Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 2839 of 2020

M/s Consolidated Construction Consortium Limited **…Appellant**

Versus

M/s Hitro Energy Solutions Private Limited **…Respondent**

J U D G M E N T

Dr Justice Dhananjaya Y Chandrachud, J

This judgement has been divided into the following sections to facilitate analysis:

A The Appeal

B Factual Background

C Submissions of counsel

D Whether the appellant is an operational creditor

D.1 Statutory Provisions

D.2 Legislative History

D.3 Judicial Precedent

D.4 Analysis

E Evidentiary value of respondent's MOA

F Whether the application under Section 9 is barred by limitation

G Conclusion

A The Appeal

1 The present appeal under Section 62 of the Insolvency and Bankruptcy Code 2016[1] arises from a judgment and order dated 12 December 2019 of the National Company Law Appellate Tribunal[2] by which it reversed the decision of the National Company Law Tribunal, Chennai[3] dated 6 December 2018.

2 By its judgment and order dated 6 December 2018, the NCLT admitted an application[4] filed by the appellant, Consolidated Construction Consortium Limited[5], under Section 9 of the IBC for the initiation of the Corporate Insolvency Resolution Process[6] against the respondent, Hitro Energy Solutions Private Limited[7]. While admitting the application, the NCLT held that the respondent's Memorandum of Association[8], without evidence to the contrary, proved that it took over a proprietary concern, Hitro Energy Solutions[9], and that the Proprietary Concern did owe the appellant an outstanding operational debt. Further, the NCLT declared a moratorium under Section 14 of the IBC and appointed an Interim Resolution Professional[10].

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[1] "**IBC**"
[2] "**NCLAT**"
[3] "**NCLT**"
[4] CP/708/(IB)/CB/2017
[5] "**Appellant**"/"**Operational Creditor**"
[6] "**CIRP**"
[7] "**Respondent**"/"**Corporate Debtor**"
[8] "**MOA**"
[9] "**Proprietary Concern**"
[10] "**IRP**"

3 In appeal [11], the NCLAT set aside the NCLT's decision, dismissed the application of the appellant under Section 9 of the IBC and released the respondent from the ongoing CIRP. In support of its conclusions, it held: *(i)* the appellant was a 'purchaser', and thus did not come under the definition of 'operational creditor' under the IBC since it did not supply any goods or services to the Proprietary Concern/respondent; *(ii)* there is nothing on record to suggest that the respondent has taken over the Proprietary Concern; and *(iii)* in any case, the appellant cannot move an application under Sections 7 or 9 of the IBC since all purchase orders were issued on 24 June 2013 and advance cheques were issued subsequently.

4 While issuing notice by its order dated 18 November 2020, this Court stayed the operation of NCLAT's judgment and order dated 12 December 2019. The following issues now arise before this Court in the present appeal:

(i) Whether the appellant is an operational creditor under the IBC even though it was a 'purchaser';

(ii) Whether the respondent took over the debt from the Proprietary Concern; and

(iii) Whether the application under Section 9 of the IBC is barred by limitation.

[11] Company Appeal (AT) No 19 of 2019

B Factual Background

5 The genesis of the appeal arises from a project which was being executed by the appellant with Chennai Metro Rail Limited[12], in the course of which the latter placed an order for supply of light fittings. In turn, the appellant placed orders with the Proprietary Concern, which was the supplier of Thorn Lighting India Private Limited[13], through three purchase orders dated 24 June 2013. It was noted in these purchase orders that the delivery of the light fittings would strictly be in accordance with the schedule provided by the appellant.

6 The Proprietary Concern requested the appellant for an advance payment of Rs 50,00,000. CMRL issued a cheque of Rs 50,00,000 in favor of the respondent, with the condition that the delivery of the light fittings should be in compliance with the schedule provided by the appellant.

7 On 2 January 2014, CMRL informed the appellant that the project they had been working on stood terminated. According to the appellant, this information was communicated to the Proprietary Concern on the same day. However, this has been denied by the respondent.

8 Thereafter, the Proprietary Concern deposited the cheque issued by CMRL and withdrew the amount of Rs 50,00,000. Since the project had been terminated, CMRL informed the appellant that the amount would be deducted from the dues

[12] "**CMRL**"
[13] "**TLIPL**"

payable to it unless the amount was returned. The appellant paid the amount of Rs 50,00,000 to CMRL and intimated this to the Proprietary Concern and requested them to make the payment.

