST amount paid against such invoices and had, vide its letter dated 21.10.2022, and in the ledger account of the Operational Creditor maintained by the Corporate Debtor, acknowledged its liability towards the Operational Creditor. The admitted liability exceeds the threshold limit of Rs. 1 Crore as stipulated under Section 4 of the Insolvency and Bankruptcy

Code, 2016. Accordingly, the existence of debt and default stands established. Any contention regarding the precise quantification of the debt is to be verified by the Resolution Professional during the Corporate Insolvency Resolution Process (CIRP) and cannot constitute a ground for rejecting the present Application at the admission stage.

11. Furthermore, it is observed that the Corporate Debtor has disputed the Date of Default, i.e., 30.10.2021, as mentioned in Part IV of the Application, contending that there are no terms or conditions in the invoices stipulating that the amount would become due and payable upon issuance thereof. It is, however, noted that the Operational Creditor has considered the date of the last invoice raised upon the Corporate Debtor, i.e., 30.10.2021, as the Date of Default for the entire outstanding debt amount.

12. It is further observed that the Operational Creditor had duly issued a Statutory Demand Notice under Section 8(1) of the Insolvency and Bankruptcy Code, 2016, upon the Corporate Debtor on 31.03.2023, which was delivered to the Corporate Debtor on 03.04.2023. However, the Corporate Debtor failed to furnish any reply to the said Statutory Demand Notice within the prescribed period of ten days as mandated under Section 8(2) of the Code.”

xvii. Aggrieved by the said order, appellant has come up in this appeal.

3. We have heard learned Sr. counsel Mr. Abhijeet Sinha appearing for the appellant and Mr. Suvashish Sengupta and Mr. Shovan Ghosh appearing for R-1 as well as Mr. Rhythm Buaria appearing for the Interim Resolution Professional (IRP).

4. Learned counsel for the appellant challenging the impugned order submits that operational creditor and corporate debtor were JV Partners, they were co-venturer and joint bidder and not a supplier of goods or provider of service to the corporate debtor. Under the JV Agreement relation between

corporate debtor and operational creditor was profit sharing in the ratio of 40:60, 40% of corporate debtor and 60% of operational creditor. Both parties were to make contribution to the joint venture. Materials were supplied by operational creditor to OPTCL for the OPTCL work order. Goods were not supplied to the corporate debtor. Payments to the operational creditor were to be released only after receipt of the corresponding payments from OPTCL. Corporate debtor never required to make any independent payment to the operational creditor from its own funds. It is submitted that there was no operational debt, the application filed under Section 9 was not maintainable. Learned counsel for the appellant further submitted that claim of operational creditor was barred by Section 10A of the IBC. Invoices amounting to ₹4 crore which was claimed by the operational creditor fell during the period 25.03.2020 to 24.03.2021, thus the claim of ₹4 crore was required to be excluded from the total alleged principal amount of ₹3.19 crore which would render alleged claim of the operational creditor in negative. Adjudicating Authority proceeded to rely upon the ledger account statement, which was also included the invoices during 10A period. Ledger account of the corporate debtor contained all the invoices. Adjudicating authority was required to consider that invoices upto the tune of ₹4 crore was hit by Section 10A. Out of total supply of material amounting of ₹11.87 crore as per ledger account of ₹11.37 crore were already paid by the corporate debtor. There was pre-existing dispute between the parties which is reflected from the letter dated 01.03.2023, written by operational creditor to OPTCL. Adjudicating authority erred in admitting Section 9 application.

5. Learned counsel appearing for R-1 refuting the submission of the appellant submits that work order by OPTCL was issued jointly to both corporate debtor and operational creditor. Corporate debtor being lead consortium member, an Internal Agreement was executed on 04.01.2019 determining respective rights, scope of work and liabilities of both the parties for smooth execution of work. Operational creditor was responsible for supply of component of work order only except the power structure. On 11.02.2020, operational creditor and corporate debtor jointly entered into first Addendum to the Internal Agreement dated 04.01.2019. As per Clause 2, the operational creditor could execute the supply component of the contract and supply material and the corporate debtor shall be responsible for the payment. R-1 was to issue tax invoices upon the corporate debtor for 100% of basic price as per rate decided upon by the corporate debtor in the original Agreement. It was agreed that corporate debtor shall raise progressive supply bills to OPTCL and shall release to the operational creditor the full payment received from OPTCL with applicable GST. Operational creditor duly supplied goods to the corporate debtor as per specification and raised invoices from 30.04.2019 to 31.10.2021. Relationship between R-1 and corporate debtor as per Internal Agreement is reflected from invoices issued by operational creditor to corporate debtor where corporate debtor was mentioned as the buyer and the consignee was OPTCL. Corporate debtor has availed the GST Input Tax Credit by filing statutory returns. Operational creditor has disclosed in the GST return all the invoices raised to the corporate debtor. The corporate debtor has admitted its liability vide letter dated 21.10.2022, which was part of

