

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

CP (IB) NO.7/ALD/2023 WITH IA NO.351/2023

(Application filed under Section 9 read with Sections 8, 13, 14 & 33 and other applicable provisions of Insolvency and Bankruptcy Code, 2016, r/w Rule 6 of the Insolvency and Bankruptcy Rules, 2016)

IN THE MATTER OF:

M/S R N BUILDCON

Through Its Partner Mr. Rajesh Kr. Badesara

Having Its Office At:

S-176, Near Indian Bank (Old Allahbad Bank), RIICO

Complex, Neemrana, Distt. Alwar, Rajasthan-301705

Email: r.nbuildcon.tipl@gmail.com, rnbuildcon2020@gmail.com

.....Operational Creditor

Versus

M/S OCEAN INFRAHEIGHT PVT. LTD.

Having Its Registered Office At:

Plot No. 11, Tech Zone 4, Greater Noida West,

Gautam Buddha Nagar, Uttar Pradesh-201318

Also At:

H-191, Sector-63, Noida, Uttar Pradesh-201301

Email: account@thegolden-i.com, civil@thegolden-i.com

.....Corporate Debtor

AND IN THE MATTER OF:

M/S R N BUILDCON

.....Applicant/Operational Creditor

Versus

M/S OCEAN INFRAHEIGHT PVT. LTD.

.....Respondent/Corporate Debtor

Order pronounced on: 30.09.2026

Coram:

Sh. Praveen Gupta : Member (Judicial)
Sh. Ashish Verma : Member (Technical)

Appearances:

Sh. Arun Saxena with Sh. Anjaneya : For the Applicant/ Operational
Mishra, Advs. Creditor

Sh. Amit Saxena, Sr. Adv. Assisted by : For the Respondent/ Corporate
Sh. Srijan Mehrotra with Ms. Debtor
Phalguni Bhalla, Advs.

ORDER

1. This Petition has been filed on 10.01.2023, under Section 9 of the Insolvency and Bankruptcy code, 2016 (“IBC/the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s R N Buildcon, through its partner Mr. Rajesh Kr. Badesara (hereinafter referred to as ‘Operational Creditor/Applicant’) seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred to as ‘CIRP’) against Ocean Infraheight Private Limited (hereinafter referred to as ‘Corporate Debtor/Respondent’).
2. Part-I of the Petition sets out the details of the Operational Creditor/Applicant. It is averred that the Operational Creditor/Applicant is engaged in the business of construction. Operational Creditor/Applicant

is a partnership firm, having its registered office situated at S-176, near Allahabad Bank, RIICO complex, Neemrana, Alwar, Rajasthan-301705.

3. Part-II of the Petition sets out the details of the Corporate Debtor/Respondent, Ocean Infraheight Private Limited, as a company engaged in the business of real estate, incorporated on 10.01.2013, having its registered office at Plot No. 11, Tech Zone 4, Greater Noida West, Gautam Buddha Nagar, Uttar Pradesh, India - 201318.
4. In Part III of the Petition, the Operational Creditor/Applicant has not proposed any name of an Insolvency Professional to act as an Interim Resolution Professional (IRP). However, the Applicant has proposed the name of Mr. Sunil Kumar Agarwal to be appointed as IRP through IA No. 351 of 2023 filed in the main Company Petition on 18.07.2023, annexing Form-2 by the proposed IRP as Annexure A-1 with the said IA.
5. Part-IV of the Petition states that the total outstanding Debt is Rs. 27,76,58,492/- (Twenty-Seven Crore Seventy-Six Lakhs Fifty-Eight Thousand Four Hundred and Ninety-Two Only), along with interest @ 18% and the date of default had occurred on 20.12.2022.
6. Part-V of the Petition describes the particulars of the Operational Debt (documents, records and evidence of the default) as below:

- a. Copy of the Letter of Intent dated 01.09.2018 issued by the Corporate Debtor.
 - b. Copies of the ledger account maintained by the OC along with the running account (“RA”) bills.
 - c. Copies of the Pour cards acknowledged by the Corporate Debtor.
 - d. Copies of the proof depicting the TDS deduction
 - e. Copies of minutes of several meetings executed between Operational Creditor and the Corporate Debtor
 - f. Copy of the letter dated 08.04.2019 issued by the Corporate Debtor.
 - g. Copy of the Demand notice dated 23.12.2022 issued by the Operational Creditor along with the Copy of reply dated 31.12.2022 sent by the Corporate Debtor.
 - h. Copies of various relevant emails, photographs depicting the work done by the Operational Creditor, complaint dated 30.12.2022 lodged by the Operational Creditor and relevant drawing maintained by the Operational Creditor.
7. As submitted, the Operational Creditor/Applicant was approached by the Corporate Debtor/Respondent for the construction of structure work for the multi-storied commercial building (Tower D & E) Sarvottam Golden-I at Plot no-11, Techzone-4, Greater Noida, Uttar Pradesh (hereinafter referred to as “said project”). Subsequently, an offer proposal dated 16.08.2018 was made by the Operational Creditor/Applicant and thereafter, the Corporate Debtor/Respondent was awarded the said project

vide Letter of Intent (hereinafter referred to as “LoI/work order”) dated 01.09.2018.

8. As stated in the application, the terms of LoI, entered amongst parties, included entire scope of work, value of the contract and other terms. The scope of work given to the Operational Creditor as stated in the application pertains to the structure, brick work, plaster, main plumbing, slab electrical, etc. The Operational Creditor/Applicant further submits that the said project was started by them from the beginning and only upon the completion of two front towers allotted to them for construction, the Corporate Debtor/Respondent was able to sell off its units.
9. The Operational Creditor/Applicant avers that the time schedule for the completion of the said project initially was *12 months from the date of the work order with grace period of 60 days*. As per clause 6(d) of the LoI, the Operational Creditor/Applicant had deposited a security deposit of 5% of the value of the running bill with the Corporate Debtor/Respondent. Thereafter, with the progress of the work of the said project, the Operational Creditor/Applicant started raising invoices upon the Corporate Debtor/Respondent. With respect to the work undertaken for the said project as stated by the Operational Creditor, the Corporate Debtor/Respondent never disputed the work carried out by them and also issued “pour cards” in favour of them, clearly establishing the fact that the

work done by the Operational Creditor/Applicant has been acknowledged by the Corporate Debtor/Respondent till filing of application by them. Further, the construction work is still being continued by the Operational Creditor and they are maintaining running account of the Corporate Debtor/Respondent.

10. In support of their submissions, the Operational Creditor/Applicant relies on the ledger account evidencing that the Corporate Debtor/Respondent had never been punctual in clearing the outstanding dues. Further the Corporate Debtor/Respondent failed to adhere to the payment obligations as agreed under Clause (6) of the work order along with its subsequent addendums. As per the Operational Creditor, the Corporate Debtor was also not punctual in supplying the drawings which was the obligation of the Corporate Debtor. In this regard, the Operational Creditor/Applicant relies on a letter dated 08.04.2019 issued by the Corporate Debtor/Respondent wherein it assured for not worrying about the supply of drawings and project completion and confirmed for automatic extension of timeline for project completion in case of any delay in supplying the drawing. The relevant excerpts from the letter dated 08.04.2019 are reproduced as under:

“Dear Sir,

Don’t be anxious regarding the drawing it would be provided to you immediately. You also need not worry about the project completion time, as per the working conditions the given time will be extended automatically.”

- 11.** Subsequently, due to the default on the part of the Corporate Debtor in timely supplying the drawings, various meetings were held on 23.02.2021, 22.03.2021, 19.03.2021, 27.05.2021, 20.03.2022 and 07.10.2022 wherein the tenure for completion of the said project was extended and further it was also agreed that the Corporate Debtor/Respondent shall release the outstanding dues of the Operational Creditor/Applicant. As per the minutes of the meeting held on 07.10.2022, it was agreed that the Corporate Debtor/Respondent shall release Rs. 15,00,000/- every week to the Operational Creditor/Applicant against their outstanding dues. However, the Corporate Debtor/Respondent failed to adhere to the said timelines. The relevant excerpts from the minutes of the meeting dated 07.10.2022 are reproduced below:

“Meeting with R N Buildcon and agreed terms for the completion of balance work (Brick work plastering plumbing waterproof etc.) of Tower D&E project Golden I,

The decision made in meeting regarding work.

To speed up the work.

We will release 15 Lakh (Fifteen Lakh) Every week to RN Buildcon for labour expense and other expenses for site work.

Structure work almost complete as per norms and quality.

As per the discussion the due balance and future payment of RN Buildcon will be earlier cleared in installments.

R N Buildcon will complete the balance work as per target.”

12. It is emphasised by the Operational Creditor that they abided by all the work orders including subsequent addendum cum Minutes of Meeting (“MoM”) and continued to execute the work at the said project. It is further submitted by the Operational Creditor/Applicant that during the tenure of its engagement for construction of the said project from November 2018 till 05.12.2022, they raised a total of 23 running account bills amounting to Rs. 55,71,12,130/- out of which only part payments of Rs. 27,94,53,638/- (which includes material debited in the ledger) were made by the Corporate Debtor/Respondent, the last payment of Rs. 20,00,000/- was received by the Operational Creditor on 18.10.2022, leaving a total sum of Rs. 27,76,58,492/- due against the Corporate Debtor/Respondent. In light of the terms of the invoices as well as the LoI wherein the payment mechanism was due within 15 days from the date of the invoice, the Operational Creditor/Applicant on various occasions approached and requested the Corporate Debtor/Respondent to clear the

outstanding operational dues but the Corporate Debtor did not take any action to make the payment for balance outstanding amount.

13. It is also stressed by the Operational Creditor that the services of the Operational Creditor was not disputed by the Corporate Debtor, which is evident from the fact that until the 19th running account (“RA”) bill dated 01.08.2022, the Corporate Debtor deducted the TDS on bills payable but failed to release the payment of the Operational debt.
14. Due to continued default, the Operational Creditor/Applicant issued a demand notice under Section 8 of the Code on 23.12.2022, demanding the release of the outstanding payment of Rs. 27,76,58,492/- along with interest @ 18% p.a. from the date it became due until realization within the period of 10 days of receipt of the notice. This demand notice was duly served upon the Corporate Debtor upon their email address.
15. Computation of outstanding debt by the Operational Creditor has been done until the invoice dated 05.12.2022 in which the payment is to be done within 15 days from the date of invoice, falling on 20.12.2022, and hence the date of default has been taken as 20.12.2022.
16. In response, the Corporate Debtor/Respondent, vide reply dated 31.12.2022, denied the aforesaid demand raised in the said demand notice on the ground of pre-existing disputes arising between the parties prior to

the issuance of the said notice. However, the Operational Creditor/Applicant submits that the reply submitted by the Corporate Debtor/Applicant raised false and frivolous dispute and is nothing but an afterthought. The relevant excerpts from the reply dated 31.12.2022 to the demand notice are reproduced below:

“1. At the outset, your alleged demand notice dated 23-12-2022 received by Our Client on 26-12-2022 demanding payment in respect of alleged unpaid operational debt of Rs.27,76,58,492/- (Twenty-Seven Crore Seventy-Six Lakhs Fifty-Eight Thousand Four Hundred Ninety Two) under the provisions of IBC 2016 "Demand Notice" is based upon fallacious, untrue and wrong facts. The allegations upon Our Client in the said Demand Notice are vague, false and completely denied in toto. No part of this response ought to be considered as acquiescing or conceding to the Demand or any of the averments, contentions or allegations canvassed by you in the Demand Notice. Each amount, invoice and claims alleged in your said Demand Notice are hereby vehemently denied due to pre-existing disputes as detailed in this reply and intimated to you many times during physical meetings and interactions at the site of construction.

...

7. In your said Demand Notice you have alleged that you waited long for payment, but one of the alleged invoices purported to be sent by you is dated 05.12.2022, which as per your wrong interpretation fell due on 20.12.2022 and your alleged Demand Notice is dated 23.12.2022 (received by us on 26-12-2022), then

how come you waited for long, for the payment. It clearly shows your malafide intention and trying to extract undue money from Our Client by twisting the arm through Demand Notice under IBC, 2016. It is pertinent to mention that the physical copy of the said alleged invoice was never received by Our Client, it was sent by you purposely on wrong email ID used exclusively for the approvals of drawings only and not for the submission of bills. Our client came to know about this invoice only after receiving your said alleged Demand Notice.

8. That in your alleged Demand Notice, Annexure I — Working Computation, you have failed to show any computation or specific computation as to how you have arrived at the said alleged amount and what work you have done and completed, what and how much material you have supplied, where are the work and material supply acknowledgment receipts etc. All such points indicate pre-existing disputes, which needs to be first reconciled, as Our Client is having due on you rather you claiming from Our Client.

...

13. However, you have failed to complete the construction of the abovementioned project till date, as per the scope of work mentioned in the Agreement. This is in gross violation of the terms and conditions of the Agreement and is gravely prejudicial to the interest of the allottees.

14. Moreover, at various occasions and upon your request Our Client provided material including steel, cement, and other resources for construction, at their own cost for the completion

of project in time, which was otherwise to be provided and arranged by you.

...

16. That several requests were made to you to provide the reconciliation statement for the raw material and other resources supplied to you by Our Client, which were completely ignored and fell on deaf ears. Moreover, you have even failed to disclose the utilization schedule of the abovementioned raw materials, despite numerous requests for the same. The non-disclosure of the same certainly amounts to suppression of material facts.

.....

22. Further, it is stated that the reliance placed on the "pour cards" (annexed to the Demand Notice as Annexure III) to establish that Our Client had acknowledged the purported work done is also denied. A bare perusal of these "pour cards" would demonstrate that these carry remarks by Our Client on the quality of the work carried out by you, highlighting the defects and incomplete work carried out by you, thereby dispelling your version that the purported work carried out by you was accepted by Our Client without any protest or demur. Moreover, it is relevant to mention that a portion of these "pour cards" do not bear the Company's stamp and are not even signed by any authorised representative of Our Client, further contradicting your assertion that the work done by you has been acknowledged by the Company."

