NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 2153 of 2024

(Arising out of the Order dated 17.05.2024 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench in CP (IB) No. 393/MB/2022)

IN THE MATTER OF:

Shreenathji Infrastructure
Through its Authorized Representative,
Amit Kumar Malpani,
Civil and Mining Contractor
Office at: A-3/6os, Aakriti Green
Bhopal – M.P.- 462042 **...Appellant**

Versus

M/s Namasthetu Infratech Pvt. Ltd,
Through its Director
Registered Office: The Great Eastern
Galeria Complex, 5o2, 5th Floor,
Plot No. 20, Sector No.4, Nerul,
Navi Mumbai – 400706 **...Respondent**

Present:

For Appellant : Mr. Vishal Bhatnagar and Mr. Veer Pratap Singh, Advocates

For Respondent : Mr. Rohit Gupta and Mr. Rhythm Buaria, Advocates

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

That the instant Appeal is being filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("IBC") against the order dated 17th May 2024 ("Impugned Order") passed by the Ld. National Company Law Tribunal, Mumbai Bench ("Adjudicating Authority") in CP (IB) No. 393/MB/2022 titled "Shreenathji Infrastructure Vs. M/s Namasthetu Infratech Pvt Ltd." by way of

which the Ld. Adjudicating Authority had dismissed the Petition filed by the Appellant under Section 9 of the IBC.

Submissions of the Appellant:

2. The Appellant - Shreenathji Infratech – Operational Creditor (OC) is a partnership firm registered in MP and is engaged in the business of construction of civil and engineering works, mining, drilling, earthwork. The Appellant brings to our notice that various work orders dated 14 September 2018, 10 September 2018, and 5 January 2019 were awarded to it by the Corporate Debtor Company-M/s Namasthetu Infratech, for the installation of mobile stone crushing plants, earthwork in excavation and supplying and filling muroom in depressions. The Appellant also brings to our notice that the Airport Authority of India (AAI) on 3rd September 2019 issued a letter to one M/s Vishal Infratech Limited for the removal of the stone crusher installed in the airport site. AAI stopped the Operational Creditor from carrying out the work in the said site on the ground of lack of approval to carry out the crushing work. The Appellant also claims that the District Collector granted requisite approvals and permission to the Operational Creditor to carry out upgradation work in the said site on 12 September 2019. Appellant claims that the CD Company from 1st September 2019 onwards stopped making payments to the Operational Creditor for the work already carried out and being carried out on the said site. The Appellant issued a demand notice/invoice demanding payment under the code as per Form 3 and 4, on 7 December 2019 and 16 December 2019. The Appellant claims that on 23rd August 2020, FIR bearing number 0244/2020 was also filed

against the CD company, and the charge sheet has also been filed on the said FIR. On 20th January 2022, the Appellant filed the Company Petition bearing number (IB/393/2022), namely Shreenathji Infrastructure versus M/s Namasthetu Infratech Pvt. Ltd. under Section 9 of the Code before NCLT Mumbai. The matter was heard by NCLT Mumbai on various dates, and on 17th May 2024, the Adjudicating Authority dismissed the said petition under Section 9 of the Code.

3. Respondent Company were not unaware of the said impediment and a problem with the installation of crushing plant in the area of AAI. The Respondent Company had failed to expeditiously inform the Appellant about the same. It was obligatory upon Respondent Company to make sure, that the Respondent Company have the requisite permission/sanction or not. If not, then Respondent Company should not have executed the letter of work orders presented to Appellant. In lieu of that work order(s), Appellant invested huge amount for installing the crusher on the work site to execute and complete the work order(s). On 07.12.2019/16.12.2019, the Appellant sent the notice of demand in terms of Section 8 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 (1) (a) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 3 and Form 4 prescribed thereunder along with the copies of invoices and other documents relied upon by the Appellant. In terms of the notice a request was made to Respondent Company to clear the outstanding payments due to the Appellant. The Ld. Adjudicating Authority has failed to see that the notice was dispatched by speed post at the registered office address of the Respondent. After the service

of notice by email, the Appellant neither received any reply nor payment, nor any notice of dispute.

4. Respondent Company has received the amount from the AAI through Vishal Infrastructure but have not cleared the outstanding payments to the Appellant and as such they are liable to pay the outstanding amount together with interest thereon to the Appellant because there is a substantial cost of financing involved for every business.