Section 9 application filed by the operational creditor. The appellant did not file the copy of letter dated 21.10.2022 in the appeal paper book. Letter dated 21.10.2022 was clear acknowledgement of liability of the corporate debtor towards operational creditor. Amount admitted was sufficient, being more than ₹1 crore, the case was clearly made out to initiate proceeding under Section 9. Corporate debtor in their books of account in the reply affidavit to Section 9 application has admitted its liability to the extent of ₹3,45,42,777.26/- during the period 01.04.2022 to 31.03.2023, Section 10A was not applicable. Operational creditor has duly supplied goods raised invoices to the extent of ₹3.6 crore to the corporate debtor between 01.04.2021 to 31.03.2022, which clearly indicate that amount claimed in the application was more than ₹1 crore which was admittedly not covered under 10A period. The R-1 has pleaded running and continuous account of the corporate debtor and has made ad hoc payments. Invoices raised between 01.04.2021 to 31.03.2022 which are partially unpaid worth merely ₹3.19 crore. There was no pre-existing dispute between the parties, rather corporate debtor has clearly and categorically acknowledged its dues. The operational creditor has not filed the application claiming for amount towards profit sharing at the ratio of 60:40, rather application confined only to the supply component which was to be discharged by the operational creditor and it being obligation of the corporate debtor to make the payment to operational creditor out of the fund received from OPTCL. The submission of the appellant that application is not maintainable both being JV Partner is not attracted. There being Independent Agreement between the parties and Addendum clearly indicate

that corporate debtor was obliged to make the payment to the operational creditor towards the supply made.

6. Learned counsel for the parties placed reliance on the various judgements of this Tribunal, which we shall refer to while considering the submission in detail.

7. We have considered the submissions of the counsel for the parties and perused the records.

8. From the facts brought on the record, it is clear that a Joint Venture/Consortium Agreement was entered between M/s. SB Electro Structural (predecessor in interest of the corporate debtor) and M/s. Daga Power Systems & Engineers Private Limited, the operational creditor where corporate debtor was a lead partner for purposes of making bid and entering into contract with OPTCL regarding supply erection, testing and commissioning of 132 KV line. Both the parties have jointly executed the contract. Under the JV Agreement, parties share the responsibilities and obligations. The bid submitted by both operational creditor and corporate debtor was accepted and letter of award of work was issued on 20.08.2018 in the name of corporate debtor and operational creditor, in pursuance of which, after the award of work, a Contract Agreement dated 04.01.2019 was entered between M/s. SB Electro Structural predecessor in interest of the corporate debtor and M/s. Daga Power Systems & Engineers Private Limited. Clause 3 of the Agreement dated 04.01.2019 deals with the responsibilities of operational creditor and corporate debtor. Clause 3.1 dealt with the

responsibility of the first party which require execution and erection and civil works. Clause 3.2 dealt with the responsibility of the operational creditor was to execute the supply component of the contract. Clause 3.2 of the Agreement is as follows:

“3.2 RESPONSIBILITIES OF M/S. DAGAPOWEE SYSTEM & ENGINEERS PVT. LT (SECOND PARTY):

3.2.1. Second Party shall execute the Supply Component of the contract with total responsibility as per the rate which will be mutually decided during placing purchase order to suppliers except tower structure materials. Cost towards inspection of Supply components will be in the scope of “SECOND PARTY” and the actual cost thereof shall be accounted for in the total project cost and the same shall be reimbursed to “SECOND PARTY” from the Joint Venture Account.