- 17.** It has been further submitted by the Operational Creditor/Applicant that even after last invoice of 05.12.2022 till which the outstanding debt has been taken in demand notice, they performed the services at the said project, which according to the Operational Creditor, was even acknowledged by the Corporate Debtor by last pour card dated 15.12.2022. However, subsequent to receipt of the demand notice dated 23.12.2022, the Corporate Debtor/Respondent allegedly threatened the workers against which a police complaint dated 30.12.2022 had also been lodged with SHO-Gautam Budh Nagar. Subsequently, on the very next day i.e., 31.12.2022, the officials of the Corporate Debtor/Respondent forcefully stopped the workers of the Operational Creditor/Applicant from entering the site as well as performing their work. Accordingly, the Operational Creditor/Applicant as claimed its dues until the invoices dated 05.12.2022 which fell due on 20.12.2022.
- 18.** As the Corporate Debtor has not paid the outstanding debt as demanded in the notice issued under Section 8 of the Code, and instead raised false dispute in its reply dated 31.12.2022 in response to Section 8 notice, the Operational Creditor filed the present application under Section 9 of the Code, praying for the initiation of the CIRP against the Corporate Debtor to cause substantial justice to the Operational Creditor.

REPLY OF THE CORPORATE DEBTOR

19. Against, the notice issued by this Tribunal on considering the instant application under Section 9 in the hearing held 17.02.2023, the Corporate Debtor, filed a reply on 21.05.2023, denied the submissions of the Applicant and countered on the following grounds:

- a.** At the outset, the Respondent contends that the present petition is liable to be dismissed under Section 65 of the Code on account of non-disclosure of relevant facts. It is submitted that, on 22.12.2022, the Operational Creditor/Applicant issued a legal notice seeking recovery of alleged dues amounting to Rs. 27,76,58,492/- claiming for work and supply, which was never done, nor completed by the alleged Operational Creditor / Applicant.
- b.** It is further submitted that, in exercise of the arbitration clause contained in Clause 15 of the LoI, the Respondent issued a notice dated 27.12.2022 to the Operational Creditor/Applicant, proposing the name of an Arbitrator. However, no response was received to the said notice. Consequently, on 16.01.2023, the Respondent filed a petition bearing Arb.P. No. 37 of 2023 under Section 11(6) of the Arbitration and Conciliation Act, 2016 before the Hon'ble High Court of Delhi, which is presently pending.
- c.** On the other hand, it is further contended that the Operational Creditor/Applicant had also approached the Samadhaan–Micro and Small Enterprises Facilitation Council (“MSEFC”),

Rajasthan, by initiating proceedings under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (“MSMED Act”) on 01.03.2023.

- d. It is specifically pointed out that various debit notes issued by the Respondent to alleged Operational Creditor has not been annexed by it, not even one with the application, which goes on to show that the Applicant (Alleged Operational Creditor) has not placed true facts before this Tribunal. It is contended that it is trite law that a petition under the Code ought to have disclosed all material particulars of the transaction and failure to do the same amounts to fraud. As the alleged Operational Creditor in its application under section 9 of the Code concealed various letters and proceedings already initiated before different forums as mentioned above, it has not approached this Tribunal with clean hands.
- e. The Respondent further contends that the Operational Creditor/Applicant has concealed material documents, including debit notes, Pour Cards, Minutes of Meetings and emails, which record deficiencies, defects, non-performance, pilferage and defaults on the part of the Operational Creditor/Applicant. In support of its contention regarding the alleged concealment, the Respondent has relied upon the judgment of the Hon’ble NCLAT in the matter of *Unigreen Global Private Limited v. PNB and Ors.* [CA(AT) No. 81 of 2017] wherein it has been held that the non-disclosure of the relevant facts may lead to rejection of Application.

- f.** It has been pointed out that while replying to Section 8 notice dated 23.12.2022, in its letter dated 31.12.2022 the (alleged Corporate Debtor) Respondent raised the issue of pre-existing dispute refuting the claim of the outstanding debt made in the said notice of the alleged Operational Creditor. In this regard, reliance is placed on the judgement of Hon'ble Supreme Court in case of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (Manu/SC/1196/2017) in which it has been categorically laid down that Insolvency and Bankruptcy Code, 2016 is not intended to be substitute of recovery forum and whenever there is existence of real dispute, the provision of the Code cannot be invoked.
- g.** It has been further submitted that, while computing the alleged outstanding dues, the Applicant has failed to account for and give due adjustment towards all debit notes and has also included amounts which had not yet fallen due. It is, therefore, contended that the running account (RA) bills relied upon by the Applicant remain subject to reconciliation.
- h.** In support of the aforesaid contention, the Respondent has referred to the 20th RA Bill, annexed as Annexure P-6 to the Section 9 petition, wherein the Applicant has raised claims towards completion of plumbing, electrical and safety works. It is contended that the said claims are contrary to the Applicant's own email dated 22.11.2022, wherein the Applicant stated that, although the tower structure was 100% complete, the external brickwork, plaster and plumbing works were still ongoing and would require a further period of 15–20 days for completion. The relevant excerpts of the email dated 22.11.2022 are reproduced below:

“Dear sir

Sir it's my humble request to you that please adjustment amount to property of Rs. 3;21000 (Three lac twenty-one thousand only) for classic scaffolding (Mr Amarjeet singh will be recovered from my account.

With Best Regards

R N Buildcon”

- i. The Respondent has further relied upon the Applicant’s email dated 23.11.2022, wherein the Applicant stated that the balance work could be completed within 3–4 months, and contends that these communications demonstrate that the works had not been completed in accordance with the LOI dated 01.09.2018. It is further submitted that the claim of 100% completion of safety works is untenable, particularly in view of the safety violations recorded and penalties imposed upon the Applicant vide communications dated 11.10.2021, 13.10.2021, 21.10.2021, 26.10.2021 and 28.10.2021. On this basis, the Respondent contends that the RA Bills raised by the Applicant contain false and fabricated claims.
- j. The Respondent contends that the Operational Creditor/Applicant failed to adhere to the timelines stipulated under the LoI for completion of the project and also failed to discharge its obligations thereunder, including the arrangement of various materials. Consequently, the Corporate Debtor was required to make alternate arrangements for completion of the project.
- k. The Respondent further seeks dismissal of the present petition on the ground of pre-existing disputes. It is submitted that, under the

LoI, the Operational Creditor/Applicant was responsible for procuring Cement, Sand, Steel and other raw materials. However, on several occasions, despite having received payment towards the same, the Operational Creditor/Applicant failed to procure the required raw materials. In this regard, reference is made to few emails dated 19.01.2021, 20.01.2021, 27.02.2021 & 08.05.2021. In order to avoid further delay in the project, the Respondent was consequently constrained to independently arrange, at its own cost, Cement, Sand, Steel, Thermocol, Wooden Batten, Hassian Cloth, Safety Net, Binding Wire, Green Net, Shuttering Material, Labour, Bricks and Badarpur, without relying upon the Operational Creditor/Applicant, and debit the corresponding amounts to its account for which various debit notes were issued to the alleged Operational Creditor out of which not even a single debit note is attached with the application, which goes on to show that there is a pre-existing dispute. In this regard, reliance has been placed on the judgment of Hon'ble NCLAT in the case of *Mr. Umesh Saraf Vs. Tech India Engineers Pvt. Ltd.* [Company appeal (AT) (Insolvency) No. 548/2020] wherein it is held that the correspondence through email/letters show that there is existence of dispute prior to issuance of demand notice.

1. It is further submitted that the (alleged Corporate Debtor) respondent has been issuing Pour Cards in which the Respondent had made several observations pointing out the subpar and improper work carried out by the Operational Creditor/Applicant. As a regular check and as per clause 7 and 24 of the Contract, the respondent initiated quality check for which a technical consultant, M/s NIDA Consultants was appointed. As per the

report of M/s NIDA Consultants, several defects and deficiencies in the works carried out by the Operational Creditor were reported. The approximate cost of rectification of such defects is reported to be approximately Rs. 10 crores. The relevant excerpts from the report dated 16.01.2023 are reproduced below:

“Some major overarching issues are highlighted below:

1. Alignment of beams at each floor are not straight due to which the facade has to be redesigned with ACP cladding. (Which can also be seen implemented at site) Approx. costing for ACP cladding as confirmed by the site head is approx. (7.5-8 cr.)

2. Internal brickwork has not yet started for complete tower DE as visible at site. (please reference attached images)

3. Brick work and beam create offset in several location.

...

49. At several areas concrete is casted without cleaning the surface due to which cracks/ patches are observed in bottom surface of slab. (please reference attached images)

50. Lift lobby area beam and column brick work not in plumb lintel level is not properly maintained. (please reference attached images)

51. Parapet wall brick work joint not as per specification. (please reference attached images)

52. Lift lobby area slab and beam joint not properly finished foam is not removed at the time of casting, repair work is balance. (please reference attached images)

The details are enclosed with reference images.

Note: These are the observations which are detected at site after physical observation. Also, if there are any other observations which are missed in this report will be added in the supplementary report.”

- m.** It is further submitted that the parties held various discussions and meetings concerning, inter alia, the delay in construction, poor quality of work, completion schedule, availability of materials, work performance and other deficiencies. During these discussions and meetings, the Respondent raised various issues and concerns, which were duly acknowledged by the Operational Creditor/Applicant but, according to the Respondent, remained unresolved.
- n.** In support of the aforesaid submission, the Respondent relies on the certain judgments passed by Hon’ble NCLAT and Hon’ble Supreme Court in *Essjay Ericsson Pvt. Ltd. vs. Frontline (NCR) Business Solutions Pvt. Ltd.* [MANU/SC/1467/2021], and *S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. and Ors.* [MANU/SC/1146/2022] wherein it is held that the application under section 9 ought to be rejected if there is a pre-existing dispute.
- o.** It is pointed out that the respondent within 10 days of receipt of the notice under Section 8 of the Code, replied raising a dispute and refuting the claims of alleged Operational Creditor and thus giving a notice of dispute, and therefore, in view of the provision of Section 9 (5) (ii) (d), the application under section 9 ought to be rejected.

- p.** It is contended that, on several occasions, the Operational Creditor/Applicant failed to make payments to its vendors, thereby breaching the terms of the LoI. Consequently, in order to ensure that the construction work was not obstructed, the Respondent was compelled to make payments from its own funds towards the outstanding dues of such vendors, although the said payments were to be made by the Operational Creditor/Applicant as being their responsibility to make these payments. In this regard, reliance has been placed on Clause 28 of the LoI.
- q.** The Respondent further contends that the present petition has been filed fraudulently and with malicious intent, with the object of using the insolvency proceedings as a substitute for a recovery forum. It is submitted that the Operational Creditor/Applicant has neither disputed the debit notes nor the coefficient of steel, while also raising a claim for escalation in the contract value through its running account. The Respondent submits that such claim for escalation had already been denied by it through email communications dated 18.01.2021, 20.01.2021 and 03.02.2021.
- r.** With regard to the financial standing of the Corporate Debtor, the Respondent submits that the Corporate Debtor is a fully solvent and financially sound company. It is further submitted that the project, having a value of more than Rs. 1,400 crores, has been fully funded by the Respondent.
- s.** With regard to the terms of the LoI, the Respondent submits that payments were to be made against the percentage of work completed, in accordance with Clause 6 of the contract. It is contended that the amounts claimed through the RA Bills would

become due and payable only upon completion of the work stipulated under the aforesaid Clause 6 of the LoI. The Respondent submits that the work has not been completed and, in fact, only two items specified under Clause 6 of the LoI have been completed. Accordingly, the Respondent contends that the amounts claimed in the RA Bills annexed to the present petition could not have been disbursed in full.

- t.** It is further submitted that the Respondent has made payments to the Operational Creditor against the running RA Bills, which were subject to verification and reconciliation towards completion of the Contract. The Respondent further submits that the payments made to the Operational Creditor till date are in excess of the amount allegedly payable by the Corporate Debtor under the Contract.
- u.** The Respondent contends that the Applicant failed to comply with the terms as agreed under the LoI, and in support thereof relies upon the following instances:
 - i.** The Applicant's scope of work included procuring cement, steel, bricks and other raw materials and thereafter raising bills in respect thereof. However, the Applicant failed to comply with the terms of the LoI. Consequently, at the Applicant's request, the Respondent was required to make payments to the Applicant's vendors, as evidenced by the Applicant's letter dated 14.10.2019.
 - ii.** The Applicant has not included all the debit notes raised by the Corporate Debtor in the Applicant's ledger annexed as

Annexure P-6 to the main petition. The said accounts are, therefore, subject to reconciliation.

- iii.** The Respondent contends that the Applicant raised false and fabricated RA Bills. In particular, the Applicant's claims regarding completion of the plumbing, electrical and safety works, as reflected in the 20th RA Bill, are stated to be contrary to the Applicant's email dated 21.11.2022, wherein the Applicant itself stated that it would require 15–20 days to complete the external brickwork, plaster and plumbing. Thereafter, vide email dated 23.11.2022, the Applicant stated that it could complete the balance work within 3–4 months. It is further submitted that the Corporate Debtor had already imposed penalties upon the Operational Creditor for violation of safety measures and had communicated the safety violations, along with photographs of the site, vide communications dated 11.10.2021, 13.10.2021, 21.10.2021, 26.10.2021 and 28.10.2021.
- iv.** As per the terms of the LoI, the total period stipulated for completion of the project was 14 months, comprising 12 months plus a grace period of 60 days, from the date of the LoI, i.e., 01.11.2019. The terms further stipulated that the cost of materials and other resources required for execution of the construction work would be borne solely by the Applicant. The Respondent contends that the Applicant failed to adhere to the aforesaid terms.