5. The Respondent Company, in its reply to the company petition filed by the Appellant before the Ld. Adjudicating Authority, has not objected to or disputed the non-performance of the contract. Silence or non-denial of specific allegations by the Respondent Company implies acceptance of those allegations. In the present case, the Respondent company has neither refuted the claims regarding the completion of work as assigned under the contract nor provided any evidence to counter the assertions of the Appellant regarding the performance of its obligations. The failure of the Respondent Company to specifically deny or challenge the completion of work under the contract constitutes an implied admission of the facts asserted by the Appellant. According to legal principles, particularly under Order VIII Rule 5 of the Civil Procedure Code, 1908, which states that every allegation of fact in the plaint, if not denied specifically or by necessary implication, shall be taken to be admitted. The order passed by the Ld. Adjudicating Authority fails to take into consideration the lack of contestation by the Respondent Company regarding the performance of the contract. Adjudicating Authority did not adequately

address the unchallenged assertions made by the Appellant that in September 2019, the officials of AAI stopped the Appellant from working the crushers and informed that the installation of crusher was not allowed in the said site from the very beginning and no approval has been acquired from the same.

6. The Appellant asked the Respondent Company to provide the copy of agreement between AAI and Vishal Infrastructure, but the same was not provided to the Appellant and keeping the matter delayed on the one pretext or the other. Eventually, it came to Appellant's knowledge that in consonance with the agreement dated 19.02.2018 between AAI and Vishal Infrastructure Ltd. the installation of crushing plant within AAI area was never allowed. The Respondent Company without acquiring the requisite permission, ordered the Appellant to start installing stone crushers in the said site. The Respondent Company have for the First work order cleared the amount of ₹4,61,01,411.50/- (₹ Four Crore Sixty-One Lakhs Four Hundred Eleven and Five Paisa Only) and asked the Appellant to continue the process of making infrastructure in the said site of AAI. The Respondent company has not cleared payments of the Appellant since September 2019. The total outstanding amount as per the books of accounts is ₹1,54,56,473/- (Rupees One Crore Fifty-Four Lacs Fifty-Six Thousand Four Hundred and Seventy-Three only).

7. There has been no existing dispute with respect to the outstanding payment. As per the terms and conditions of installing crushers the

Respondent Company is liable to pay interest at the rate of 24% to the Appellant in addition to the outstanding amount, calculated on the outstanding amount against various invoices from the date of invoice., thereby disregarding crucial evidence and the principles of natural justice. Adjudicating Authority's order does not provide clear reasoning or findings on the key issue of whether the work assigned under the contract was not completed and by whose fault. Instead, it appears to have overlooked the absence of a dispute on this fundamental aspect. Such an omission renders the order vague and legally unsustainable, as it lacks a thorough examination of the uncontested facts presented by the Appellant. **The Hon'ble Supreme Court in Union of India Vs. Ibrahim Uddin & Anr. (2012) 8 SCC 148** emphasized the necessity for judicial orders to reflect consideration of all material evidence and arguments. An order that fails to address uncontested claims is flawed and warrants appellate intervention. So much so, in **Vishnu Dutt Sharma Vs. Daya. Sapra (2009) 13 SCC 729,** the Supreme Court held that non-denial of specific allegations leads to an inference of admission of such facts. Adjudicating Authority has failed to recognize, the undisputed completion of the work and directing the Respondent company to make the due payments to the Appellant.

8. The whole contract for up-gradation of Jabalpur Airport took place at the initiation of the AAI, they were aware of the work carried out in the given site and being in the knowledge that the requisite permission not being taken by the Respondent Company or by the Vishal Infrastructure Ltd. with whom the AAI had executed the contract, it was their responsibility to stop the

crushers from being installed, instead, they chose to maintain the status quo and interfered after one year, after the Appellant has invested huge amount of money in said project and carried on half of the work. It is necessary to hold them responsible for the one-year inactivity and interference later on.

9. The Respondent Company issued a letter dated 09.08.2019 to the Appellant outlining specific terms for invoicing, which stated that some invoices should be issued through Tax Invoices and for the balance quantity, the new rate as per the letter could be considered. This letter was sent as a part of the agreement renegotiation and was crucial for the Appellant and financial understanding between the parties. In the reply, the Respondent Company neither accepted nor denied the receipt and the terms outlined in the letter dated 09.08.2019. The absence of any rebuttal or acknowledgment from the Respondent company signifies a lack of contestation regarding the terms which were proposed by the Respondent Company to the Appellant. According to the principle of implied acceptance, the non-response from the Respondent company can be construed as an acceptance of the terms mentioned in the letter. The Respondent Company's silence or failure to address the contents of the letter dated 09.08.2019 implies that they had no objections to the terms specified therein.