3.2.2. Second Party shall supply the materials for Supply component of the contract to the First Party designated store yard with full responsibility matching supply with the progressive erection requirements.

3.2.3. Second Party shall complete the Supply Component of the as per stipulated completion period of the contract. If OPTCL levy penalty for delay in delivery of the project and the cause of such delay if construed to be due to delay in supply, the penalty will be on account of the Second Party.”

9. Clause 5 dealt with distribution of profits with the rate of 40% to the corporate debtor and 60% to the operational creditor.

10. In pursuance of the Award of Contract, the Contract Agreement dated 22.02.2019 was entered between the OPTCL, corporate debtor and operational creditor. Price Schedule for different component was contained in Clause 7 of the Agreement which is as follows:

“7. Price Schedule

| <i>Sl no.</i> | <i>Description</i> | <i>BASIC PRICE (Taxable Value) in Rs.</i> | <i>CGST@9% plus OGST@9% IGST@18% in Rs.</i> | <i>TOTAL</i> |
|---------------|---|---|---|-----------------|
| 1 | <i>SCHEDULE VIIA- PART-I SUPPLY COMPONENT OF THE WORKS CONTRACT for Line.</i> | 16,02,20,588.50 | 2,88,39,705.93 | 18,90,60,294.43 |
| 2 | <i>SCHEDULE VIIB- PART-II ERECTION COMPONENT OF THE WORKS CONTRACT for Line.</i> | 1,88,67,309.00 | 33,96,115.62 | 2,22,63,424.62 |
| 3 | <i>SCHEDULE VIIC- PART-III CIVIL WORK COMPONENT OF THE WORKS CONTRACT for Line.</i> | 9,55,31,216.80 | 1,71,95,619.02 | 11,27,26,835.82 |
| 4 | <i>TOTAL CONTRACT PRICE</i> | | | 32,40,50,554.87 |

Total Contract Price R/O: RS.32,40,50,555.50 (Rupees Thirty Two crore Forty lakh Fifty thousand Five hundred Fifty Five) only.”

11. The first Addendum to Contract Agreement dated 04.01.2019 was executed between M/s. SB Electro Structural and operational creditor on 11.02.2020. As per Clause 2 of which the operational creditor was to execute the supply component of contract and supply material and the corporate debtor was responsible for the payment. Clauses 2, 2.1 & 2.3 are as follows:

“2. The second party shall execute the Supply Component of the contract entered with OPTCL by Joint Venture Partnership of both parties as per original agreement dated 4th January 2019 entered by both parties with following Terms and Conditions:

2.1. The second party shall supply materials in quantity as per the Dispatch Instructions received from OPTCL and the first party shall be responsible for payments to the second party for total quantity supplied as per Dispatch Instructions.

2.2. The first party shall raise progressive supply bills for supplies against erection (20% on supplied materials/ equipment against erection) to OPTCL soon after erection of materials / equipment by the first party as per the rate of OPTCL price and terms of contract with OPTCL within reasonable time and the first party shall release to the second party the full payments received from OPTCL along with CGST plus OGST or IGST as the case may within 02 (Two) working days after receipt of progressive payments from OPTCL.”

12. The above Addendum thus clearly recorded that second party has to supply materials to quantity as per Dispatch Instructions received from OPTCL and first party shall responsible for the payment to the second party for total quantity supplied as per Dispatch Instructions, it was clearly mentioned in paragraph 2.1. Further, the corporate debtor was to release the payment to second party of full payment received from OPTCL.

13. Section 9 application which was filed by the appellant related to demand notice issued by operational creditor to the corporate debtor. In Section 9 application, the operational creditor has referred to work order and operational creditor made supply between 30.04.2019 and 30.10.2021 to the corporate debtor at the desired work premises of OPTCL. All invoices raised on corporate debtor were part of Section 9 application. Invoices were also

shown in GST returns of both operational creditor and corporate debtor and corporate debtor has enjoyed GST Input Tax in their GST returns. GST returns of the operational creditor were also part of the application. The amount claimed in Section 9 application was thus relate to the material supplied and according to the operational creditor, the balance payment is of ₹3,19,92,738/- was due till 31.03.2023. In Part-IV of Section 9 application in paragraph 18, following has been pleaded by the operational creditor:

“PART – IV

| PARTICULARS OF THE OPERATIONAL DEBT | |
|--|---|
| <p>1. <i>TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE</i></p> | <p>18. <i>The Operational Creditor humbly submits that the Corporate Debtor has deliberately neglected to pay the pecuniary dues to the Operational Creditor for the goods/consignments delivered by them. The Operational Creditor further submits that the Corporate Debtor admittedly is not in a position to meet the current financial liability of the operational creditor and hence is unable to pay its operational debts and in such facts and circumstances the Operational Creditor is entitled to the reliefs as prayed herein in this instant application filed under Section 9 of The Insolvency & Bankruptcy Code, 2016 read along with Rule 6 of The Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, before this Learned Tribunal.</i></p> <p><i>Date from which such debt fell due is 31/10/2021 (Date of issuance of last Invoice upon the Corporate Debtor bearing number DPSE/21-22/0593.”</i></p> |

14. Further, in Part-IV, column 2, following was stated:

“PART – IV

| PARTICULARS OF THE OPERATIONAL DEBT | | |
|--|---|---|
| 2. | <p><i>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)</i></p> | <p><i>Principal Amount Due is Rs. 3,19,92,738/- from 30/10/2021.</i></p> <p><i>(Workings in tabular form sufficing the Operational Debt Separately Attached)”</i></p> |

15. All materials brought in Section 9 application makes it clear that the Section 9 claim was only related to towards the outstanding payment against the supplies made by the operational creditor. We had already noticed the agreement between the parties dated 04.01.2019 and first Addendum under which the supply component was to be performed by the operational creditor and operational creditor was to receive payments towards supply component after the said amount is received from OPTCL by corporate debtor.

16. The submission which has been raised by the applicant challenging the order on the ground that there being JV Agreement between the parties, there was no operational debt for filing an application under Section 9 needs to be considered. Further, appellant has submitted that profit was to be distributed between at the ratio of 60 to 40 between operational creditor and corporate debtor. There can be no dispute between the parties, in the facts of the present case, that both the parties have formed a JV Agreement/consortium to take a work from OPTCL and work order was awarded, an Agreement was also entered between the parties. The parties themselves entered into separate Agreement dated 04.01.2019 with Addendum to the Agreement,

where role and responsibilities of both the parties were clearly provided, supply component of the contract was to be performed by the operational creditor and payments towards the operational creditor was to be made by corporate debtor after amount is received from OPTCL towards the same. The Section 9 application was not based on any component of profit sharing. Question of profit sharing is a question may arise, which after completion of work and what is the profit received by both the parties then was required to be shared. In the present case, application was only with respect to supply components which was exclusively made by the operational creditor as per Agreement dated 04.01.2019 between the parties read with the Addendum as noted above.

17. Learned counsel for the appellant has relied on two judgements of this Tribunal in support of his submissions. The first judgement relied by the appellant is judgement of this Tribunal in ***‘Prashanth Shekara Shetty Designated Partner of Abmay Health Ventures LLP, Vs. ‘Alcuris Healthcare Private Limited & Anr.’*** reported in [2022 SCC OnLine NCLAT 4786]. Above was a case where two parties carried a Joint Venture, which Agreement was for general profit sharing and an application filed under Section 9 by one of the parties was admitted against which the appeal was filed. In the facts of the above case, this Tribunal laid down following in paragraph 28:

“28. In the present matter, the clauses of the agreement entered between the two parties, who are described as “general profit sharing partners” therein, furnish the key to the minds of the makers of this

agreement. The clauses of the agreement disclose an intent that both parties shall exercise joint control over the SRV Heart Centre and will be accountable to each other for their respective acts with reference to the functioning of the Cathlab. We also note that both the parties also combined their investments, property, efforts, resources, skill and knowledge in this unit. There are unmistakable signs of reciprocal rights and obligations contained in the agreement besides evidence of common participation/joint control in the management as well as sharing of profits and losses. When shared control of interest or enterprise and shared liability for profit and losses is so clearly manifested, it cannot be denied that both parties are implicit partners and co-adventurers in the Cathlab venture rather than one being a consumer and the other a service provider. From the material on record, facts and circumstances there arises no clear or unambiguous jural relationship between the two parties as one of Corporate Debtor and Operational Creditor. Rather both the Corporate Debtor and Respondent No. 1 are like the principal as well as the agent of the other party. This spirit is not only captured in the body of the agreement but also demonstrated in the actions and conduct of both parties in their role as “general profit sharing partners”. Thus, for the above reasons, we are not inclined to agree with the contention of the Respondent No. 1 that the outstanding amount so claimed constitutes an operational debt under the IBC. As we hold that the claim is not in the nature of Operational debt, we need not go further to examine whether there was any default in respect of a debt which had become due and payable and whether it was laced with preexisting dispute.”