- v.** Subsequently, the non-completion of the work resulted in the Applicant's failure to discharge its obligations under the LoI, including the arrangement of various materials. As a result, the Corporate Debtor was required to make alternative arrangements for completion of the project. It is submitted that, since the project remains incomplete and there are defects in the work, the obligation of the Corporate Debtor to make payment in full, does not arise.
- vi.** Various meetings were held between the Operational Creditor/Applicant and the Respondent/Corporate Debtor concerning the delay in construction, poor quality of work, completion schedule, availability of materials, slow work performance and other deficiencies. The Respondent contends that these issues were duly acknowledged by the Operational Creditor but were never resolved.
- vii.** Further, relying upon the record of the meeting dated 18.01.2021, the Respondent contends that the Operational Creditor was required to prepare a realistic plan for completion of Tower D, and that the use of the term "realistic" was necessitated by the Applicant's continuous failure to fulfil its obligations under the LoI.
- viii.** Further, vide email dated 19.01.2021, the Applicant stated that it was in the process of delivering the required quantity of steel within one week. The Respondent contends that, in the same email, the Applicant admitted delays on various occasions in slab casting. The Respondent further relies upon its email dated 20.01.2021, wherein it highlighted the

Applicant's failure to deliver steel within the stipulated time despite payments having been released for the same.

- ix.** Thereafter, vide email dated 18.02.2021, the Respondent requested the Applicant to rectify, at the earliest, the defects, defaults and non-compliances noticed during the site visit conducted on 18.02.2021. It is further submitted that the bills raised towards the coefficient of steel and cement, as submitted on 02.02.2021, were under verification by the Respondent, as intimated through email dated 20.02.2021. Upon verification, the Respondent observed that the amount raised in the invoice was higher than the rates agreed under the LoI. Consequently, the Respondent raised an objection to the increased coefficient being charged by the Operational Creditor, which was not acceptable to the Respondent.
- x.** Vide email dated 22.02.2021, the Respondent requested the Applicant to increase the manpower strength to more than 130 workers, as agreed between the parties, whereas only 100 workers had been deployed. Further, during the meeting held on 23.02.2021, the Respondent and the Operational Creditor agreed that the Operational Creditor would rectify all beams, projected slabs, etc. by 15.03.2021, failing which the appropriate amount would be withheld from the RA Bills. It was further agreed that all damaged shuttering materials would be replaced immediately and that all laid concrete and ply/battens from old structures would be removed immediately.

- xi.** On 27.02.2021, the Respondent, vide email, requested the Operational Creditor to arrange steel immediately so as to avoid further delay in the work. It was further informed that, for the preceding three days, the steel-binding team had been unable to work due to the shortage of steel.
- xii.** On 15.03.2021, the Respondent, vide email, again raised the issue of the Operational Creditor's failure to meet the stipulated deadlines. It was stated that only 7,200 sq. ft. of area had been cast as on 15.03.2021, whereas, as per the agreed 34 schedule, a total area of 60,000 sq. ft. was required to be cast during March. It was further informed that the rectification of the external edges of the beams/slabs was required to be expedited, as the existing pace of work was not satisfactory.
- xiii.** The Respondent contends that the quality of work carried out by the Operational Creditor was subpar and that the same was brought to its notice on several occasions. The Respondent states that it made repeated remarks on the Pour Cards from 21.04.2021 to 28.11.2022 and made several requests to the Operational Creditor to improve the quality of workmanship. In this regard, the minutes of the meeting held with the alleged Operational Creditor held on 19.03.2021 has been specifically referred in which penalty for poor quality and for carrying out rectification was imposed and also, delay in completing the work was mentioned. The relevant portion of the minutes is reproduced for a ready reference: -

“Meeting with RN Buildcon and Agreed Terms for the Completion of Balance Work

Date:- 19.03.2021

- 1) This is certified that total outstanding of RN Buildcon against work done up to 28th FEB 2021 is Rs. 5.65 Cr. Only.*
- 2) The above outstanding inclusive of Retention money which is Rs. 89 Lakh and hold amount of Rs. 25 Lakh against poor quality and balance rectification.*
- 3) We can release Rs. 2.0 Cr to RN Buildcon subjected to full fill of steel and shuttering materials which are required to achieve the casting slab area 60,000 sft. Agreed by RN Buildcon during march,
The payment will release in stages as:_
 - a) Rs. 1.00 Cr (against 180 MT steel and additional shuttering materials)*
 - b) Rs. 50 Lakh (against steel of 60 MT)*
 - c) Rs. 50 Lakh (against staff salary and other expenses)**
- 4) If RN Buildcon will fail to achieve the above target, we will impose penalty of Rs. 50 Lakh and if RN Buildcon will achieve the said target of slab area 60,000 sft we will release another payment of Rs. 50 Lakh to RN Buildcon.*
- 5) Subject to availability of Drawing & Realization of Payment. This amount (5.65 cr) without GST.”*

xiv. According to the Respondent, such requests were completely ignored by the Operational Creditor. As pointed out by the respondent with respect to such defects in the work done by the alleged Operational Creditor and pointed out by the respondent from time to time, have now been reflected in the Report of NIDA Consultants, which

establishes the genuinity of such defects raised by the respondent time and again and constitute pre-existing dispute making the present application to be rejected on the grounds of pre-existing dispute.

- xv.** On 06.04.2021, the Respondent, vide email, informed the Operational Creditor that there was an error in the bill dated 19.03.2021 in relation to the calculation of the rate of Ready Mixed Concrete (RMC) and the RMC material supplied by the Respondent, as the rate of RMC mentioned in the said bill was not in accordance with the rate agreed under the Contract. The Respondent accordingly requested the Operational Creditor to rectify the bill.
- xvi.** On 07.04.2021, the Operational Creditor, vide email, stated that no amount was liable to be debited to it. It further stated that the materials provided by the Respondent would be returned to the Respondent upon receipt of complete payment. The Respondent contends that the said communication evidences the existence of pre-existing disputes.
- xvii.** On 16.04.2021, the Respondent informed the Operational Creditor that the Government had announced a partial lockdown from 8:00 p.m. to 7:00 a.m. The Respondent further stated that the Operational Creditor had agreed to achieve a target of 50,000 sq. ft. of slab area during April 2021 and, in view thereof, requested the Operational Creditor to commence work from 7:00 a.m. so as to avoid further delay. The Respondent contends that the aforesaid

email communications demonstrate continuous delay in completion of the work and that, on account thereof, the Corporate Debtor also suffered loss at the hands of the Operational Creditor.

- xviii.** On 08.05.2021, the Operational Creditor, vide email, informed the Respondent that, due to a payment crisis, it was unable to arrange steel and shuttering materials at the site. The Operational Creditor further requested release of Rs. 50 lakhs towards procurement of steel and Rs. 30 lakhs towards clearing the outstanding dues of its vendors. The Respondent submits that, as per the last mutual agreement, the Operational Creditor was required to purchase steel first and thereafter raise the bill towards the same. However, the Operational Creditor failed to procure the steel and instead demanded advance payment towards the same.
- xix.** It was always understood between the parties that, once the LoI was nearing completion, the accounts would be reconciled. The Respondent submits that there is no confirmation regarding verification of any bill after the 11th RA Bill by the Corporate Debtor. Accordingly, no bill from the 12th RA Bill onwards has been acknowledged or confirmed by the Corporate Debtor, and the Respondent contends that no amount can arise from the 12th RA Bill onwards.
- xx.** The Respondent made several requests to the Operational Creditor to provide a reconciliation statement in respect of the raw materials and other resources supplied by the

Respondent for doing the work by the Operational Creditor at the project site of the respondent. Vide email dated 19.05.2021, the Respondent sought details in the form of an Excel sheet regarding the Reinforced Cement Concrete (RCC) consumed from commencement of the work till February 2019 as from March 2019, the Respondent had been supplying RMC. The Respondent further sent reminder emails dated 25.05.2021 and 03.06.2021. However, the Respondent contends that the Operational Creditor failed to provide the utilisation schedule of the raw materials.

- xxi.** On 11.10.2021, the Respondent, vide its report, informed the Operational Creditor that, despite frequent instructions, the workers engaged by the Operational Creditor continued to indulge in unsafe acts and work under unsafe conditions. The Respondent further instructed the Operational Creditor not to violate the safety rules and imposed a penalty of Rs. 1,000/-, to be deducted from the monthly bill/payment. The Respondent, on 13.10.2021, 21.10.2021, 26.10.2021 and 28.10.2021, again informed the Operational Creditor regarding various safety violations and the penalties imposed in respect thereof.
- xxii.** Accordingly, pursuant to the mutual discussions, the Respondent, on 28.10.2021, issued a debit note and imposed a penalty of Rs. 15,50,000/- for delay of 31 days, calculated at the rate of Rs. 50,000/- per day. The Respondent further submits that the said debit note was duly acknowledged by the Operational Creditor.

- v. Respondent contends that, as a regular control and quality measure, it initiated a quality check audit by appointing a consultant, M/s NIDA Consultants, Noida, on 15.10.2022, to analyse the deficiencies and defects in the scope of work executed by the alleged Operational Creditor. It is further contended that M/s NIDA Consultants submitted a preliminary report which revealed various defects and deficiencies in the work and supplies of the Operational Creditor. The Respondent further contends that, apprehending that such defects, non-performance, pilferages and defaults would be highlighted in the audit, the Operational Creditor abandoned the site in haste without informing any authorised person in charge, thereby causing inordinate delay in completion of the project.
- w. It is further submitted that, on 21.01.2023, the Respondent, vide email, issued a notice to the Operational Creditor seeking clarification regarding the quality issues raised in the Quality Audit Report, along with submission of a rectification report and reconciliation statement. Thereafter, on 06.02.2023, the Operational Creditor, vide its letter, replied to the notice dated 21.01.2023 and stated that, since the Final Report issued by M/s NIDA Consultants was prepared at a belated stage, i.e., after issuance of the demand notice dated 23.12.2022, the same cast doubt upon the veracity of the said Report.
- x. The Respondent contends that the RA Bills from the 21st to the 23rd RA Bill prima facie appear to be manufactured, as, according to the Respondent, the Operational Creditor could not, under any circumstances, have completed work valued at Rs. 14,39,72,515/- within a period of less than 2.5 months. It is further contended that

this is particularly so in view of the fact that, from October–November 2022, the Operational Creditor had already started abandoning the work, with an increasingly reduced number of workers of the Operational Creditor reporting at the project site.

- y. The Respondent contends that it neither supplied any material to the Operational Creditor nor made any payment to the Operational Creditor towards procurement of materials. It is submitted that, in such circumstances, the Operational Creditor could not have executed work valued amounting to Rs. 14 crores.
- z. The Respondent further contends that, under the LoI, the maximum permissible amount for raising an RA Bill was capped at Rs. 5 crores, whereas the 23rd RA Bill raised by the Operational Creditor exceeds Rs. 8 crores. According to the Respondent, the Operational Creditor thereby violated the terms of the Contract, giving rise to a pre-existing dispute, and the present petition is liable to be dismissed on this ground alone.
- aa. Respondent submits that the Final Report submitted by M/s NIDA Consultants has identified various quality issues and the approximate cost of rectification, which, under the Contract, is liable to be reimbursed by the Operational Creditor. It is contended that, owing to the defects and deficiencies in the work, the alignment of the beams at each floor is not straight, thereby requiring redesigning of the façade with ACP cladding at an approximate cost of Rs. 7.5–8 crores. It is further submitted that other defects and deficiencies identified in the work require rectification at an approximate cost of Rs. 2,01,99,500/-. The Respondent further contends that, under Clause 10 of the Contract,

the Operational Creditor is liable to pay liquidated damages amounting to Rs. 2,25,00,000/- for non-completion of the awarded work within the stipulated period.

bb. It is also submitted that approximately Rs. 3.30 crores towards GST has been paid to the Operational Creditor, but has not been deposited with the concerned authority till date, apart from PF/ESI liabilities of approximately Rs. 2.50 crores.

cc. The Respondent further submits that it has incurred expenditure towards material and labour falling within the scope of the Operational Creditor and claims reimbursement and risk purchase in respect thereof, including amounts of Rs. 42,73,920/- towards steel scrap and Rs. 4,50,000/- towards shuttering material, which were allegedly sold unauthorisedly by the Operational Creditor.

20. In the light of the facts and circumstances of the case as discussed in the aforesaid reply filed by the respondent, it is prayed to dismiss the instant application and penalty under Section 65 of the Code may be imposed on the alleged Operational Creditor for filing a frivolous and malicious application.

REJOINDER FILED BY THE APPLICANT

21. In response to the reply, the Applicant filed its rejoinder, denying and countering the contentions raised by the Corporate Debtor in its reply filed on 21.05.2023 and making the following submissions:

a. At the outset, it is submitted that the work executed by the Operational Creditor had never been disputed by the Corporate

Debtor and had, in fact, been accepted without any demur or protest. In support thereof, reliance was placed upon the “Pour Cards” issued by the Corporate Debtor against the work executed by the Operational Creditor, which acknowledged the work so carried out.

- b.** As regards the observations made by the Corporate Debtor in relation to the Pour Cards, it was submitted that the same had already been duly addressed by the Operational Creditor. It was further submitted that the Operational Creditor continued to undertake the construction work until June 2022 and maintained a running account with the Corporate Debtor. Reference was also made to the Minutes of Meeting dated 07.10.2022, wherein the structure was recorded as almost complete, with only the balance work remaining. It was submitted that, in the said meeting, the Corporate Debtor had agreed to pay a sum of Rs. 15 lakhs to the Operational Creditor, but failed to clear the said amount. On this basis, it was contended that the Operational Creditor could not be said to be claiming its dues without having completed the work.
- c.** Insofar as the proceedings before the Hon’ble Delhi High Court and the MSME proceedings were concerned, it was submitted that the same had been initiated after issuance of the demand notice dated 23.12.2022 under Section 8 of the Code. The said proceedings had been initiated for recovery of its dues and damages, whereas the present proceedings sought initiation of CIRP against the Corporate Debtor. It was, therefore, contended that the pendency or initiation of MSME proceedings or appointment of an arbitrator could not operate as a bar to the present proceedings, as the two proceedings could run parallelly.