10. Adjudicating Authority has failed to see the Non-Performance Attributable to AAI's Intervention, not the Appellant. The Appellant entered into a contract with the Respondent company to perform certain crushing and excavating work at a specified site. The Appellant commenced the work

as per the contractual terms and in good faith. There was Intervention by AAI during the execution of the contract, the AAI intervened and halted the work. AAI declared that the site area was not permitted for crushing and excavating, citing regulatory and safety concerns. AAI's intervention was beyond the control of the Appellant and directly impacted the ability to perform the contractual obligations. Adjudicating Authority failed to see that the non-performance was not due to Appellant's Actions. The cessation of work was mandated by a Regulatory Authority (AAI), which had jurisdiction over the site area. Therefore, the non-performance of the contract cannot be attributed to any fault, negligence, or failure on the part of the Appellant. The Appellant was ready, willing, and able to perform the contractual duties but was legally restrained from doing so by the AAI. That the intervention by AAI constitutes a force majeure event or an instance of frustration of contract under Section 56 of the Indian Contract Act, 1872, as the performance of the contract became impossible due to an unforeseen and uncontrollable external event. Adjudicating Authority ought to have seen that performance of a contract is excused when prevented by an act of government or a regulatory authority. **In Satyabrata Ghose Vs. Mugneeram Bangor & Co. (1954 AIR 44, 1954 SCR 310)**, the Hon'ble Supreme Court held that a contract becomes void when its performance is rendered impossible due to circumstances beyond the control of the parties. Adjudicating Authority erroneously attributed non-performance to the Appellant without considering the legal and factual context of AAI's intervention. Adjudicating Authority failed to recognize that the stoppage of work by AAI, a governmental authority and absolves the

Appellant from any liability of non-performance under the contract. The principle that parties are discharged from contractual obligations when performance is made impossible by an unforeseen event is well-established. The Hon'ble ·Supreme **Court in Energy Watchdog Vs. CERC (2017) 14 SCC 80** reiterated that performance is excused when prevented by an unforeseen event beyond the parties' control. So much so, additionally, **Naihati Jute Mills Ltd. V s. Hyaram Jagannath (AIR 1968 SC 522)** established that if a contract becomes impossible to perform due to an external event, the affected party is not liable for non-performance. The Appellant has been performing its contractual obligations diligently and in accordance with the agreed terms, but the Respondent Company failed make the payments to the Appellant outstanding payments since September 2019. Despite the completion and performance of the work as per the contract, the Respondent Company has failed to clear the payments due to the Appellant since September 2019. As per the books of accounts maintained by the Appellant, the total outstanding amount due from the Respondent Company is ₹1,54,56,473/- (Rupees One Crore Fifty-Four Lacs Fifty-Six Thousand Four Hundred and Seventy-Three only). The significant delay in payment has severely impacted the financial stability and operational capacity of the Appellant. The Appellant relies on timely payments to manage its cash flow, procure materials, pay salaries, and cover other operational expenses necessary to continue the work. The non-clearance of dues by the Respondent company has created a financial strain, making it extremely difficult, if not impossible, for the Appellant to continue performing the work under the contract. The failure to make timely payments

constitutes a breach of the contractual obligations on the part of the Respondent Company. As per the terms of the contract, the Respondent Company is required to make payments within the stipulated time frame to ensure the smooth progress of work. The long-standing non-payment is a clear violation of these terms. Adjudicating Authority failed to considered that the party failing to fulfil its financial obligations under a contract cannot expect the other party to continue performing without receiving due compensation. The Hon'ble Supreme Court, drawing upon the principles set out in Chitty on Contracts, has consistently affirmed that non-payment of contractual dues by one party entitles the counterparty to withhold or suspend its performance until payment is made. In **S.P. Singh Vs. State of Punjab, (1967) 1 SCR 754,** the Court held that a party to a contract who suffers from a breach by the other party is entitled to stop performance until the breach is rectified.

11. Adjudicating Authority, in its judgment and order vide dated 17.05.2024, failed to consider the severe financial impact and operational constraints faced by the Appellant due to the non-payment of dues by the Respondent Company. Adjudicating Authority's judgment and order vide dated 17.05.2024 is erroneous and unjust as it overlooks the fundamental breach of contract by the Respondent Company and the resulting inability of the Appellant to continue work without receiving the outstanding payments. Adjudicating Authority failed to see that the AAI issued the notice on 03.09.2019 to the Vishal Infrastructure Ltd. to stop the crushing work and remove the crushers. The work at the said site was stopped because of the

notice dated 03.09.2019. The AAI. continued to release the running bill payments in the. favour of Vishal Infrastructure Ltd. knowing fully well that the Respondent company is not making the said payments to the Appellant through Respondent company for the work being done at the AAI site. Adjudicating Authority failed to see that the work order and consent letter signed between the Appellant and the Respondent Company did not mention that it would be the Appellant's responsibility to acquire the required work permissions. However, Clause 24 (a) of the agreement signed between the Respondent Company and Vishal Infrastructure Ltd. clearly and specifically states that all necessary registrations for complying local/state/central labour/other regulations as. required shall be obtained by the Vishal Infrastructure Ltd. and any penalty, damages, claims arising out of the failure to comply with the above shall be borne by the Vishal Infrastructure Ltd. Despite the abovementioned specific clause, the Vishal Infrastructure Ltd. has not been made to take the responsibility for the same; however, the Appellant has been facing consequences of their misdeed even at the hands of AAI.