18. When we look into the above case, the Agreement between the parties was general profit-sharing partners who had combined their investment property efforts in the units. In the above circumstances, this Court held that the said claim was not in the nature of operational debt.

19. When we look into the facts of the present case, in the present case both the parties formed JV/Consortium to submit the bid to OPTCL as

corporate debtor lead member of the consortium. Contract was awarded to both corporate debtor and operational creditor. Corporate debtor and operational creditor thereafter entered into separate Agreement dated 04.01.2019. As noted above with Addendum dated 11.02.2020. The Contract awarded by OPTCL consisted of three components, as noted above, one of the components was supply component under the Contract as agreed between the operational creditor and corporate debtor supply component was obligation of operational creditor and Clauses of Addendum dated 11.02.2020 clearly mentions that supply shall be made by operational creditor with respect to which the corporate debtor shall raise bill to the OPTCL and corporate debtor shall make payment to the operational creditor after receiving the payment from OPTCL. The facts of the present case thus are clearly distinguishable from the above judgement where obligations of both the parties were clearly differentiated and obligation and liabilities were clearly spelled out in the Agreement dated 04.01.2019 and the Addendum as noted above.

20. Another judgement which has been relied by the appellant of this Tribunal in [**Comp. App. (AT) (Ins.) No.515/2019**] in '**M/s. Sree Sankeshwara Foundation and Investments' Vs. 'M/s. Dugar Housing Limited'**', decided on 25.11.2019. In the above case Section 9 application was rejected on the ground that appellant was not operational creditor. In the above case, appellant and respondent executed a Joint Development Agreement for construction of structured allotment to the allottees. In the

above background, this Tribunal held that appellant cannot be said to be operational creditor. In paragraph 6 following has been held:

“6. Having gone through the records and stand taken by the Appellant, we hold that the Appellant along with Respondent (‘Corporate Debtor’) had executed Joint Development Agreement in the year 2012 for construction of structure and allotment to allottees. Both of them being parties to a joint venture project, we hold that the Appellant cannot claim to be ‘Operational Creditor’ as it does not relate to supply of goods nor service rendered by the Appellant. If joint venture under any service to the allottees and for that to pay service tax it does not mean that the parties of the joint venture will render service to each other.”

21. The above judgement also clearly distinguishable and does not support the appellant in the facts of the present case. The obligation of each parties and the nature of contract was well known to both of the parties. Learned counsel for the respondent has placed much reliance on letter dated 21.10.2022, which was issued by the corporate debtor in response to a claim of operational debt made by operational creditor of ₹3.19 crore. Letter dated 25.07.2022, which was part of the Section 9 application and brought on record at page 316 of the appeal paper book. By the notice dated 25.07.2022, corporate debtor was called upon to pay amount of ₹3,19,92,738/- along with the interest. The said letter was replied by the corporate debtor vide its letter dated 21.10.2022, which letter was also part of Section 9 application and has also been referred and relied by the adjudicating authority in the impugned order. Appellant has filed the incomplete copy of Section 9 application in the appeal, which did not contain the letter dated 21.10.2022, which was part of Section 9 proceeding. In the reply to appeal, respondents have brought on

record the letter dated 21.10.2022 issued by corporate debtor to the operational creditor. It is useful to extract the entire letter dated 21.10.2022, which is as follows:

“Ref No. ASBESCPL/760 Date 21/10/2022

To,

The Chairman cum Managing Director,

Daga Power Systems & Engineers Pvt. Ltd.