Consequently, the Applicant submitted that the existence of such proceedings could not be construed as constituting a pre-existing dispute.

- d.** As regards the allegation of concealment of Debit Notes, Pour Cards, Minutes of Meeting and emails, it was submitted that the Debit Notes issued by the Corporate Debtor, bearing the signatures of the representative of the Operational Creditor, had already been duly accounted for in the ledger account placed on record with the main petition. Similarly, the emails relevant to the present matter had also been placed on record and, therefore, there was no concealment.
- e.** With respect to the Debit Notes and the material supplied by the Corporate Debtor, it was clarified that, since the Corporate Debtor was not clearing the invoices raised by the Operational Creditor, it had been mutually agreed that the Corporate Debtor would supply raw material against the dues of the Operational Creditor and that the value of such material would be deducted by the Operational Creditor from the amounts payable to it.
- f.** With regard to the deficiencies pointed out by M/s NIDA Consultants in its report dated 16.01.2023, it was submitted that the said report had been finalized after issuance of the demand notice as well as after filing of the main petition. The Applicant alleged that the report was a manufactured report prepared by the Corporate Debtor with a view to avoiding the proceedings before this Tribunal and, therefore, could not be relied upon.
- g.** It was further submitted that the Pour Cards evidenced the work carried out by the Operational Creditor and that the minor defects pointed out by the Corporate Debtor during the course of

construction had already been rectified. Reliance was also placed upon the Minutes of Meeting dated 07.10.2022, which recorded that the structural work was complete as per norms and quality and this minutes bore the signature of the Corporate Debtor. On the strength of the aforesaid record, the Applicant reiterated that the report of M/s NIDA Consultants could not be relied upon.

- h.** As regards the verification and reconciliation of the RA Bills raised by the Applicant, it was submitted that Clause 6 of the LoI dated 01.09.2018 specifically provided for payment against the RA Bills and did not stipulate that such bills were to be cleared only upon verification. The Applicant submitted that the work had been duly carried out, was acknowledged by the Corporate Debtor through the Pour Cards and the RA Bills had also been accepted by it.
- i.** It was further submitted that the Corporate Debtor had, for the first time, alleged that RA Bills 21 to 23 were manufactured. The Applicant avers that these bills had never been disputed when raised before the Corporate Debtor, nor had they been disputed in the reply to the demand notice. The Applicant therefore contended that the allegation, having been raised for the first time in the reply to the Application, demonstrated the mala fide of the Corporate Debtor.
- j.** The allegation that the Operational Creditor had failed to complete the project within the stipulated period of 12 months, including the grace period, was also controverted. It was submitted that the delay was solely attributable to the non-clearance of the Operational Creditor's invoices and the failure of the Corporate Debtor to provide the drawings required for execution of the work.

In this regard, reference was made to several emails, including the email dated 07.04.2021 issued by the Operational Creditor, and it was submitted that the emails relied upon by the Corporate Debtor in its reply also recorded the said issue.

- k.** Further, reliance was placed upon the Corporate Debtor's letter dated 08.04.2019, wherein it had stated that the timelines would be automatically extended. The Applicant also relied upon the Pour Cards, TDS and other records to submit that the work carried out by it had been admitted and acknowledged by the Corporate Debtor. It was accordingly contended that the original period of 12 months for completion of the project had been waived by the parties and that the delay was attributable to the Corporate Debtor and could not constitute a pre-existing dispute.
- l.** With regard to the contention of the Corporate Debtor that it had obtained the occupation certificate for the project on 09.03.2023, it was submitted that the said fact itself demonstrated successful commissioning of the work undertaken by the Operational Creditor, as its scope related to the basic work of the project. The Applicant further submits that, since the work undertaken by it had been successfully commissioned, the Corporate Debtor had thereafter obtained the occupation certificate. The Applicant therefore submitted that the obtaining of the occupation certificate itself showed that the work commissioned by the Operational Creditor was of good quality and as per norms.
- m.** The Applicant further controverted the reliance placed by the Corporate Debtor upon RA Bills issued to another contractor to contend that the Operational Creditor had left the site without completing the work and that the remaining work had thereafter

been entrusted to another contractor. The Applicant submitted that the said RA Bills were forged and fabricated documents filed by the Corporate Debtor only to create a false pre-existing dispute.

- n.** The allegation that the Operational Creditor had left the site in October-November 2022 without completing the work was also disputed. It was submitted that the Operational Creditor had, in fact, continued to carry out the work until 30.12.2022. It is also submitted that following receipt of the demand notice dated 23.12.2022 issued under Section 8 of the Code, the officials of the Corporate Debtor started threatening the workers and representatives of the Operational Creditor, resulting in a complaint dated 30.12.2022 being lodged with the SHO, Gautam Buddha Nagar, Uttar Pradesh.
- o.** It was further submitted that, on 31.12.2022, the officials of the Corporate Debtor forcefully stopped the workers of the Operational Creditor from carrying out the work and threatened them to leave the site. Thereafter, the entry of the Operational Creditor, its workers and representatives were prohibited by the Corporate Debtor. Reference was also made to the email dated 31.12.2022 addressed to the Corporate Debtor, in response to which the Corporate Debtor stated that the matter would be discussed with its top management.
- p.** In response to the allegation that the Operational Creditor had stolen raw material from the work site while leaving the site, it was submitted that the site had designated entry and exit points and that no person could enter or leave the premises without a gate pass. It was further submitted that no material could be brought

into or taken out of the site without such gate pass and that the gate passes were issued by the Corporate Debtor itself.

- q.** The Applicant further referred to its email dated 22.11.2022 addressed to the Corporate Debtor, wherein it had stated that the structure of Towers D and E was 100% complete and that only minimal work remained. In the said communication, the Operational Creditor had requested the Corporate Debtor to provide GFC drawings for the internal brickwork so that the remaining work could be completed. It was submitted that no response was received from the Corporate Debtor to the said request.
- r.** As regards the Corporate Debtor's contention that the Operational Creditor used to procure material from it, the Applicant submitted that such procurement was pursuant to the mutual understanding between the parties and that all material so procured had been duly accounted for in the ledger account annexed with the petition.
- s.** The Applicant also addressed the contention that, since the Operational Creditor remained unregistered until 15.12.2022, the authority issued in favour of Mr. Rajesh Badesara, its Authorized Representative, was incompetent and defective. In response, it was submitted that several judgments had held that non-registration of a partnership firm did not debar such firm from filing a petition under Section 9 of the Code. It was, accordingly, contended that the authority in favour of Mr. Rajesh Badesara could not be treated as defective on the said ground.
- t.** Finally, it was submitted that, for maintaining a petition under Section 9 of the Code, two requirements were material, namely, the absence of a pre-existing dispute and the existence of a debt of

Rs. 1 crore or above. The Applicant thus submits that neither requirement was lacking in the present case, as there was no pre-existing dispute and the dispute raised by the Corporate Debtor was false. Reliance was placed upon the TDS certificates, Pour Cards, Minutes of Meeting and RA Bills to submit that the debt exceeded Rs. 1 crore and that the same had not been repaid by the Corporate Debtor. The Applicant also submitted that CIRP was required to be initiated against the Corporate Debtor for its resolution, as the current management was not in a position to run and manage the affairs of the Company.

22. During the course of hearing, we took on record IA No. 174 of 2024 filed by the Operational Creditor/Applicant seeking to place additional documents on record, including an internal ledger allegedly forwarded on 14.09.2022, drawing charts, ROC financial statements and GST return and the subsequent counter affidavit, filed in response to the aforesaid, by the Corporate Debtor. We also took on record IA No. 410 of 2024 filed by the Corporate Debtor bringing on record subsequent statutory developments, including the final Arbitral Award dated 14.06.2024 passed by the Ld. Micro, Small and Medium Enterprises Facilitation Council (MSEFC), Headquarter-First, Jaipur, in Case No. RJ/02/M/JPQ/00724, whereby the entire claim of the alleged Operational Creditor was rejected and dismissed on merits and the subsequent reply, filed in response to the aforesaid, by the Operational Creditor.

23. The aforesaid IAs although allowed vide earlier orders dated 19.04.2024 and 09.07.2025, have been taken into consideration for the present determination to the extent of the documents placed on record therein.

WRITTEN SUBMISSIONS.

24. In pursuance to the directions passed by this Tribunal vide its order dated 16.08.2023, both the Applicant/Operational Creditor and Respondent/Corporate Debtor filed their written submissions on 23.08.2023 and 06.02.2024, respectively, which has been taken on record and considered. It is further noted that in compliance with the order dated 08.09.2026 passed by this Tribunal, the Applicant/Operational Creditor and the Respondent/Corporate Debtor filed their respective revised written submissions on 11.09.2026 and 14.09.2026, respectively. The same have been taken on record and duly considered. Upon perusal of the revised written submissions, we note that certain fresh submissions have been advanced by both parties, which are accordingly recorded herein below:

a. Submissions made by the Respondent/Corporate Debtor

- The Respondent/Corporate Debtor submits that in pursuant to the MSME proceedings initiated by the Applicant/Operational Creditor under Section 18 of the MSMED Act for the exact claim as brought forth through this petition, an order/award was passed on 14.06.2024,

wherein it has been held to the effect that no amount can be claimed in pursuance to the alleged RA Bills. Therefore, it is submitted that there is no “Debt” due, as contemplated under the Code from the Respondent/Corporate Debtor to the Applicant/Operational Creditor.

- It is submitted that the present Company Petition under Section 9 of the Code is wholly unmaintainable and legally non-est on the preliminary grounds that the underlying claim of the alleged Operational Creditor has already been conclusively adjudicated upon and dismissed on merits by a competent statutory Arbitral Tribunal.
- In support of its submission, the Respondent/Corporate Debtor has relied on *Bharat Industrial Projects Pvt. Ltd. v. Anupam Industries Ltd.* [CP(IB)/43(AHM)2021] passed by NCLT Ahmedabad bench, *Kellton Tech Solutions Limited v. Actas Technologies Private Limited* [Company Appeal (AT) (Insolvency) No. 1569 of 2023, *Sushil Kanugolu v. Samunnati Agro Solutions Pvt. Ltd.* [Company Appeal (AT) (CH) (Ins) No. 265 of 2022, decided on 23.08.2022] and *SRV Techno Engineering Pvt. Ltd. v. Purvanchal Vidyut Vitran Nigam Ltd.* [Comp. App. (AT) (Ins) No. 1651 of 2023, decided on 23.04.2024] passed by the Hon’ble NCLAT.
- The Respondent/Corporate Debtor further submits the reliance on the Applicant’s TDS deduction on the RA bills cannot in any way amount to acknowledgment of debt. As already settled in judgment passed by Hon’ble NCLAT in

the matter of *P.M. Cold Storage Pvt. Ltd. Vs. Goouksheer Farm Fresh Pvt. Ltd. and Ors [Company Appeal (AT) (Insolvency) No. 615 of 2020]* and order passed by NCLT - Mumbai Bench in *Kalpesh Jaysukh Shah Vs. Arch Pharmalabs Limited [CP (IB) 3460/MB/2019]*.

b. Submissions made by the Applicant/Operational Creditor

- The Applicant/Operational Creditor submits that in any event if any serious breaches had been committed by the Applicant, justifying withholding of the entire outstanding amount, the Respondent/Corporate Debtor could have invoked the contractual mechanism and issued an appropriate notice for termination. However, no such termination or cancellation of the LoI had been produced.
- With respect to reliance placed by the Corporate Debtor on the MSME Award dated 14.06.2024, the Applicant submits that the said Award was admittedly passed during the pendency of the present insolvency proceedings. It is, therefore, submitted that the said Award cannot retrospectively create a dispute which did not exist prior to the issuance of the Section 8 demand notice.
- The Applicant further submits that the reliance of the Corporate Debtor on certain alleged self-manufactured statements of account to suggest that the remaining work was subsequently completed through another contractor. However, all such statements, alleged bills and sheets pertain to the period after issuance of the Section 8 Demand Notice.

FINDINGS AND ORDER

25. We have heard the submissions advanced by the Ld. Counsel/ Sr. Counsel appearing for the Applicant/Operational Creditor and the Respondent/Corporate Debtor and have carefully perused the pleadings, documents placed on record, written submissions and annexures filed by the respective parties in support of their respective contentions.
26. Upon consideration of the material available on record, it is observed that the present application arises out of the claim of the Applicant/Operational Creditor, M/s R.N. Buildcon, for alleged outstanding dues arising from the Letter of Intent (“LOI”) dated 01.09.2018 executed between the parties for construction of structure work for Towers D & E of the project “Sarvottam Golden-I” at Plot No. 11, Techzone-IV, Greater Noida. The Applicant claims to have commenced the work pursuant to the said Contract and to have raised RA bills from time to time for the work executed and material supplied. According to the Applicant, the Corporate Debtor acknowledged the work performed by issuing pour cards and continued to make part-payments against the running bills, while the outstanding amount remained unpaid. It is the case of the Applicant that, despite repeated requests and subsequent Minutes of Meetings between the parties, the Corporate Debtor failed to clear the outstanding dues and, accordingly, the Applicant issued the Demand Notice dated 23.12.2022

under Section 8 of the Code claiming an amount of Rs. 27,76,58,492/- as operational debt.

27. Per contra, the Corporate Debtor has opposed the present application primarily on the ground that there existed a genuine and substantial pre-existing dispute between the parties much prior to the issuance of the Demand Notice dated 23.12.2022. The Corporate Debtor contends that the Applicant had failed to complete the contracted work within the stipulated time period and subsequently revised timelines, and also as per clause 7 of the Contract had failed on several occasions to procure steel, cement and other construction material as contemplated under the Contract, and thereafter, had raised claims concerning the coefficient of steel and RMC and escalation of rates, and further had failed to maintain the requisite pace of construction, and had executed work which, according to the Corporate Debtor, was of sub-par quality suffering from various defects and deficiencies.