9 In the interim, the respondent was incorporated on 28 January 2014, on the basis of an MOA dated 24 January 2014. Under the MOA, one of the four main objects of the respondent was to take over the Proprietary Concern. It reads as follows:

> "(A) THE MAIN OBJECTS OF THE COMPANY TO BE PURSUED BY COMPANY ON ITS INCORPORATION:
>
> […]
>
> 4. To take over the existing Proprietorship firm Viz. M/S. Hitro Energy Solutions having its registered office at Chennai."

10 By its letter dated 23 July 2016, the appellant requested the Proprietary Concern to refund the amount of Rs 50,00,000 since the contract had been terminated and the amount had been returned by the appellant to CMRL. It noted that once the amount was released by the Proprietary Concern, it would indemnify them against any future claim from CMRL. The letter reads as follows:

> "This is in reference to the purchase order Nos. KH000115, KH000116, KH000117, dated 24.06.2013 towards the supply of light fittings for our CMRL project. The advance amount of Rs.50.00 Lakhs paid to you was directly released by our client, the CMRL at our request and the amount has already been debited to your account However, the contract with CMRL was terminated by us and it was intimated to you not to proceed with the supply or materials ordered under the aforesaid purchase orders. We, therefore, request you to pay

> the advance amount of Rs.50,00,000/- to M/s. Thom Lighting India Pvt Ltd as agreed by you.
>
> We once again wish to state that the amounts paid to you by the CMRL have already been recovered from our payments and therefore, we assure that no liability shall be cast on you towards the same. Upon release of the aforesaid payment to M/s. Thom Light/rig Ind/a Pvt Ltd as agreed by you, the CCCL shall indemnify you against any claim from the CMRL towards the advances directly paid to you."

11 In its reply dated 25 July 2016, the Proprietary Concern stated that it would return the amount directly to CMRL, if it was insisted upon by them. It further noted that till date it had not received any letter from the appellant informing them that the contract had been terminated with CMRL, and that it had never agreed to return the amount. The letter notes:

> "This has reference your letter dt.23rd July 2016 wherein you are asking us to pay the amount of Rs.50,00,000/- which we had received from Chennai Metro Rail Limited (CMRL), to M/S.Thorn Lighting India Pvt. Ltd. Since, the amount has been received by us directly from CMRL, the said amount will be returned only to CMRL if they claim the same.
>
> We would like to inform you that we have not received any letter of communication from your organisation till date mentioning that the contract with CMRL is cancelled and it has never been agreed at any point of time to give the amount to M/s.Thron Lighting India Pvt. Ltd."

12 A joint meeting was held between the appellant, the Proprietary Concern and TLIPL on 4 August 2016, where the appellant requested that the amount of Rs 50,00,000 be returned to TLIPL. To assuage the concerns of the Proprietary Concern, that CMRL may also try to recover the amount from them at a later date,

the representatives of the appellant agreed to provide an indemnity to the Proprietary Concern for the amount. However, this was refused by the Proprietary Concern, which instead asked for a bank guarantee of the same amount, which was refused by the appellant. Finally, the Proprietary Concern noted that the appellant should obtain a letter from CMRL stating that the advance paid by them to the Proprietary Concern belongs to the appellant, and will not be claimed by them in the future. The minutes of the meeting state as follows:

> "The following points were discussed during the meeting
>
> - RSK explained the reasons and procedure for the direct payment from CMRL to vendors of CCCL.
> - RSK requested NSR to return the advance paid to Hitro Energy to Thom Light.
> - NSR refused the same since the payment had been received from CMRL through cheque and can be returned to CMRL only if CMRL claim the same.
> - RSK explained that, CCCL requested CMRL to release this advance to Hitro and the amount already been deducted in CCCL payables by CMRL, hence this amount belongs to CCCL and can be returned.
> - NSR refused the same and asked CCCL to get a letter from CMRL stating that, the advance paid to Hitro belongs to CCCL and CMRL does not claim the same in future from Hitro.
> - SR asked NSR, that CCCL can provide a Indemnity Bond to Hitro to return the Advance, and NSR refused and asked BG For the same amount to return the Advance, CCCL refused the same."

13 Thereafter, the appellant obtained a letter dated 27 December 2016 from CMRL where it noted that it had issued the cheque for Rs 50,00,000 only on the request of the appellant. The letter reads as follows:

> "With reference to your letter under reference above, it is to confirm that CMRL had issued a cheque of Rs.50,00,000/- (Rupees fifty lakhs only) bearing no. 991712 dt. 7.11.2013, based on the request of M/s. Consolidated Construction Consortium Ltd., to M/s. Hitro Energy Solutions, as a part of Special Advance to M/s. CCCL under EAS 04, EAS 05 & EAS 06 contracts duly debiting CCCL's account."