Todi Corner, South Block, 32 Ezra Street

Room No. 505/616, Kolkata-700 001

Emad md@dagapowergroup.com

Kind Attn: Mr. Manak Chand Daga (CMD)

Subject: Undertaking for submission of fresh Performance Bank Guaranty in OPTCL and arrange to release the Performance Bank Guaranty of M/s. Daga Power Systems & Engineers Pvt. Ltd; and confirmation of payment received from OPTCL for supply of materials for the bills raised up to 4 Jun 2022 and out of which the principle balance of Rs. 1,52,26,153/-payable to M/s. Daga Power Systems & Engineers Pvt. Ltd.

Ref: (1) OPTCL LOA No. Sr.GM-CPC-I-e_tender-Constn 132KV Line-RTSS (PKG-10/2017-18)-51/2017/4366, dated 20 Aug 2018

(2) OPTC Agreement No. 302/2018-19 dated 22 Feb 2019.

(3) Your Letter No. Letter No. DPSE/2022-23/ASRES(Pkg-10)/48 dated 25 Jul 2022

(4) Agreement dated 4 Jan 2019

(5) 1st Addendum dated 11 Feb 2020 to Agreement dated 4 Jan 2019

Dear Sir,

With reference the captioned subject, we do hereby undertake that we shall submit fresh Performance Bank Guaranty to OPTCL and arrange to release from OPTCL. by 5 Nov 2022 Performance Rank Guaranty

No. 0006BGR0152619 dated 17 Jan 2019, Amended on 6 Dec 2021 for a sum of Rs. 2.21.86,125/-.

We do hereby confirm that we have received Rs. 11,3865,860/- from OPTCL against supply of materials for the bills raised up to 4th Jun 2022 and out of which we have paid Rs. 9.86.39,711/- to M/s Daga Power Systems & Engineers Pvt. Ltd. and our liability of balance payment to M/s Daga Power Systems & Engineers Pvt. Ltd. is Rs. 1,52,26,153/- for supply of materials.

The reimbursement of ITDS, GST-TDS, 08&OC etc. deducted by OPTCL will be checked and confirmed later. We are trying to arrange the funds and will be able to start paying you from Jan-2023 onwards.

Thanking you

Yours faithfully

For M/s. A.S.B Energy Systems and Construction Pvt.
Ltd.

Amarendra Mahapatra, (Managing Director)"

22. Above letter is clear acknowledgement that operational creditor has made supply of materials to the OPTCL and the corporate debtor has received amount of ₹11,38,65,869/- from OPTCL towards supply of material and it has paid only ₹9,86,39,711/- to the operational creditor and balance liability of ₹1,52,26,153/- for supply of material is of the corporate debtor. The above letter clearly indicate that parties were well aware of their responsibilities, supply was to be made by the operational creditor and payment to the operational creditor was to be made by corporate debtor. Operational creditor although have received the from OPTCL towards supply of material but has not released the entire amount and liability was clearly acknowledged. Letter dated 21.10.2022 is a letter of the corporate debtor clearly acknowledging the debt, which is more than ₹1 crore. Adjudicating authority

in paragraph 8 and 13 of the impugned order has already noted and relied on the letter dated 21.10.2022, which clearly prove the debt. Under the Contract, liability of the corporate debtor to release the payment to the operational creditor after receiving the same from OPTCL. Supply having been made by respondent, which was its sole obligation under the inter se contract between the operational creditor and the corporate debtor. The said amount was clearly an operational debt. Debt having been acknowledged, adjudicating authority has rightly admitted Section 9 application.

23. Now we come to the submission of the counsel for the applicant relying on Section 10A. Submission of the counsel for the appellant is that invoices pertaining to 25.03.2020 to 24.03.2021, were about ₹4 crore, hence the said invoices when excluded from amount claim of ₹3.19 crore, there is a negative due, hence application deserve rejection. It is relevant to notice that in reply to Section 9 application which was filed by the corporate debtor, the corporate debtor has not pleaded any facts nor furnished any foundation that application filed by the operational creditor was barred by 10A. There was no plea based on 10A in reply and it is only during the submission before this Tribunal that the appellant has made submission regarding Section 9 application being barred by 10A. Section 10A being legal issue which prohibits initiation of any Section 9 proceeding, we need to consider the submission in detail. What is sought to be contended by the appellant in the appeal is that there were invoices between 25.03.2020 and 24.03.2021 which was more than ₹4 crore and if the said amount is excluded claim of ₹3.19 crore being less than the said amount, application was clearly barred. There