12. Adjudicating Authority has failed to see that the FIR was lodged and registered and the Chargesheet has been filed. The said documents both substantially a part of evidence which points to the fact that there has been a commission of offences by the Respondent company upon the Appellant, as a charge sheet would not take effect unless the investigating police do not find vital evidence which link the said Corporate Debtor with the offences committed.

13. Adjudicating Authority failed to see that the Appellant has also filed the **Writ Petition before the Hon'ble Madhya Pradesh High Court, Principal Seat at Jabalpur, WP bearing no. 22703/2022** and the same was averred in the rejoinder to the affidavit of reply filed by the Respondent, however, the said rejoinder was not taken on record. Nonetheless, the Hon'ble High Court dismissed the Writ Petition vide dated 24.11.2022 but gave some findings in the impugned order, the relevant paras of the impugned order are reproduced herein:-

> "5. On hearing learned counsel, we do not find any merit in this petition. Undoubtedly, there is a contract entered into by respondent No.1 in favour of respondent No.3 and the sub-contract thereafter in favour of respondent No.2 and the consequential allotment of work in favour of the writ petitioner. Therefore, if it all any action has been taken by respondent No. 1, the same may affect the contractual obligations of the petitioner and other respondents. Therefore, the petitioner would have to seek remedy under contract. The matter of contract cannot be questioned in a writ petition under Article 226 of the Constitution of India. Be that as it may, the prayer made herein is for initiation of an enquiry. In case the plea of the petitioner is to be accepted then an enquiry has to be ordered on the finding that certain illegalities have been committed by the respondents under contract. Therefore, once again the terms of the agreement would have to be scrutinized to find out if there is any violation and only after coming to a conclusion that there are violations that subsequent orders could be passed. Even assuming this exercise is to be done, the same would not, under any circumstances, result in the initiation of an enquiry against any of the respondents, since what is contended is based on the violation of the terms and conditions of the contract. If that were to be so, the petitioner has a remedy elsewhere. Therefore the prayer sought for by the petitioner herein for the initiation of an enquiry,

in our considered view, would not arise in the facts and circumstances of this case.

6. Even otherwise, the relief sought for is to direct respondent No.1 to constitute an enquiry for the officers of respondent No.1 as stated herein. It is respondent No.1 who had entered into contract with respondent No.3 and thereafter respondent No.3 entered into contract with respondent No.2. The work order as such has been issued by respondent No.2 to the petitioner. Therefore, prima facie even if there is any grievance of the petitioner, it can only be against respondent No.2 and none else. Even otherwise, we do not wish to comment on the same since in matters of contract, the remedy of the petitioner lies elsewhere. The question of directing initiation of an enquiry against officials of respondent No. 1, in our considered view, is wholly misconceived and is alien to the facts and circumstances of the case. Hence we do not find any ground to interfere."

14. Adjudicating Authority failed to take the aforesaid order into consideration, the same had clearly stipulated that the genesis of the dispute has never been the contract executed between the parties herein, the dispute was that the Appellant was made to enter into the contract which was defied illegal, as, the project was of AAI, the agreement executed between the AAI and the Vishal infrastructure had an impediment that crushing plant cannot be installed, however, the Respondent made Appellant to enter into the agreement for installation of crushing plant having had the knowledge that the same is illegal in consonance with the ·contract executed between the AAI and Vishal Infrastructure ltd. and the Adjudicating Authority passed the order while dismissing the petition of the Appellant stating and observing that· there was a non- performance of the contract on the part of the Appellant.

15. Ld. Adjudicating Authority has erred to see that the illegal contract predominantly and undisputedly performed by the Appellant cannot be ruled out and negatived on the ground of non- performance. Adjudicating Authority erred in completely ignoring the balance sheet which proves that payments were made by the Respondent Company to the Appellant in lieu of the performance of the tasks assigned on regular basis and the Respondent has accepted that there is a debt due. The Adjudicating Authority erred to even cite and did not follow the statutory rule and the guidelines issued by the judgements of Hon'ble Supreme Court and have failed to see as to whether the Respondent has raised a dispute which can be described as "a pre-existing dispute" as understood by the Hon'ble Supreme Court in the decision in **Mobilox Innovations (P) Ltd. versus Kirusa Software (P) Ltd**. The answer is in negative. Adjudicating Authority has erred to see that the plea of non-performance of the contract may have had with the Respondent with the precondition that the said contract executed between the Respondent and Appellant did not have invalidation from the AAI, as, the project was of AAI and the Respondent was to perform the work, as, assigned by Vishal infrastructure ltd, however, the said work i.e. installation of crushing plant was never allowed by the AAI. Adjudicating Authority has erred to see that mere by averring non-performance does not suffice the purpose, as, against the non-performance as alleged, the Respondent has not taken any legal recourse against the Appellant, therefore, there is no question of non-performance of contract subsisted. The Respondent was never aggrieved by the act of the Appellant and therefore, did not initiate any legal recourse

against the Appellant. The same depicts the Respondent had no grievance to redress qua Appellant.