28. It is further contended that the Corporate Debtor was, on several occasions, required to arrange and supply material, labour and other resources and to make payments to vendors of the Operational Creditor in order to facilitate continuation of the project, with the corresponding amounts being subject to debit and reconciliation. The Corporate Debtor has further relied upon various emails, Minutes of Meetings, debit notes,

pour cards and the report of M/s NIDA Consultants in support of its contention that the quality, completion and quantification of the work remained disputed between the parties.

29. It is further the case of the Corporate Debtor that the RA Bills raised by the Operational Creditor were subject to verification, certification and reconciliation and that corresponding adjustments were liable to be made on account of material, labour, rectification, penalties and other expenditure incurred by the Corporate Debtor in relation to the work falling within the scope of the Operational Creditor for which debit notes were issued to the Operational Creditor by the Corporate Debtor, which have not been fully accounted for by the Operational Creditor. The Corporate Debtor has also relied upon the contractual arbitration mechanism and the subsequent proceedings initiated by the parties before the competent forums i.e. MSME Arbitration and Arbitrator appointed by the Hon'ble High Court of Delhi in relation to the disputes arising out of the same contractual relationship.

30. In light of the aforesaid rival submissions, apart from the other issues required to be examined for consideration of admissibility of an application under Section 9 of the Code, the principal issue which, in our considered opinion, arises for consideration before us is whether there existed a "pre-existing dispute" between the parties prior to issuance of

the Demand Notice dated 23.12.2022 within the meaning of Section 5(6) of the Code.

31. For examining the aforesaid issue, it is relevant to note that, as reflected from Part IV of the present application, the Applicant/Operational Creditor claims an operational debt of Rs. 27,76,58,492/- in respect of the RA Bills raised in relation to the work allegedly executed under the LOI. The Demand Notice under Section 8 of the Code was issued on 23.12.2022. The relevant examination, therefore, is whether disputes contemplated under Section 5(6) of the Code existed between the parties prior to issuance of the said Demand Notice. Section 5(6) of the Code defines “dispute” as follows:

“5. Definitions. –

(6) “dispute” includes a suit or arbitration proceedings relating to–

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;”

32. The aforesaid definition is an inclusive definition, however, now it is settled law that dispute regarding amount of debt or quality of goods or services may exist by way of correspondences between the Operational Creditor and the Corporate Debtor made through emails or letters exchanged between them prior to issuance of the Demand notice. In the landmark judgment of ***Mobilox Innovations Private Limited vs Kirusa***

Software Private Limited (2017) 1 SCC297 also, the Hon'ble Supreme Court held that definition of dispute in Section 5(6) is an inclusive definition, rather than exhaustive term and a dispute is not limited solely to pending court suits or arbitration proceedings. It encompasses any real, legitimate disagreement or correspondence between parties regarding payment.

33. It has been held, however that a dispute must genuinely exist prior to the Operational Creditor issuing a demand notice and it must be prima facie legitimate, plausible and real and not spurious, hypothetical, illusory, or a mere bluster, fabricated just to deny insolvency proceedings. Mere existence of a plausible dispute which requires further investigation and dispute is not patently feeble legal arguments or an assertion of fact not supported by evidence, is sufficient to show that a dispute exists and the court does not need to be satisfied that the defence is likely to succeed and the court at this stage is also not required to examine the merits of the dispute except to see that a real dispute between parties exists about existence of debt or quality of goods or services.
34. In the light of the aforesaid legal position, we have examined the material placed on record. On such examination, the pre-existing dispute emerging from the record can broadly be considered under two facets: (i) the first facet concerns the disputes which arose and continued between the parties

during the period in which the project work was being executed and (ii) the second facet concerns the subsequent proceedings initiated by the parties before independent adjudicatory forums in relation to the disputes arising out of the same contractual relationship and the outcome thereof, insofar as the same is available on record, which are being discussed in detail as under:

i. Disputes which arose during the period in which the project work was being executed.

35. The first facet of the dispute relates to the period during which the contracted work was being executed and the project was under completion. The material placed on record demonstrates that the disputes between the parties during this period were not confined to a single issue, and broadly, the disputes under this facet can be considered under the following three aspects: (a) delay in execution and completion of work; (b) quality of work, defects, deficiencies and rectification of work; and (c) quantum and computation of the amounts claimed including reconciliation of RA Bills.

a. Disputes concerning delay in execution and completion of work:

36. At the outset, it is significant to note that the LOI dated 01.09.2018 contemplated a defined time schedule for completion of the awarded work as 12 months from the date of award of contract dated 01.09.2018, with a

grace period of 60 days. The Applicant has, on the other hand, relied upon the subsequent conduct of the parties, including the letter dated 08.04.2019 and various Minutes of Meetings, to contend that the timeline stood extended from time to time. Even assuming that the parties subsequently altered or extended the completion schedule, such subsequent arrangements themselves indicate that completion of the contracted work and the pace at which the work was being executed remained ongoing disputed issues between the parties.

37. In this regard, reference may first be made to the email dated 19.01.2021 sent by the Operational Creditor itself. In the said communication, while responding to the correspondence exchanged between the parties, the Operational Creditor acknowledged that there had been delays on various occasions and assured the Corporate Debtor that it would complete the project at the earliest and improve the pace of work. The relevant portion of the email dated 19.01.2021 is reproduced below:

“D/Sir

In reply to your trailing mail, on dated 18 jan & 19 jan 2021 we have to say that,

1. We are in process to deliver the quantity of steel as discussed during meeting, of course will deliver within a week. Meanwhile please arrange payment also against delivery of steel as mutual agreed in MOM.

2. As per target given by you, we will put our best efforts to meet timeline as discussed although this is fact that we many times delayed in slab casting due to non-availability of RMC after completing steel and shuttering work.

3. We will submit all the escalated quantity of Steel and RCC by end of this month positively.

4. Since as we already inform you about huge deviation in the coefficient of steel and Rmc from agreed work order we are facing financial crunch this time as we already invested big amount on this project. Therefore, we need your valuable support on this matter.

5. We are very positive to complete this project at the earliest and off course will improve our work pace very soon. Overall, we assure for our better services all the time.”

- 38.** The aforesaid communication is material for more than one reason. First, the Operational Creditor itself acknowledged that there had been delays in slab casting. Second, the Operational Creditor connected its difficulty in continuing the work with the alleged deviation in the coefficient of steel and RMC and its financial position. Third, the communication contains an assurance that the project would be completed at the earliest and that the pace of work would be improved. Thus, the issue of delay and pace of execution was not raised for the first time by the Corporate Debtor after issuance of the Demand Notice; rather, it formed part of the contemporaneous exchange between the parties during the execution of the LOI.

39. Subsequently, the Corporate Debtor, in its response email dated 20.01.2021, specifically disputed the explanation furnished by the Operational Creditor and referred to the delay in delivery of steel, the agreed mechanism concerning payment against procurement of steel and the progress of work. The Corporate Debtor also called upon the Operational Creditor to furnish the calculations relating to the alleged escalation. The relevant portion of the email dated 20.01.2021 by the Corporate Debtor is reproduced below:

“Wrt to point no. - 1, refer your written statement, you had promised to deliver 180 tonnes by 17th January. We gave you payments as per decided mutually but steel was 4-5 days later. Then we had a meeting and conveyed to you that as soon as, you deliver further lot, payments will made to you immediately but still we are awaiting the delivery so there is no failure of commitment from our side and still we are on, at that matter. But is justifiable on your part to demand payments from side to procure steel for your work?

You are supposed to execute the work first, raise the bill on the second part and then raise the bill.

Wrt to second point, there has never the case of non-delivery of RMC to you. There might a case when we have to cast a bigger area and we are not able to give casting 5-6 cu m as you know, even for a small casting, whole system of pipeline and pump has to move from one place to another but never has been a case, in which concrete quantity is more 20 cu m and we have not given you casting. So this is completely a false statement.

Wrt to third point, we have reminding from the begin of January to provide us BBS of steel and concrete escalation statement. Still we have not received it.

Your claim to point no. 4 is only valid, after delivery of calculations, mentioned in point no .- 3.

And to sum up, intentions and motives can only be justified with the progress at site.”

- 40.** The aforesaid exchange assumes significance as it demonstrates that, much prior to the Demand Notice, there was an ongoing disagreement between the parties concerning the manner in which the work was progressing, procurement of steel, the timing of payments against such procurement, and the claim of the Operational Creditor concerning escalation/coefficient. The Corporate Debtor's response was not a bald denial raised for the first time after the Demand Notice, rather, it raised specific objections concerning the manner in which the contractual obligations were being performed and the basis upon which the Operational Creditor was seeking corresponding payments.
- 41.** The issue of completion of the work also continued thereafter. In the email dated 03.02.2021, the Corporate Debtor specifically referred to the failure of the Operational Creditor to complete the work within the original period and recorded a further deadline for completion of Tower D. The

relevant portion of the email dated 03.02.2021 by the Corporate Debtor is reproduced below:

“1. With respect to point no.1 and 5, You failed to complete the said work within a span of 12 months. That's why, we have told you to complete D block first within a time frame up to 30th April, given and signed by you on 30/01/2021.

2. With respect to points 2,3,4,6 and 7 As discussed with you, terms and conditions given in the work order given to you will be honoured completely.

Calculations about steel and concrete escalations have been handed over to us, by you, yesterday only, on 2/2/2021. We will get it vetted by our consultant and his decision about final steel and concrete co-efficient will be acceptable to you and us both. Only after vetting, you will be in a position to calculate the amount so predicting any amount would be improper.

3. We expect from you to complete block D construction work as per deadline given you.”

42. The fixing of a further deadline for completion of Tower D, coupled with the preceding correspondence regarding delay, demonstrates that the parties were continuing to address the issue of completion of the contracted work. The subsequent email dated 15.03.2021 is also material wherein the Corporate Debtor recorded that against the target of 60,000 sq. ft. of slab casting during March, only 7,200 sq. ft. had been cast even after 14 days and further required additional shuttering material and

manpower and expeditious rectification of external edges of beams/slabs.

The relevant portion from the email dated 15.03.2021 is reproduced below:

“D/Mr. Rajesh Gupta

With reference to the several meetings and finalization of your clear outstanding this is agreed by you that,

1. Minimum 60000 sft slab area to be casted during march.

2. Still only 7200 sft area have been casted even after 14 days have been past. 3. You will arrange additional shuttering materials to achieve this target. 4. The rectification of external edges of beam/slab to be expedited because the existing pace of work is not satisfactory.

5. You will increase man power for core area and NTA immediately along with shuttering materials as required.

6. You have to shift your site office to lower basement slab in Tower 'E'- After many instructions not being shifted.

7. Many time we have instructed you to get implemented safety precautions for workers who are working on height and corners/Out sides-Need to be taken care.

You are advised to Focus on the above points which are most critical”

- 43.** The aforesaid communication demonstrates that the dispute regarding the pace of execution was continuing during the subsistence of the Contract. The Corporate Debtor was identifying specific quantitative targets and pointing out the shortfall in achievement thereof. The Minutes of Meeting

dated 27.05.2021 further demonstrate that the parties continued to structure the execution of the work around mutually agreed targets. The said Minutes recorded, inter alia, targets for slab casting in Tower D and E and the Non-Tower Area, requirements of steel, manpower and other store materials, a specific schedule for release of payments for procurement of steel and the supply of RMC by the Corporate Debtor.

44. The record further reflects that the parties thereafter continued to revise and settle targets. The Minutes of Meeting dated 14.03.2022 and 20.03.2022 similarly contemplated targets for slab casting, brickwork and plaster, additional manpower, supply of RMC by the Corporate Debtor, monthly clearance of RA Bills and adjustment/debit of material and labour cost where work falling within the scope of the Operational Creditor was completed by the Corporate Debtor. The relevant excerpts are reproduced below:

“With reference to the meeting held in your site office on 14th and 20th March with MD Mr. Anil Kasana Ji and GM Project Mr. R.K Mahalwal Ji regarding completion of structure for Tower-D&E and following points have been discussed and agree mutually.

- 1. Target of balance slab casting area in Tower-D&E will be 40000 sqft for the month of 30 April 2022.*
- 2. Brickwork and Plaster as per drawing availability for the month 30 April staircase*

3. Requirement of steel for agreed area will be require (Steel Supply by ocean infra) and additional material of store also require and labour Expense which cost will 60 lacs (To be paid 15 lac each on weekly of every month).

4. RN BUILDCON will have to arrange additional man power accordingly.

5. This has been agreed by ocean infra to release payment as agreed schedule to achieve target as set.”

45. It is significant that, even immediately preceding the issuance of the Demand Notice dated 23.12.2022, the communications exchanged between the parties disclose that the work under the Contract had not been fully completed and the same has been reflected from the contrary email communications dated 22.11.2022 and 23.11.2022. These two emails sent by the Operational Creditor by claiming in former email that work is 100% completed while in later email, it is said that out of Rs. 68 Cr. of work, it is completed worth Rs. 57 Cr. for which bill of Rs. 43.5 Cr. was deposited, are being reproduced below:

Email dated 22.11.2022

“Dear sir, The structure of the tower D&E is 100% completed. The external brick work, plaster and plumbing is going on with a smooth pace. And it would be completed within 15 to 20 days. Along with this Please provide final GFC drawings of internal brick work and

any other work as per our scope. So that I can finish my work as soon as possible.”

Email dated 23.11.2022

“To The ocean infra heights (project GOLDEN I)

Sir my company is in work order agreement for this project of Rs-68cr and I have been completed the work for Rs57cr.aprox for this site

Where I have

just deposited the bill of Rs-43.5 crore.

So it's my humble request to u pl release my balance payment so that I can completed the balance work at site within 3 to 4 months.