are two reasons due to which the said plea cannot be accepted. In the reply which was filed to the Section 9 application the plea of 10A and details have not been stated. The invoices which were issued by the operational creditor were invoices 30.04.2019 to 30.10.2021. It is stated by the respondent that invoices between 01.04.2021 to 31.03.2022, were about ₹3.19 crore, thus present is a case where invoices which are unpaid are also invoices which was subsequent to 24.03.2021. Application under Section 9, thus was not clearly barred by 10A. There is one more aspect of the matter which need to be considered. Section 10A prohibits initiation of any application for a default which is committed during a period 25.03.2020 to 24.03.2021. In Section 9 application, the date of default claimed by the appellant was only 31.10.2021 when default was claimed subsequent to 10A period, there is no question of it being barred by time. Furthermore, what is basis for prohibiting an application during the said period is the actual default. Raising of invoices for supply itself may not be default on the part of the corporate debtor. We have noticed above the relevant part of the Addendum between the parties, Agreement dated 04.01.2019 and Addendum dated 11.02.2020. Entitlement of the operational creditor to receive payment from corporate debtor arises when corporate debtor receives the payment against supply invoices from the OPTCL. Thus, the date of invoices is not relevant for finding any violation of Section 10A. There is neither any pleading nor any material to come to any conclusion that application under Section 9 filed by the operational creditor was barred by 10A. There is no merit in the above plea of the appellant.

24. Appellant has in support of his case has also placed reliance on the judgement of this Tribunal in '**Decor Paper Mills Limited' Vs. 'Mahashakti Plasto Private Limited'** in [Comp. App. (AT) (Ins.) No.2022/2024], decided on 26.11.2024. In the above case, this Tribunal in paragraph 5 laid down following:

“5. Even if, the argument of the Appellant is accepted for the time being that there was running account, the invoices which fall within the 10A period has to be excluded. The acknowledgment of debt for invoices during 10A period cannot permit the Operational Creditor to maintain the application and for invoices which are under 10A period has to be excluded since Section 10A clearly bars recovery of amount for default occurred during 10A period which is statutory scheme for a purpose and object. The statutory scheme which is reflected in Section 10A cannot be allowed to be defeated, even by claim of Appellant that amount claimed being running account or any action of the Corporate Debtor of confirmation of debt.”

25. What was held by this Tribunal in the above case was that invoices falling within 10A period has to be excluded? There cannot be any dispute to the above proposition, but as noted above present is not a case, where there is any plea with respect to 10A and as noted above, the date of invoices was not relevant for finding out any default so as to prohibit under Section 10A application. We do not find any substance in the submission of the appellant.

26. Learned counsel for the appellant lastly contended that there was pre-existing dispute between the parties which is reflected from letter dated 01.03.2023, which was written by operational creditor to Chairman and Managing Director of OPTC where OPTCL was requested to intervene for

dispute between Joint Ventures/Consortium Partners. In the said letter, operational creditor has stated as follows:

*“In spite of receiving payment from OPTCL and acknowledging the liability of payment, **M/s. A.S.B Energy Systems and Construction Pvt. Ltd.** has been miserably failed to make payment deliberately with malafide intent of the following amounts due to **M/s Daga Power Systems & Engineers Pvt. Ltd.:***

*(1) The principal balance of **Rs.2,15,66,143/- (Rupees Two Crore Fifteen Lac Sixty Six Thousand One Hundred and Forty Three Only)** for supply of materials.*

*(2) The principal balance is **Rs.79,22,682/- (Rupees Seventy Nine Lac Twenty Two Thousand Six Hundred and Eighty Two Only)** for civil works after adjustment of profit share.*

*In this regard, **M/s Daga Power Systems & Engineers Pvt. Ltd.** has sent **Demand Notice (Annexure – 4)** to **M/s. A.S.B. Energy Systems and Construction Pvt. Ltd.** on 26 Jul 2022 for recovery of money but **A.S.B. Energy Systems and Construction Pvt. Ltd.** could not give any satisfactory response till date to the above said **Demand Notice.***