Submissions of the Respondent

16. The Respondent, the Corporate Debtor, claims that the Appellant is guilty of suppressing the true nature and the extent of the pre-existing disputes between the parties. A mala fide attempt has been made by the Appellant to mislead this appellate tribunal into believing that an operational debt is due. The said appeal is nothing but an attempt to usurp monies which are neither due nor payable to the Appellant by the Respondent.

17. Respondent brings to our notice that there was a pre-existing dispute between the Appellant and the Respondent. The Respondent, with a letter dated 15 November 2019, had terminated the work order dated 14 September 2018. The Appellant issued the notice invoking the provisions of the Code on 16 December 2019, which is after the issuance of the letter terminating the work order issued by the Respondent in favour of the Appellant. The said work order was terminated due to the failure of the Appellant to complete the contract within the stipulated time. The Respondent had warned the Appellant time and again regarding the lackadaisical approach of the Appellant. Hence, there was a pre-existing dispute between the parties before the issuance of the notice dated 16 December 2019.

18. The alleged claim of the Appellant inter alia relates to the alleged recovery of ₹1,54,56,473 with interest at the rate of 24%, which comes to ₹80,37,366 calculated up to November 2021, which is outstanding as per the books of accounts of the Appellant. There is no acknowledgement of debt by

the Respondent. However, it is the Appellant who owed money to the Respondent for work not done by the Appellant.

19. The Appellant has wrongfully issued notice dated 16 December 2019 and invoked the provisions of the Code in view of the fact that there was a pre-existing dispute. The Appellant had failed to perform its obligations under the terms and conditions agreed between the Respondent and the Appellant as per the work orders dated 14 September 2018, 16 December 2018, and 5 January 2019.

20. The Respondent claims that the Appellant was required to commence the business with the required facilities. The Appellant failed to commence the business of the installation of the mobile stone crushing plant at Jabalpur site and supply the crushed aggregate as per the grading requirement form WMM, and GSB mix, and also failed to provide the contractual amount of crushed aggregate with all required facilities in compliance with the work order dated 14 September 2018. Furthermore, the validity of the said work was twelve months; however, despite the repeated assurances, the Appellant failed to supply the crushed aggregate as per the grading requirement form WMM, and GSB mix as per the terms and conditions of the work order.

21. As per the work order dated 14 September 2018, the Appellant was supposed to supply GSB quantity of 5,040,000 CFT; however, the quantity supplied by the Appellant was 131,444 CFT only up to March 2019, leaving a balance of 4,908,556 CFT, which the Respondent had to acquire from other agencies for which the Respondent had to incur additional costs for acquiring

the same. The Respondent incurred about ₹88,867,952 for acquiring the balance 4,908,556 CFT.

22. If the Appellant had done their work on time, then the Respondent would have spent ₹6,01,298,11 (₹49,08,556 X ₹12.25 per CFT). However, the extra cost that they had to spend was ₹ 88,86,952/- less ₹ 6,01,298,11/- which comes to ₹ 2,87,38,141/- excluding GST and ₹ 3,39,11,066 including GST at the rate of 18%. The Respondent claims that it has therefore incurred a loss of ₹2,87,38,141/- excluding GST, and the Respondent reserves its right to recover the same from the Appellant.

23. The Respondent claims that they had to incur extra cost with respect to the work order dated 5 January 2019 due to non-completion of Moorum embankment of the runway. The period of the contract/work had to be extended by 31st March 2020 for the completion of the embankment. The total quantity of Moorum to be supplied was 200,000 cubic meters; however, the quantity supplied by the Appellant was 140,645 cubic meters. Due to non-supply of the quantity of Moorum as per the agreement and extension of work, various machineries were deployed, which was an extra burden to the Respondents. The total cost of these machineries was ₹5,355,000 without diesel. The cost of diesel itself was ₹3,929,800. Respondent also claims that the extra cost due to the extended period is ₹1,02,48,750 including GST. Therefore, the Respondent incurred a loss of ₹1,02,48,750 including GST. Respondent reserves its right to recover the same from the Appellant.

24. The Respondent also brings to our notice that the excavated stuff stacked in the runway portion was not used for crushing till the expiry of the period of crushing, that is, 14th March 2019. Hence, the question of granting permission on 12th September 2019 did not arise in any event. Assuming, without admitting, there was no permission for excavation from 12th September 2019, the contract should have been completed before that day. However, the reality was that the contract was not even 3% completed after the completion of one year from the date of issuance of the work order.

25. The Respondent also brings to our notice that the erection of the crusher was not objected to by the Airport Authority of India till September 2019. The Airport Authority of India asked to remove the crusher because the place where excavated stuff was stacked by the Appellant for crushing was the same place that was supposed to be used by the Airport Authority of India for work to be started by them. The period of completion for the work was up to 14th March 2019, and since the same was not completed in time, the Appellant was liable for delays.