Thanks & Regards

Team R N Buildcon”

- 46.** Hence, the aforesaid documents show that the contractual relationship continued to be governed by a series of discussions concerning the manner in which the balance work was to be completed, the targets to be achieved, the materials to be arranged by each party, the payments to be released and the consequences of failure to achieve the agreed targets. The contractual relationship, therefore, cannot be viewed as one in which the work had been completed without controversy and only the payment of an admitted sum remained outstanding. The repeated fixation and revision of targets, coupled with the corresponding stipulation of consequences for failure to achieve them, clearly indicates that the issue of timely

completion of the contracted work remained a continuing matter of dispute between the parties well prior to the issuance of the Demand Notice dated 23.12.2022.

b. Disputes concerning quality of work

47. The second aspect concerns the quality of work and the alleged defects and deficiencies therein. The Corporate Debtor has placed on record contemporaneous communications predating the Demand Notice wherein specific defects and rectification requirements were communicated to the Operational Creditor. In this regard, the email dated 18.02.2021 is material, wherein the Corporate Debtor referred to, inter alia, damaged shuttering material, wastage of concrete, rectification of RCC work relating to beams, columns and slabs, removal of construction material from casted areas and other deficiencies. The relevant excerpts from the email dated 18.02.2021 are as follows:

“D/Mr. Rajesh Gupta

We like to brief you about discussion with you during site visit today,

1. All the damaged ply of shuttering to be changed immediately to get smooth surface of concrete.

2. Wastage of concrete to be used for CC beam otherwise same will be debited from your RA bills.

3. Non tower area around D should be started immediately.

4.You have to complete target of Feb any how as you committed earlier.

5.Planning of march to be summited by 25th of Feb by you.

6.Put a team to remove all the ply/nails/joot bags/batten from casted area immediately.

7.put a team to rectify all the Rcc of beam/column/slab (if any) to make required shape and size.

You are advice to instruct your site team to attend the above activities at the earliest.”

48. The Minutes of Meeting dated 23.02.2021 are also relevant. The parties recorded, inter alia, that rectification of beams and projected slabs was to be undertaken within a stipulated period, failing which an appropriate amount could be withheld from the RA Bills; that damaged shuttering material was to be replaced; and that laying concrete and other material from old structures was to be removed. These documents demonstrate that the issue of quality and rectification was not raised for the first time in the reply to the Section 8 Demand Notice but the Corporate Debtor had, during the execution of the Contract, specifically communicated the alleged deficiencies and required their rectification.

49. The record further contains Minutes of Meeting dated 27.05.2021, wherein the parties mutually discussed and agreed upon specific targets for slab casting in Tower D/E and the Non-Tower Area, the requirement

of manpower and material, the payment schedule for procurement of steel and the supply of RMC by the Corporate Debtor. Significantly, the aforesaid Minutes also contemplated consequences in the event the agreed target was not achieved. The parties recorded that if the Operational Creditor failed to achieve the agreed target, a penalty of Rs. 50,000/- per day would be imposed, while the Corporate Debtor was also required to adhere to the agreed payment schedule.

“If steel payment given & steel not purchased by R N BUILDCON 5-6 Days then steel will be provide

The company directly & debit actual (as steel purchase bill amount)

If R N Buildcon fail to achieve target @ Rs. 50000/- per day, will be imposed as penalty and same way i.e., payment is delayed from the above and agreed schedule the same will be paid by Ocean infra and in this case R N Buildcon will not responsible to achieve the set target.”

50. The existence of such contemporaneous records is material. Whether the penalties were ultimately contractually recoverable, whether the alleged violations occurred in the manner asserted, and whether the corresponding debits were justified are matters on which the parties have taken rival positions. For present purposes, however, the documents demonstrate that these were continuous contractual issues concerning the quality of work well before the Demand Notice. In this regard, the Minutes of the Meeting

dated 19.03.2021, demonstrating that Rs. 25 Lakhs was held by the Corporate Debtor are being reproduced below:

“Meeting with RN Buildcon and Agreed Terms for the Completion of Balance Wrok

Date:- 19.03.2021

- 6) This is certified that total outstanding of RN Buildcon against work done up to 28th FEB 2021 is Rs. 5.65 Cr. Only.*
- 7) The above outstanding inclusive of Retention money which is Rs. 89 Lakh and hold amount of Rs. 25 Lakh against poor quality and balance rectification.*
- 8) We can release Rs. 2.0 Cr to RN Buildcon subjected to full fill of steel and shuttering materials which are required to achieve the casting slab area 60,000 sft. Agreed by RN Buildcon during march,
The payment will release in stages as:_*
 - d) Rs. 1.00 Cr (against 180 MT steel and additional shuttering materials)*
 - e) Rs. 50 Lakh (against steel of 60 MT)*
 - f) Rs. 50 Lakh (against staff salary and other expenses)*
- 9) If RN Buildcon will fail to achieve the above target, we will impose penalty of Rs. 50 Lakh and if RN Buildcon will achieve the said ateget of slab area 60,000 sft we will release another payment of Rs. 50 Lakh to RN Buildcon.*

Subject to availability of Drawing & Realization of Payment. This amount (5.65 cr) without GST”

51. The parties thereafter continued to revise and settle targets. The Minutes of Meeting dated 14.03.2022 and 20.03.2022 similarly contemplated targets for slab casting, brickwork and plaster, additional manpower,

supply of RMC by the Corporate Debtor, monthly clearance of RA Bills, and adjustment/debit of material and labour cost where work falling within the scope of the Operational Creditor was completed by the Corporate Debtor.

52. The aforesaid documents are significant because they reveal that the parties were continuously negotiating the manner in which the balance work was to be completed and the targets to be achieved. Therefore, the contractual relationship had not reduced to a simple and undisputed monetary liability.
53. The record also contains remarks on the Pour Cards over a substantial period, including, according to the Corporate Debtor, from 21.04.2021 to 28.11.2022. The Corporate Debtor relies upon such remarks to contend that defects, improper shuttering, incomplete work and deviations from drawings were repeatedly brought to the notice of the Operational Creditor.
54. The Operational Creditor, in response, has contended that the observations recorded in the Pour Cards were routine quality-control observations, which were subsequently rectified, and has relied in particular upon the Pour Card at page 173 of the petition where, according to it, the observations initially recorded on 12.10.2022 were subsequently marked as rectified and the Pour Card was signed on 15.10.2022. The Operational

Creditor has accordingly argued that the Pour Cards demonstrate continuous inspection, verification and acceptance of the work.

55. The aforesaid submission, however, does not by itself eliminate the existence of a dispute. The fact that some defects may have been rectified does not establish that all defects raised at different stages were accepted by the Corporate Debtor as having been finally cured. A perusal of the Pour Cards annexed with the petition shows that, although certain items in the checklist bear a tick in the status column, several other items remain without any such indication. Further, even in respect of the items where ticks have been marked, observations have been recorded at the bottom of the relevant Pour Cards, some of which have thereafter been marked as rectified, while others continue to remain without any such endorsement. Neither is there any material on record to demonstrate that the disputes or objections relating to all such aspects were ultimately resolved between the parties, nor can it be said, on the basis of the material placed before us, that no dispute survived concerning the quality of the work, the extent of rectification required, the cost thereof or the corresponding adjustment, if any, from the RA Bills.
56. On the contrary, the very recording of specific defects and the stipulation of timelines for their rectification, coupled with the consequence of withholding appropriate amounts from the RA Bills in the event of non-

rectification, demonstrate that the issue of quality and compliance with the contractual specifications was being actively dealt with between the parties during the subsistence of the Contract. At the stage of Section 9, it is not necessary for us to finally determine which of the competing assertions regarding rectification is correct, however, what is material is that such issues had arisen and were being contemporaneously raised between the parties much prior to the issuance of the Demand Notice.

57. The Applicant has also relied upon the Occupation Certificate obtained by the Corporate Debtor on 09.03.2023 as demonstrating that the project was ultimately commissioned and that the work carried out by the Operational Creditor was accepted. The said document, however, is subsequent to the Demand Notice dated 23.12.2022 and, therefore, cannot retrospectively extinguish disputes which were already existing between the parties prior thereto. Similarly, the Applicant's contention that the Occupation Certificate establishes the correctness of the work executed by it involves a matter which cannot be conclusively determined in the summary jurisdiction exercised in a Section 9 proceeding.

58. On the other hand, the Corporate Debtor has relied upon the report of M/s NIDA Consultants dated 16.01.2023. The Applicant has contended that the said report is subsequent to the Demand Notice dated 23.12.2022 and that no preliminary or monthly report, as contemplated under the

consultancy arrangement, was communicated to it prior to issuance of the Demand Notice. The Corporate Debtor, on the other hand, submits that, in view of the quality-related issues noticed during execution of the Contract, it had initiated a quality check audit through M/s NIDA Consultants on 15.10.2022, which thereafter inspected the work executed in Towers D and E and submitted its report dated 16.01.2023. A perusal of the said report shows that, M/s NIDA Consultants recorded that it had observed “*multiple issues related to quality and workmanship at D&E block*” and categorised the same as major, intermediate and minor issues on the basis of their impact, the extent of rectification required and the consequences arising therefrom.

59. It is true that the final report dated 16.01.2023 of M/s NIDA Consultants was prepared after issuance of the Demand Notice dated 23.12.2022 and, therefore, the findings recorded therein cannot, by themselves, be treated as constituting the genesis of a pre-existing dispute. At the same time, the appointment of M/s NIDA Consultants and initiation of the quality audit was done on 15.10.2022, i.e. prior to the Demand Notice, assume significance. Further, the inspection undertaken was not in relation to any unrelated or subsequent work, but specifically concerned to ‘Towers D and E’, which constituted the very subject matter of the LOI dated 01.09.2018 between the parties. Thus, the fact that the Corporate Debtor

considered it necessary to have the work executed in the said Towers subjected to a quality audit even before issuance of the Demand Notice is a contemporaneous circumstance which lends support to its case that concerns regarding the quality and workmanship of the work had arisen prior to the Demand Notice.

- 60.** The Applicant has also pointed out that no preliminary or monthly reports contemplated under the consultancy arrangement have been placed on record and that the final report was furnished only after issuance of the Demand Notice. These aspects may have a bearing upon the weight to be attached to the final report and its ultimate evidentiary value. However, they do not, by themselves, efface the fact that the subject Towers had been inspected prior to the Demand Notice. More importantly, the issue of quality and rectification does not originate with the NIDA report itself. The record already contains, much prior to 23.12.2022, emails, remarks in the Pour Cards, Minutes of Meetings and Debit Notes raising concerns regarding defects, deficiencies, workmanship and rectification of the work executed by the Operational Creditor. The subsequent NIDA report, therefore, may at best be regarded as a later technical assessment of concerns relating to the same Towers which had already arisen during the execution of the Contract; it does not constitute the first instance in which the Corporate Debtor raised an issue regarding the quality of the work.

- 61.** As regards the Applicant's assertion that M/s NIDA Consultants is a related entity of the Corporate Debtor and that the report was procured only to frustrate the present proceedings, no sufficient material has been placed before us at this stage to conclusively establish such allegation and nothing has been placed on record to establish that M/s NIDA Consultants was a related entity of the Corporate Debtor. In any event, the determination of such allegation is not necessary for deciding the present issue, since the existence of the dispute regarding quality and rectification is independently borne out by the contemporaneous material existing prior to issuance of the Demand Notice.
- 62.** The Corporate Debtor has also placed on record contemporaneous Safety Violation Reports dated 11.10.2021, 13.10.2021, 21.10.2021, 26.10.2021 and 28.10.2021, annexed as Annexure R-25 with the reply, whereby the Operational Creditor was repeatedly informed of alleged violations of the prescribed safety measures by the workers/contract workers engaged at the project site. In the communication dated 21.10.2021, the Corporate Debtor specifically recorded that the workers were carrying out work at height without safety belts and helmets despite repeated instructions and, accordingly, imposed a penalty of Rs. 2,000/-, to be deducted from the monthly bill/payment. Similarly, vide communication dated 28.10.2021, the Corporate Debtor recorded that the workers were working at the site

without safety helmets despite repeated instructions and imposed a further penalty of Rs. 2,000/-. The relevant portions of the safety report dated 21.10.2021 are reproduced below:

“This is informed to you that, you/contract worker working under you are doing UNSAFE ACT / UNSAFE CONDITION

(Without Safety Belt & Helmet Work at Height.), after frequent instruction, which may lead to accident.

So you are instructed not to violate safety rule, otherwise you will be responsible for same and penalized. accordingly, Penalty of Rs.2000/- Two Thousand only.

Penalty of Rs. 2000/- Two Thousand Only will be deducted from your monthly bill/payment.”

63. Viewed cumulatively, the material placed on record demonstrates that the Operational Creditor remained at variance with regard to the adequacy and conformity of the work, the extent of rectification carried out and the financial implications arising therefrom. Accordingly, the question of the quality and contractual conformity of the work remained an unresolved issue between the parties prior to the issuance of the Demand Notice.

c. Disputes concerning quantum and computation of amounts claimed

64. The third aspect emerging from the contemporaneous record concerns the quantum of the amounts claimed by the Operational Creditor. The issue concerning the quantum and computation of the claim also arose much

prior to the Demand Notice. In this regard, the email dated 19.01.2021 itself records the Operational Creditor's contention regarding “*huge deviation in the co-efficient of steel and RMC*” and its request for support on the said issue.

65. The Corporate Debtor, however, disputed the basis of such claim and, vide email dated 20.01.2021 (as reproduced in the preceding paras of this order), called upon the Operational Creditor to furnish the calculations. Thereafter, vide email dated 03.02.2021, the Corporate Debtor recorded that the calculations concerning steel and concrete escalation had been handed over only on 02.02.2021 and that the same would be vetted by its consultant, after which the final coefficient would be determined.
66. The record further contains the email dated 06.04.2021, wherein the Corporate Debtor specifically objected to the calculation of the rate of RMC/material supplied in the bill dated 19.03.2021 and stated that the rate reflected therein was not in accordance with the rate agreed under the Contract. The relevant excerpts from the email dated 06.04.2021 are as follows:

“With reference to the mutual agreement about outstanding against your bill dated 19th march 2021, We like to inform you that there is a mistake with the calculation of the rate of rmc rmc/materials which is supplied by us for Tower D/E. In the agreed contract by you this is

clearly shown the rate of RMC as Rs.6000/-cum. You can see the documents attached herewith.