*We have requested **M/s. A.S.B. Energy Systems and Construction Pvt. Ltd.** several times through emails, telephonic message and by sending personal messenger to Mr. Amarendra Mohapatra, the appointed attorney and one of tis Director for release of the said outstanding payment, but **M/s. A.S.B. Energy Systems and Construction Pvt. Ltd.** has always been purposely delaying the same on one pretext or the other and so far have not paid even a single paise out of the said outstanding undisputed amount.*

*On 21 Oct 2022, **M/s. A.S.B. Energy Systems and Construction Pvt. Ltd.** gave us an undertaking letter no. ASBESCPL/760 accepting its liability and promised to pay us in the month of Jan 2023. But it has not fulfilled its promise. The copy of the undertaking is attached herewith as **Annexure – 5** for your reference.*

*Due to noncompliance of the Terms & Conditions, **M/s. A.S.B. Energy Systems and Construction Pvt. Ltd.** has pushed us to a trust deficit zone and a huge fund deficit in our current account for withheld of our fund.*

Further, we would like to keep OPTCL informed that we apprehend the Joint Venture Consortium would face significant risks relating to liabilities and the potential for conflicts and disputes between Joint Venture / Consortium Partners and ultimately the project would suffer.

In view of the above, we pray following to OPTCL for the best interest of the project and the Joint Venture / Consortium:

1. *Kindly organise and chair a meeting with both partners of the Joint Venture / Consortium and mediate for an amicable solution for the above dispute which would yield better cooperation between both the Joint Venture Partners leading to smooth execution of the projects.*

2. *Please stop further any payment to **M/s. A.S.B. Energy Systems and Construction Pvt. Ltd.** with immediate effect till an amicable solution is arrived as it is diverting the fund received from OPTCL for its own personal gain.*

3. *Please persuade **M/s. A.S.B Energy Systems and Construction Pvt. Ltd.** to pay to us **Rs. 3,19,92,738/- (Rupees Three Crore Nineteen Lac Ninety Two Thousand Seven Hundred and. Thirty Eight Only)** immediately as we have been pushed to a financial crunch due to huge fund diverted by the lead partner for its personal gain.*

Your Kind consideration and favorable decisions on above would enable us to maintain a harmonious relations as per the spirit Joint Venture/Consortium and also to perform smooth execution of the project.

Yours faithfully

For Daga Power Systems & Engineers Pvt. Ltd.”

27. The above letter clearly notices that corporate debtor has received the payment from OPTCL and has not made the payment to operational creditor.

Letter dated 21.10.2022 was also referred to. In the above circumstances, the

operational creditor has written to OPTCL to stop releasing any payment to the corporate debtor and the corporate debtor be persuaded to make the payment of ₹3,19,92,738/-. The above letter was written by operational creditor to OPTCL with whom both the corporate debtor and operational creditor were working. Letter contained the clear acknowledgement of the corporate debtor. We thus are of the view that the said letter cannot be read to mean that there was any pre-existing dispute between the parties. As observed above the application under Section 9 was with respect to component of supply which was made by operational creditor and the corporate debtor having already acknowledged the liability to pay amount of more than ₹1 crore which amount has already been received by corporate debtor from OPTCL and has not paid to the operational creditor. The above acknowledgement clearly belies any claim of pre-existing dispute between the parties. We thus are of the view that it cannot be held that there was any pre-existing dispute between the parties with respect to amount which was received by corporate debtor from OPTCL are not paid to the appellant.

28. Learned counsel for the appellant has lastly contended that the corporate debtor was a going concern which has large number of government contracts and initiation of insolvency with respect to going concern shall cause immense harm. We are of the view that it is always open for the appellant to settle the matter with operational creditor and take the recourse of Section 12A of the IBC for withdrawal of the CIRP proceedings.

29. In result of the forgoing discussions and our conclusions, we dispose of the appeal in following manner:

- i. The order impugned dated 25.10.2025 passed by NCLT Cuttack Bench admitting Section 9 application is upheld.
- ii. The interim order dated 31.10.2025 passed by this Tribunal is discharged. IRP to constitute CoC and proceed further in the CIRP of the corporate debtor. The period from 31.10.2025 till date is excluded from the CIRP period.
- iii. In event, any settlement is entered between appellant and operational creditor, it shall be open for the parties to take steps for withdrawal of CIRP under Section 12A in accordance with law.

Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

04th May, 2026

himanshu