26. The Respondent also wrote many letters to the Appellant on:

- 11 June 2019
- 14 June 2019
- 20 June 2019
- 25 June 2019
- 26 June 2019
- 5 July 2019
- 8 August 2019
- 21 October 2019
- 15 November 2019

not only disputing the quality of work done but also the minuscule quantity being supplied by the Appellant under the said contracts/work orders. In these letters, the Respondent time and again called upon the Appellant to rectify their mistakes in executing the contract, to provide GST returns, as after claiming GST from the Respondent, the Appellant did not deposit the same with the Department. By letters dated 5th July 2019 and 15 November 2019, the Respondent terminated the contract and cancelled the orders given to the Appellant, as the Appellant had only provided about 2% of the quantity under the orders dated 14 September 2018, 10 December 2018, and 5 January 2019. The Appellant has deliberately not filed the above-mentioned letters before the NCLT and also before the Appellate Tribunal.

27. The Appellant's purported claim is not a debt at all under the provisions of Section 3(11) and/or operational debt under Section 5(21) of the IBC. Since the Appellant's purported claim is not a debt and/or operational debt, the question of any default under Section 3(11) of the Code does not arise, since there is no amount that has become due and payable and is not paid by the Respondent.

28. The appeal is gross abuse of process of law, as the same is being used as an arm-twisting tactic to coerce the Respondent into making payment of amounts which are not due at all.

29. The Appellant filed the Company Petition under Section 9 of the Code, being CP (IB) No. 393/MB/2022, for an operational debt of ₹15,456,473/- plus 24% interest per annum, i.e. ₹ 80,37,366/-.

30. It is also brought to our notice by the Respondent that the date of default was stated to be the 31st day from the date of each invoice, as 30 days' credit was admissible to the Respondent. The demand notice dated 16th December 2019 was sent by the Appellant, but the same was not replied to by the Respondent, and neither was the balance amount paid. However, the Respondent had, prior in time, sent a termination notice dated 15th November 2019, and the Appellant, as an afterthought and as a counter blast, sent a demand notice and also lodged an FIR No. 0244 dated 23rd August 2020 in the police station against the Respondent under Section 420, 294, and 506 IPC. A charge sheet has also been filed on the said FIR. The Respondent also brings to our notice that quashing proceedings are pending in respect of the aforesaid FIR.

31. The Respondent claims that the appeal and the petition raises disputes relating to the questions of fact. Hence, the same can only be decided by way of trial and not before the NCLT or before the Appellate Tribunal.

32. Furthermore, Respondent objects to Appellant bringing additional documents on record at the appellate stage, as there is no provision in law applicable to the present proceedings that allows a party to bring documents on record before this Appellate Tribunal, as they were not before the NCLT.