Therefore, Be corrected accordingly.”

- 67.** The aforesaid correspondence is material because the dispute concerning the quantum of the claim was not merely a dispute raised after the Demand Notice because the parties were, much before the Demand Notice, exchanging communications concerning the basis of calculation of the RA Bills, the coefficient of steel and RMC, the rate of RMC supplied by the Corporate Debtor and the amounts which could be included in the bills.
- 68.** The Minutes of Meeting dated 23.02.2021 further demonstrate that the parties were contemplating reconciliation and adjustment of amounts depending upon the performance and completion of specified works. The relevant excerpts from the minutes of the meeting dated 23.02.2021 are reproduced below:

“2. All rectification of Beams, Projected Slabs, etc to be rectified by 15th March '21 otherwise Appropriate Amount will be hold from RA Bills.

..

12. As requested by R N Buildcon after certification of bill up to 31st DEC 2020, meeting will arrange with management to set further term/conditions for work and payment”

- 69.** Another significant circumstance emerging from the record concerns the procurement of construction material. Under the LOI, in terms of Clause

7, the Operational Creditor was required to arrange specified construction materials. The relevant excerpts from the LOI are reproduced as follows:

“7. Cement and Steel

STEEL: The Reinforcement Steel shall be arrange by R N Buildcon and consumption status & Reconciliation as per theoretical consumption steel be submitted along with every bill and final difference if any will be adjust from bill.

..

CEMENT: The Cement shall be arranged by R N Buildcon and consumption status & Reconciliation as per theoretical consumption steel be submitted along with every bill and final difference if any will be adjust from bill.”

- 70.** However, the correspondence including 14.10.2019 and 08.05.2021 as relied upon by the Corporate Debtor in its reply demonstrates that, during the course of execution of the work, the Operational Creditor itself communicated its inability on certain occasions to procure material and sought assistance from the Corporate Debtor. In this regard the email dated 08.05.2021 by the Operational Creditor is reproduced as under:

“We like to inform you that due to crisis of payment we are not able to arrange steel, shuttering material at site for Tower D&E... We have many times discussed you regarding the same...

Therefore, You are requested to release at least 80 lakh immediately, 50 lakh to arrange steel and other material and 30 lakh to clear some previous outstanding of vendors and contractors.

..

This will help in getting the work done without any obstacle. I request you to release the payment so that there is no hurdle or problems while working. Please give us decision about tower Hold area at the joint of Tower D&E.”

71. The Corporate Debtor has relied upon the aforesaid communications to contend that, in order to ensure that the project did not suffer further delay, it was required to step into the shoes of the Operational Creditor and arrange/provide material which otherwise fell within the scope of the Operational Creditor, including steel, cement, sand and other materials, and thereafter debit the corresponding cost to the Operational Creditor. Copies of Debit Notes issued have been annexed as Annexure R-3 to the reply. Thus, the material placed on record indicates that the Corporate Debtor's case regarding the intervention undertaken by it in relation to procurement of material is not founded merely upon a subsequent unilateral assertion.
72. The relevance of this aspect is not confined merely to the question of performance of the Contract. The material supplied by the Corporate Debtor and the corresponding debit/adjustment necessarily have a bearing upon the ultimate amount, if any, payable to the Operational Creditor. Therefore, the dispute concerning procurement and supply of material is intrinsically connected with the quantum of the alleged operational debt.

73. The Corporate Debtor has further contended that the RA Bills raised by the Operational Creditor were subject to verification, certification and reconciliation and that amounts could be adjusted on account of material, labour, rectification, penalties and other expenditure incurred by the Corporate Debtor in relation to the work falling within the scope of the Operational Creditor.
74. In this regard, the record contains the correspondence relating to the verification of RA Bills and the disputed calculations. The relevant excerpts from emails dated 19.05.2021 and 01.06.2021 from the Corporate Debtor is reproduced as follows:

“Dear RN Team,

As discussed, Please share the details of excel sheet of RCC consumed before March'19 from the start of your work as afterwards Ocean Infra is suppling RMC till Date.

It is required for reconciliation of RMC till date as we are doing the same for Steel also. For closing the work done till 31st March'21. The Recon. Sheet will be attached in the certified Bill.”

“Dear R N Team,

Please find enclosed excel and scan of checked and verified R.A-11 (Work done up to March'21) of T-D & E.

This is for your information and support for preparation of Next R.A.”

75. The aforesaid material, read cumulatively, demonstrates that the parties were not ad idem regarding the final amount payable under the Contract.
- The Operational Creditor's claim in the present application is based upon

aggregation of amounts reflected in its RA Bills, whereas the Corporate Debtor has relied upon the contractual mechanism of verification, reconciliation, adjustment and proper accounting of debit notes issued by the Corporate Debtor. The determination of the final amount, therefore, involves examination of disputed factual and contractual matters. Such dispute on determination of final amount payable by the Corporate Debtor to the Operational Creditor is further corroborated by the fact that both parties have moved for Arbitral Award to determine the amount of debt, one by the Corporate Debtor to the Hon'ble High Court of Delhi under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of Arbitrator and second, i.e., Operational Creditor to the Ld. MSEFC under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act").

- 76.** The contention of the Operational Creditor that the Corporate Debtor acknowledged the work by issuance of pour cards and had made payments against certain RA Bills also does not, by itself, negate the existence of a pre-existing dispute. An acknowledgment that work was performed or that a running bill was received is distinct from an unconditional acknowledgment that the entire amount claimed under such bill had become finally due and payable. Similarly, the fact that TDS was deducted in respect of certain RA Bills cannot, by itself, conclude the controversy

concerning the final amount payable where the Corporate Debtor has contemporaneously disputed the bills, their computation and the corresponding contractual adjustments.

77. The Corporate Debtor has further relied upon Clause 28 of the LOI, which expressly confers upon it the right to retain, such amount as may be sufficient to indemnify it against any lien or claim which is chargeable to the Contractor. The said clause is reproduced below:

“28. Liens and Liabilities

If at anytime there is evidence of any lien or claim for which the owner might be or become liable and which in terms of the contract or otherwise is chargeable from the Contractor, the owner shall have the right to retain out of any payment then due or thereafter becoming due to the Contractor an amount sufficient to completely indemnify the Owner against Lien or claim.”

78. The said contractual stipulation assumes relevance while considering the quantum of the amount allegedly due to the Operational Creditor, since any liability falling within the scope of the said Clause was liable to be retained or adjusted against amounts otherwise payable under the RA Bills. Thus, the ultimate liability of the Corporate Debtor could not be said to have crystallised merely on the basis of the gross value reflected in the RA Bills, without first accounting for the claims, liabilities and corresponding adjustments contemplated under Clause 28 of the LOI, an exercise which necessarily involves determination of disputed contractual

issues and, therefore, cannot be undertaken in the summary proceedings under Section 9 of the Code.

79. In view of the foregoing discussions and on a cumulative reading of the material constituting the first facet including the final-stage disputes, it is evident that the dispute between the parties was not confined to the question of whether the Corporate Debtor had simply failed to pay an admitted sum. The dispute extended to the foundational question of what work had actually been completed, whether the work was executed in accordance with the LOI, what material was procured and by whom, what quantities and rates were applicable, what RA Bills were capable of being certified, what adjustments or Debit Notes were liable to be made, and what amount, if any, remained finally due after reconciliation.

ii. **Subsequent proceedings initiated by the parties in relation to the disputes.**

80. The second facet relates to two aspects, namely: (a) the nature and relevance of the subsequent proceedings instituted by the parties before the competent statutory forums in respect of the disputes arising out of the same Contract, and (b) the effect of such adjudication upon the maintainability of the present application under Section 9 of the Code in the light of the adjudication rendered therein.

a. The nature and relevance of the subsequent proceedings instituted by the parties

- 81.** We now proceed to consider the relevance of the Final Award dated 14.06.2024 passed by the Micro and Small Enterprises Facilitation Council ('MSEFC'), which has been brought on record by the Corporate Debtor through I.A. No. 410 of 2024.
- 82.** It is not in dispute that the Corporate Debtor invoked the arbitration mechanism under the LOI vide notice dated 27.12.2022 and thereafter approached the Hon'ble High Court of Delhi under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of Arbitrator wherein the appointment of Arbitrator was confirmed and the petition was disposed of vide order dated 20.05.2024. The Operational Creditor, on the other hand, approached the Ld. MSEFC under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act") and proceedings were thereafter initiated in relation to its claims. The final Award by the Ld. MSEFC was passed on 14.06.2024 (as reproduced in preceding paras of this order), whereby the claim of Rs. 27,76,58,492/- filed by the Applicant was dismissed. The relevant excerpts from the translated copy of the Arbitral Award dated 14.06.2024 annexed as Annexure 1 with the IA No. 410 of 2024 are reproduced below:

“5.....Thus the Council unanimously agrees that the respondent institute had informed the petitioner about the deficiencies of the work quality executed by the petitioner within the time period as stipulated in section 2(B)(ii) of the MSMED Act, 2006. Thus the Deemed Acceptance is not proved by the purchaser institute regarding the work of the claim in the case. Also it clears that the respondent had executed the faulted work executed by the petitioner, from other contractor out of its own expenses and has conducted the remaining incomplete works. In perspective of the aforesaid, the RA Bills relating to the case is not considered as true and correct on the basis of the deficiencies as shown in the pour cards, different violation reports of the safety department and the deficiencies found in the report of M/s. NIDA Consultants, which the Council considers as justified unanimously. On the basis of the aforesaid facts, any payment of the respondent institute regarding the claim filed by the Petitioner, is not found to be proved.

6. In the aforesaid circumstances, by not considering the respondent institute as the accused/ guilty of violation of section 2(b)(ii) and 15 of the MSMED Act, 2006 in relation to the claim of Rs. 27,76,58,492/- filed by the petitioner, the case/ claim is hereby dismissed unanimously.

... ”

- 83.** It is relevant to consider that the Operational Creditor has claimed in the present proceedings an aggregate amount of Rs. 27,76,58,492/- as outstanding operational debt, stated to arise from 23 RA Bills aggregating to Rs. 55,71,12,130/- against which payments of Rs. 27,94,53,638/- were

allegedly received. The very same contractual relationship and substantially the same financial claim were thereafter placed before the Ld. MSEFC. Significantly, in its Award dated 14.06.2024, the Ld. MSEFC itself recorded the claim amount of Rs. 27,76,58,492/- and ultimately rejected the said claim in its entirety.

- 84.** Thus, the proceedings before the Ld. MSEFC were not founded upon an independent or subsequent monetary claim unrelated to the present petition. The claim adjudicated by the Ld. MSEFC substantially corresponds to the very claim which the Operational Creditor has raised in the present proceedings. The Award records that the dispute arose out of the Work Contract/LOI dated 01.09.2018 for construction of the multi-storied commercial building comprising Towers D and E. The said description corresponds exactly with the subject matter of the present Section 9 petition. The relevant excerpts from the translated copy of the Arbitral Award dated 14.06.2024 are reproduced below:

“The work contract dated 01.09.2018 has been given by the Respondent to the purchaser for the construction of Multi stories commercial building (Tower D&E).”

- 85.** Further, the correspondence between the two proceedings is also evident from the documents considered by the Ld. MSEFC. The Award specifically refers to the RA Bills relied upon by the Operational Creditor,

the Pour Cards, the Minutes of Meetings, the Debit Notes, the Safety Department Violation Reports, the alleged non-completion of the work, the work subsequently executed through other contractors and the report of M/s NIDA Consultants. These are not documents foreign to the present proceedings. On the contrary, they constitute the very documents upon which the Corporate Debtor has founded its defence of pre-existing dispute before us and which the Operational Creditor has sought to explain or displace. The relevant excerpts in this regard from the Award dated 14.06.2024 are reproduced herein below:

“On perusal of the Minutes of the aforesaid meetings, the Council thinks that even despite the continue instruction of the respondent to rectify and complete the timely work executed by the petitioner, the petitioner has not completed the work timely and even the expected rectification has not been made.

4.Due to non-payment of the said debit note by the petitioner to the respondent, the amount of the debit note was supposed to be adjusted with the amount of the main RA Bill. But the amount of the aforesaid debit note has not been adjusted in the RA Bill presented by the petitioner.

5...-In the various pour cards issued by the respondent in the regular interval in relation to the work executed by the petitioner, the site engineer by entering the remarks of the respondent institute regarding the work done, has informed the deficiencies in the work. Thus the Council considers that the submission of the petitioner that

the respondent institute by not considering any defects, has admitted the pour card issued for the work done, is totally inappropriate and it is also clear that by way of the pour card, the respondent institute had within the time period, filed the objection regarding the quality of the work done by the petitioner under the provisions of the MSMED Act, 2006.

-As per the provisions of clause Nos. 7 and 27 of the contract, the respondent through the safety department examined the quality of the work done by the petitioner herein. On the basis of the said surveys, the safety department issued the Violation Report dated 11.10.2021, 13.10.2021, 21.10.2021, 26.10.2021 and 28.10.2021. In the said violation report, it has been clarified that the petitioner has violated the different parameters and safety measures in the construction works.

....

Thus the Council unanimously agrees that the respondent institute had informed the petitioner about the deficiencies of the work quality executed by the petitioner within the time period as stipulated in section 2(B)(ii) of the MSMED Act, 2006. Thus the Deemed Acceptance is not proved by the purchaser institute regarding the work of the claim in the case. Also it clears that the respondent had executed the faulted work executed by the petitioner, from other contractor out of its own expenses and has conducted the remaining incomplete works.”