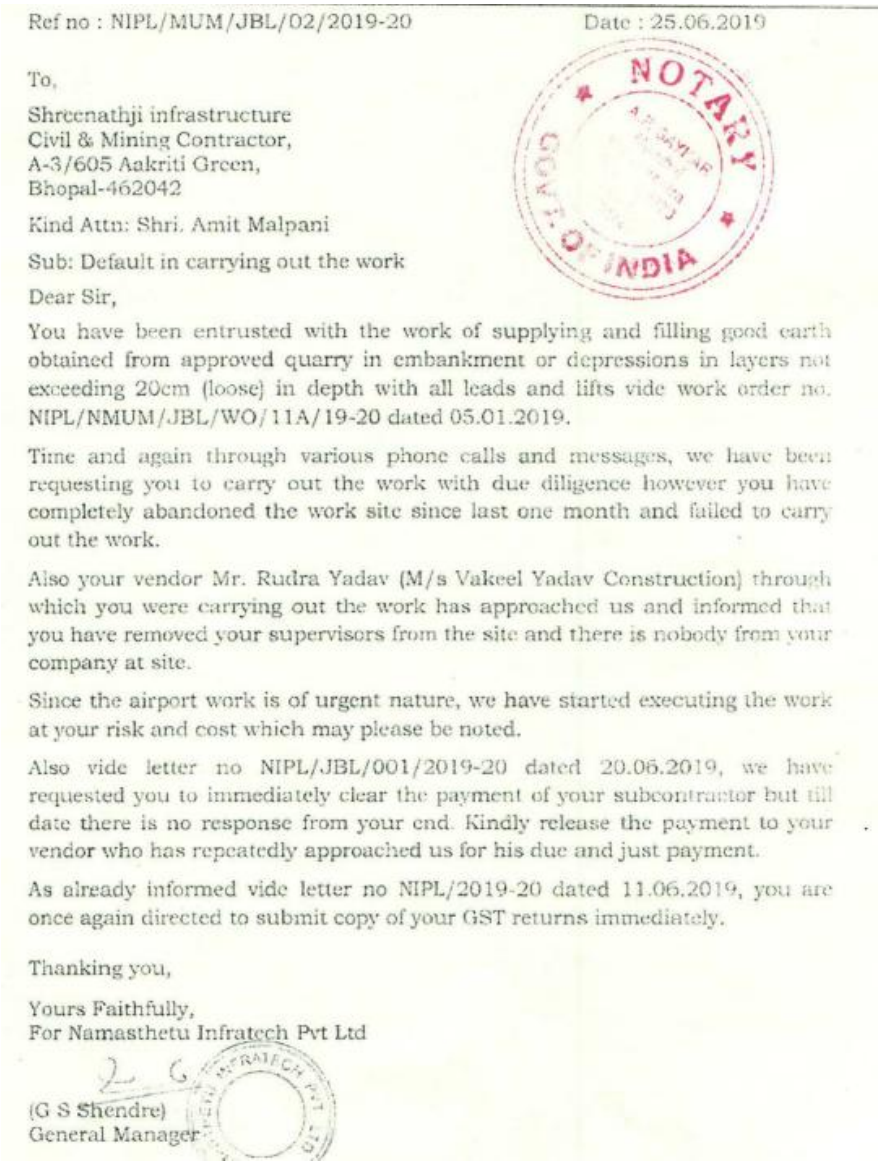
Appraisal

33. We have heard counsels of both sides and perused the material placed on record.

34. We observe that the Adjudicating Authority has clearly noted that the work which was awarded to the Appellant-Operational Creditor was as per the work order dated 14th September 2018 and was to be completed on or before March 2019. The Adjudicating Authority has also noted that the reliance of the petitioner on the letter of the Airport Authority of India dated 3rd September 2019, is baseless and cannot be referred to appreciate the case of the petitioner. The petitioner was given the task which had to be completed by March 2019. The incomplete task on the part of the petitioner clearly shows that it is the petitioner who has failed to perform his assigned task within the stipulated time period. We find no infirmity on the part of the Adjudicating Authority in coming to this conclusion that it is the petitioner who has failed to perform his assigned task within the stipulated time period. Even if there was no permission for excavation from 12th September 2019 as claimed by the Appellant, we observe that the contract should have been completed before that day. However, we find that the contract was not even 3% completed after the completion of one year from the date of issuance of the work order.

35. We also observe from the reply of the Respondent that it wrote many letters to the Appellant on 11 June 201, 14 June 2019, 20 June 2019, 25 June 2019, 26 June 2019, 5 July 2019, 8 August 2019, 21 October 2019, 15 November 2019 not only disputing the quality of work done but also the minuscule quantity being supplied by the Appellant under the said contracts/work orders. In these letters, the Respondent time and again called upon the Appellant to rectify their mistakes in executing the contract, to

provide GST returns, as after claiming GST from the Respondent, the Appellant did not deposit the same with the Department. As a sample, we note the extracts of one such letter dated 25 June 2019, which is as follows:



Ref no : NIPL/MUM/JBL/02/2019-20 Date : 25.06.2019

To,

Shreenathji infrastructure
Civil & Mining Contractor,
A-3/605 Aakriti Green,
Bhopal-462042

Kind Attn: Shri. Amit Malpani

Sub: Default in carrying out the work

Dear Sir,

You have been entrusted with the work of supplying and filling good earth obtained from approved quarry in embankment or depressions in layers not exceeding 20cm (loose) in depth with all leads and lifts vide work order no. NIPL/NMUM/JBL/WO/11A/19-20 dated 05.01.2019.

Time and again through various phone calls and messages, we have been requesting you to carry out the work with due diligence however you have completely abandoned the work site since last one month and failed to carry out the work.

Also your vendor Mr. Rudra Yadav (M/s Vakeel Yadav Construction) through which you were carrying out the work has approached us and informed that you have removed your supervisors from the site and there is nobody from your company at site.

Since the airport work is of urgent nature, we have started executing the work at your risk and cost which may please be noted.

Also vide letter no NIPL/JBL/001/2019-20 dated 20.06.2019, we have requested you to immediately clear the payment of your subcontractor but till date there is no response from your end. Kindly release the payment to your vendor who has repeatedly approached us for his due and just payment.

As already informed vide letter no NIPL/2019-20 dated 11.06.2019, you are once again directed to submit copy of your GST returns immediately.

Thanking you,

Yours Faithfully,
For Namasthetu Infratech Pvt Ltd

(G S Shendre)
General Manager

36. Furthermore, by letters dated 5th July 2019 and 15 November 2019, the Respondent terminated the contract and cancelled the orders given to the Appellant, as the Appellant had only provided about 2% of the quantity under the orders dated 14 September 2018, 10 December 2018, and 5 January 2019. It is brought to our notice that the Appellant has deliberately not filed

the above-mentioned letters before the NCLT and also before the Appellate Tribunal.

37. It is also brought to our notice that since the Appellant had not supplied the required quantity of material within time, therefore the Respondent had to acquire the same after incurring additional cost, which we have noted in the submissions of the Respondent.

38. The Respondent brings to our notice that the case of the Appellant is that the Respondent, despite having knowledge about the fact that they did not have the permission from the AAI to work at the Jabalpur airport or to set up the crusher near the runway, led the Appellant to believe that they in fact did have permission. On this belief alone, the Appellant spent a lot of money to set up the crusher plant. We have gone through one of the work orders dated the 14th September 2018, wherein it is clearly noted to supply the required crushed aggregate as per grading requirement for WMM and GSB mix. The same work order in special conditions notes that all machinery, crusher unit shifting charges to and fro, shall be to the account of the Appellant. The Respondent is interested in the supply of the crushed aggregate and not in the installation of the stone crushing plant, which is just incidental and for the convenience of both parties.

39. The Respondent also brings to our notice that the Appellant's best case is that since AAI stopped the work and since the Respondent did not have any prior permission, there was frustration and breach of contract, and hence the Appellant could not perform the work order. Appellant's case is that AAI

stopped it from performing the work because there was no permission, and this was known to the Respondent from day one. We observe that such an argument is not tenable as the letter of removal of stone crusher installed in the airport site was issued on 3rd September 2019, and AAI had stopped the operational contractor from carrying out the work in the said site on the ground of lack of approval to carry out crushing work. It is important to note that the work order was issued by the Appellant on 14th September 2018, and the validity of the said work order was for 12 months. Therefore, the whole work was to be completed by 14th September 2019. During this period, there was a lot of correspondence with respect to the delay and further subcontracting by the Appellant and finally, the Respondent had already issued the notice for termination on 5th July 2019 and finally the work order on 15 November 2019. We further note that the Appellant issued the notice invoking the provisions of the code on 16th December 2019 demanding payment and filed the appeal under Section 9 of the Code on 20th January 2022, which is almost after more than a year. In the meantime, the Appellant had also filed an FIR on 23rd August 2020, which has been noted by us herein earlier in the submissions of both sides.

40. Even if the argument of the Appellant is accepted that there is a frustration or breach of contract, we observe that the only relief that the Appellant is entitled to is only unliquidated damages under Section 73 of the Indian Contract Act for frustration of the contract under Section 56 of the Contract Act, and can only be ordered by a Civil Court after a trial.

41. We also observe that the Operational Creditor never carried out any task; rather, it subcontracted the work to be completed by one Mr. Rudra Yadav and failed to pay the amount due of ₹56,56,129/-, who in turn approached the Corporate Debtor to get the same amount released. The Operational Creditor had abandoned the work, and there were many other disputes between the Operational Creditor and the Corporate Debtor. The Adjudicating Authority has noted it from para 29 to 32 in the impugned order and has come to a conclusion that, in their view, there is a clear pre-existing dispute between the parties.

42. We observe that the Respondent had, with a letter dated 15th November 2019, already terminated the work order dated 14th September 2018. The Appellant invoked the provisions of the code on 16th December 2019 by issuing a notice demanding the payment. However, the Section 9 proceedings were initiated by the Appellant only some time on 20th January 2022, which is almost after more than a year. We observe that there were many issues regarding non-completion and quality of the work for which lot of correspondence was going on between the two parties prior to the issuance of the demand notice. These issues are not superfluous or issues which have been made up by the Respondent.

43. The Appellant has also relied on a police complaint and an FIR registered against the Corporate Debtor Company and also the charge sheet which has been filed in the said FIR. It has been brought to our notice that the Respondent is defending these proceedings. In any case, the Adjudicating Authority has clearly brought out our pre-existing dispute in this case.

Therefore, we cannot rely upon such proceedings in coming to a conclusion with respect to Section 9 proceedings.

44. Appellant has also heavily relied upon the observations in the writ petition which it had filed before Hon'ble High Court of Madhya Pradesh, Principal Seat at Jabalpur. We find that the writ petition was dismissed, and separately the Adjudicating Authority has clearly brought out the preexisting disputes. Therefore, the order in the writ petition before the Hon'ble High Court of Madhya Pradesh has no relevance.

45. We thus observe that the disputes raised by the Appellant in the appeal and the petition are disputed questions of facts, and hence the same can only be decided by way of a trial and not before this forum and they are pre-existing disputes and the Adjudicating Authority cannot be faulted upon in dismissing the Appeal under Section 9 of the Code.

Order

46. Accordingly, the appeal is hereby dismissed and all related IAs are also disposed of accordingly. No orders as to costs.

[Justice N. Seshasayee]
Member (Judicial)

[Arun Baroka]
Member (Technical)

[Indevar Pandey]
Member (Technical)

New Delhi.
May 19, 2026.

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