- 86.** The Ld. MSEFC further considered the Minutes of Meetings dated 23.02.2021, 19.03.2021, 14.03.2021, 27.05.2021 and 07.10.2022 and

drew its conclusions from the contents thereof. The Council specifically took note of the directions issued by the Corporate Debtor regarding rectification of deficiencies and completion of the work and recorded that, despite repeated directions, the work was not completed within the stipulated period and the requisite rectifications were also not carried out. Significantly, the Award records, with reference to the Minutes dated 19.03.2021, that the Operational Creditor itself had stated that, as on 28.02.2021, work of approximately Rs. 5 crores had been completed. The Council also relied upon the Minutes dated 07.10.2022 to record that the work remained incomplete even at that stage. The relevant excerpts are reproduced below:

“2.....

-In the meeting dated 23.02.2021, the respondent institute instructed the petitioner to immediately rectify the deficiencies in the work.

-In the meeting dated 19.03.2021, the petitioner has itself confessed that the work of Rs, 5.00 crores has been completed till 28.02.2021.

-In the meeting dated 14.03.2021 and 27.05.2021, the respondent institute instructed the petitioner that if the work is not completed and the said rectification is not made, then the penalty would be imposed as per the rules.

-In the meeting dated 07.10.2022, the petitioner itself confessed that the work relating to the case is still pending.”

- 87.** The Ld. MSEFC also examined the issue of material procurement and the corresponding financial adjustments. It recorded the Corporate Debtor's case, supported by the contractual terms, that under Clause 7 of the

Contract, cement and steel were to be procured by the Operational Creditor and that the expenditure towards such materials was to be borne by it. The Council further recorded that, at the request of the Operational Creditor, payments towards steel and cement were made by the Corporate Debtor and Debit Notes aggregating to Rs. 9,53,59,531/- were issued in respect thereof. The Council found that such Debit Notes were liable to be adjusted from the RA Bills, but that the Operational Creditor had not made such adjustment in the bills submitted by it. The relevant excerpts are reproduced below:

“4.....On the request of the petitioner, the respondent from time to time paid a total amount of Rs. 9,53,59,531/- for the steel and cement. Due to non-payment of the said debit note by the petitioner to the respondent, the amount of the debit note was supposed to be adjusted with the amount of the main RA Bill. But the amount of the aforesaid debit note has not been adjusted in the RA Bill presented by the petitioner.”

- 88.** The significance of the aforesaid adjudication is therefore two-fold. First, it demonstrates that the claim now presented before us was subsequently subjected to detailed adjudicatory scrutiny by an independent statutory forum on the basis of substantially the same contractual and documentary foundation. Second, the findings recorded therein correspond closely with the very matters which were already disputed between the parties prior to the Section 8 Demand Notice, namely, the delay and non-completion of

the work, deficiencies and quality of execution, procurement and adjustment of material, the effect of Debit Notes, verification of RA Bills, and the ultimate quantification of the amount payable.

- 89.** The Operational Creditor has sought to contend that proceedings under the MSMED Act and the proceedings under the Code are independent statutory proceedings and, therefore, the pendency or outcome of the proceedings before the Ld. MSEFC cannot, by itself, determine the maintainability of the present application under Section 9 of the Code.
- 90.** There can be no quarrel with the proposition that the proceedings under the Code and proceedings under the Arbitration and Conciliation Act, 1996 or the MSMED Act operate within their respective statutory frameworks and serve different purposes. However, the point that requires consideration is the final outcome of such proceedings and the nature of the findings recorded therein. Where an independent forum of law has examined substantially the same subject matter and has undertaken detailed fact-finding on the very issues which form the foundation of the exact same amount of claim before us, such findings have their own substantial value and cannot be disregarded without examining their nature and relevance.
- 91.** In this context, the stand of the Operational Creditor that the proceedings before the other forum are independent of the proceedings under the Code,

while correct as a matter of statutory character, cannot be taken to mean that the findings recorded in those proceedings are irrelevant for all purposes. On the contrary, where the subject matter before the said forum is substantially identical, the very same argument of the Operational Creditor runs contrary to its own case insofar as it seeks to rely upon the independence of the proceedings to exclude consideration of the outcome thereof.

- 92.** It is also significant to note that the mere initiation of such proceedings after the Demand Notice would, by itself, not establish a pre-existing dispute as on the date of the Demand Notice however, the relevant question is whether the underlying dispute which was subsequently brought before the Ld. MSEFC had already arisen between the parties prior to 23.12.2022.
- 93.** In the present case, the material discussed hereinabove demonstrates that the disputes concerning delay in completion of work, procurement of material, coefficient/escalation, quality and rectification, reconciliation of RA Bills and the amount payable had already arisen much prior to the Demand Notice. It is also significant that the disputes raised in the said proceedings substantially arise from the same Contract, the same work and the same financial claims which form the basis of the present Section 9 application.

b. The effect of such adjudication upon the maintainability of the present application

- 94.** Apart from the primary ground of the existence of a pre-existing dispute under Section 5(6), the maintainability of the present petition also requires consideration in the light of the subsequent adjudication by the Ld. MSEFC. While it is trite law that the IBC and MSMED Act have different fields of operation and different operational mechanisms, which work according to the provisions contained therein, however on the issue of maintainability, the significant findings of the Ld. MSEFC on merits, based on the same factual matrix, cannot be ignored or re-adjudicated upon under Section 9, particularly when such findings have led to a conclusive Order binding on the litigant parties and the same can be challenged by the aggrieved party in accordance with the provisions under the MSMED Act itself.
- 95.** Since the findings recorded by the Ld. MSEFC reject the claim of the Operational Creditor, which is based upon the same factual matrix, any adjudication under Section 9 would amount to re-adjudicating or re-writing the Order passed by the Ld. MSEFC. Therefore, we cannot remain oblivious of the fact that any adjudication of debt and default, notwithstanding the findings already recorded by the competent forum, would amount to transgressing the Order passed by the Ld. MSEFC which

has already held after considering all the details and evidences similar to what was produced before us, that there is no outstanding debt payable by the Corporate Debtor to the Operational Creditor. The relevant excerpts from the Order passed by the Ld. MSEFC are being reproduced below:

“6. In the aforesaid circumstances, by not considering the respondent institute as the accused/ guilty of violation of section 2(b)(ii) and 15 of the MSMED Act, 2006 in relation to the claim of Rs. 27,76,58,492/- filed by the petitioner, the case/ claim is hereby dismissed unanimously.”

- 96.** Accordingly, the Order passed by the Ld. MSEFC operates as a further circumstance reinforcing the conclusion that the present petition cannot be maintained on the basis of the identical and as alleged claim as projected by the Operational Creditor as also there exists no debt as crystallised by the Order passed by the Ld. MSEFC.
- 97.** In view of the foregoing discussion, it is evident that the dispute between the parties is borne out from various instances and events including dispute relating to (i) the time and pace of completion of the contracted work; (ii) procurement and supply of steel, cement and other material; (iii) the coefficient of steel and RMC and the claim for escalation; (iv) verification and reconciliation of RA Bills; (v) quality of work and rectification of alleged defects; (vi) achievement of mutually agreed targets and consequences of failure thereof; and (vii) the corresponding

adjustment/debit and ultimate quantification of the amount, if any, payable by the Corporate Debtor.

- 98.** At this juncture it would also be apposite to refer to the judgment of the Hon'ble NCLAT in *Mr. Umesh Saraf vs. Tech India Engineers Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 548/2020]*, wherein it was observed as follows:

“23. Exchange of e-mails/correspondences, as referred above, clearly establishes that there is a pre-existing dispute between the parties regarding completion of the work and the Appellant/Corporate Debtor continuously made complaints regarding non-completion of work and deficiency in services, thereby loss caused to the Appellant/Corporate Debtor.”

- 99.** Applying the aforesaid principles in the present case, the emails exchanged between the parties, the Minutes of Meetings, the correspondence concerning procurement and supply of materials, the communications regarding defects, quality and rectification, the Safety Violation Reports, and the discussions concerning the RA Bills, Debit Notes and reconciliation collectively demonstrate that the disputes regarding completion and performance of the Contract were being raised during the subsistence of the contractual relationship itself.

- 100.** At the stage of considering an application under Section 9 of the Code, this Adjudicating Authority is not required to determine whether the

Corporate Debtor's defence would ultimately succeed before the appropriate adjudicatory forum. The exercise is confined to determining whether there existed a plausible contention requiring further investigation and whether the dispute was real and supported by material. As held by the Hon'ble Supreme Court, the Court need not be satisfied that the defence is likely to succeed; it is sufficient if a dispute exists which requires adjudication and is not spurious or illusory.

101. Applying the aforesaid test to the facts of the present case, we are satisfied that the disputes raised by the Corporate Debtor cannot be characterised as a mere bald denial, an afterthought or a defence raised only upon receipt of the Section 8 Demand Notice. The correspondence and documents placed on record disclose a continuous course of dealings in which the parties were disputing the progress and completion of the work, the quality thereof, the procurement and supply of material, the contractual rates and coefficients, the calculation and verification of RA Bills and the ultimate amount payable.

102. We also find significance in the fact that the Corporate Debtor's objections were not confined to a single isolated incident. They arose at different stages of execution and related to different but interconnected aspects of the Contract. The repeated correspondence concerning delayed progress, material procurement, revised targets, quality and rectification, RA Bills

and reconciliation demonstrates a continuing contractual dispute rather than a defence artificially constructed after issuance of the Demand Notice. The subsequent proceedings before the independent forums further demonstrate that the disputes concerning the same contractual relationship were pursued by the parties through adjudicatory mechanisms.

103. Accordingly, on the basis of the material presently before us, we are satisfied that there existed a real, genuine and substantial pre-existing dispute between the parties prior to issuance of the Demand Notice dated 23.12.2022, relating inter alia to the completion and pace of the work, quality and defects in the work, procurement and supply of material, contractual rates and coefficients, reconciliation and quantification of RA Bills and the ultimate amount, if any, payable to the Operational Creditor.

104. In view of the existence of such pre-existing dispute, the claim of the Operational Creditor cannot be treated, for the purposes of Section 9 of the Code, as an undisputed operational debt merely on the basis of the invoices/RA Bills relied upon by it. The determination of the amount, if any, payable would necessarily require adjudication of the underlying contractual disputes, which exercise is beyond the limited scope of proceedings under Section 9 of the Code.

105. In view of the foregoing discussion and having regard to the law laid down by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited (supra)*, we hold that the present case discloses a pre-existing dispute within the meaning of Section 5(6) of the Code. Consequently, the present application under Section 9 of the Code does not merit admission.

106. There is another aspect of the matter which cannot be lost sight of which is concerning forum shopping. It is evident that there were multiple communications sent by the Corporate Debtor to the Operational Creditor, pointing out various discrepancies in the implementation of the project from time to time, the details of which have already been discussed in the preceding paragraphs of this order. Thereafter, when the Demand Notice was issued on 23.12.2022, the Operational Creditor also chose to initiate proceedings through the Ld. MSEFC on 13.01.2023 in respect of the same claim. These proceedings are essentially in the nature of recovery proceedings for realization of the claim as envisaged in the arbitration claim lodged by the Operational Creditor. During the pendency of the aforesaid proceedings, the Operational Creditor has chosen to file the present Section 9 petition seeking to initiate the CIRP against the Corporate Debtor. This clearly leads to an inference that the Operational Creditor has resorted to initiating multiple proceedings simultaneously,

particularly by initiating the MSEFC proceedings for recovery and, without waiting for the outcome of those proceedings, pursuing the present petition as aforesaid clearly establishes forum shopping by its own convenience. Such a practice has been deprecated by the Higher Courts and Hon'ble NCLAT in one of the judgment cited as **Partha Paul v. Kotak Mahindra Bank Ltd. and Anr.**, (Company Appeal (AT) (Insolvency) No. 1138 of 2019):

“

- c. *All this suggests that the Bank/R1 is involved in forum shopping to the multiple 'Courts/Tribunals' just to harass the 'Guarantor' as it has moved the Hon'ble High Court of Calcutta at Calcutta to coerce the trust into paying of its debts and involving the Appellant in time consuming and expensive litigation at the behest of this concerned branch of the Bank/Respondent No.1.*
- d. *It is a settled law that the practice of Forum Shopping be condemned as it is an abuse of law. This case is beyond doubt falls under the category of Forum Shopping as it is a classic example of Forum Shopping when the Respondent Bank has approached one Court for relief but does not get the desired relief and then approached another court for the same or similar relief; (refer) Hon'ble Apex Court Judgment in Union of India & Ors. Vs. Cipla Ltd. & Anr (2017) 5 SCC 262- para 148, Vijay Kumar Ghai & Ors. Vs. The State of West Bengal & Ors. in Criminal Appeal No. 463 of 2022- para 9.*
- e. *The Hon'ble Supreme Court has already settled the matter that the provision of the Code is not intended to be a substitute to be a recovery forum. The Hon'ble Supreme Court in Civil Appeal No.9597 of 2018, "Transmission Corporation of Andhra Pradesh limited Vs. Equipment Conductors and Cables Limited" vide para 15 has already held that IBC is not intended to be a substitute to a recovery forum and also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The Code cannot be used whenever there is existence of real dispute and also*

whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments.”

- 107.** The present proceedings initiated under Section 9, seeking to initiate the CIRP, therefore, are nothing but an arm-twisting tactics only to affect recovery, one way or the other. Hence, the present proceedings deserve to be rejected also for this reason as well.
- 108.** In view of our detailed findings regarding there being pre-existing dispute before issuance of notice under Section 8 of the Code by the Operational Creditor, making the present application not maintainable and also, the present proceedings is found to be initiated only for recovery purposes, therefore, the present application under Section 9 of the Code, is rejected.
- 109.** Accordingly, **CP (IB) No. 7 of 2023** stands dismissed and IA No. 351 of 2023 stands disposed of.

-Sd-

(Ashish Verma)

Member (Technical)

Date: 30.09.2026

-Sd-

(Praveen Gupta)

Member (Judicial)