This letter was sent by the appellant to the Proprietary Concern, but no payment was made.

14 The appellant then sent a letter to the Proprietary Concern on 27 February 2017 and it demanded the return of the amount of Rs 50,00,000, along with interest calculated at 18 per cent per annum from 4 November 2013, on or before 4 March 2017. In its reply dated 2 March 2017, the Proprietary Concern refused and noted that they only became aware of the termination of the contract with CMRL by the appellant's letter dated 23 July 2016. The light fittings were stated to be lying in their warehouse since then because they could not be re-sold as they had been made on customized specifications, leading to a loss. Further, it noted that CMRL's letter dated 27 December 2016 did not provide that it will not attempt to recover the amount from the Proprietary Concern in the future.

15 On 18 July 2017, the appellant sent a Form-3 Demand Notice under Section 8 of the IBC to the respondent, where the amount of the debt is noted as Rs 83,13,973, inclusive of interest calculated at 18 per cent per annum from 7

November 2013. In its response dated 28 July 2017, the respondent denied that any debt was owed by them to the appellant. Thereafter, the appellant filed its application under Section 9 of the IBC read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016[14] on 1 November 2017 along with the supporting affidavits.

16 By its judgment dated 6 December 2018, the NCLT admitted the application under Section 9 of the IBC, declared a moratorium under Section 14 of the IBC and appointed an IRP. The operative parts of the order are extracted below:

> "11. It has also been noted by this Authority that the Memorandum of Association being the constitutional document of the Corporate Debtor is not rebutted by other documentary evidence. In view of it, the objection raised by the Counsel for the Corporate Debtor stands rejected.
>
> 12. It has been submitted by the Counsel for the Corporate Debtor that till date, the Proprietorship Firm is paying the income tax and also carrying on the business which is contrary to the Memorandum of Association of the Corporate Debtor viz., M/s. Hitro Energy Soluti9ns Private Limited. It seems that the Director of the Corporate Debtor viz., N. S. Rangachari may be making communications on behalf of Proprietorship Firm for the purpose of dubious transactions or Tax benefits but as per the Memorandum of Association, the same has been taken over by the Corporate Debtor of which there is no doubt at all. Thus, the Memorandum of Association being the constitutional document of the Corporate Debtor is an authentic documentary proof that the Proprietorship Firm has been taken over or converted into corporate entity.
>
> 13. It has been submitted by the Counsel for the Corporate Debtor that in case the CMRL could have given a certificate that they would not claim Rs.50 Lakhs from M/s Hitro Energy Solutions then, the amount could have been paid by the

[14] "**2016 Application Rules**"

> Corporate Debtor to the Operational Creditor, to which the Counsel for the Operational Creditor has submitted that his client has always been ready and willing to give indemnity bond against any claim made by the CMRL, but the Counsel for Corporate Debtor did not any response with regard to the security offered."

17 The order of the NCLT was set aside by the NCLAT on 12 December 2019. The order notes:

> "7. However, there is nothing on the record to suggest that by any list prepared 'M/s. Hitro Energy Solutions Private Limited' has taken over 'M/s. Hitro Energy Solutions'…
>
> […]
>
> 9. The 'Purchase Orders', which makes it clear that 'M/s. Consolidated Construction Consortium Limited' is a 'Purchaser' and do not come within the meaning of 'Operational Creditor' having not supplied any goods nor given any services to 'M/s. Hitro Energy Solutions Private Limited'. In any case, whether 'M/s. Hitro Energy Solutions Private Limited' or 'M/s. Hitro Energy Solutions' all 'Purchase Orders' having issued on 24th June, 2013 and advance cheques have been issued for subsequently such orders, 'M/s. Consolidated Construction Consortium Limited' cannot move application under Sections, 7 or 9 or the 'I&B Code'."

The appeal arises from the decision of the NCLAT.

C Submissions of counsel

18 Mr M P Parthiban, Counsel appearing on behalf of the appellant submitted that:

(i) The MOA of the respondent states that one of its four main objects is to take over the Proprietary Concern. Thus, the findings contained in paragraph 7 of the NCLAT's judgment, that there is no list noting that the respondent has taken over the Proprietary Concern, is incorrect;

(ii) The appellant made the payment of Rs 50,00,000 to CMRL, and it thus becomes due from the respondent to the appellant;

(iii) The appellant is an operational creditor within the framework of the IBC since the purchase orders for light fittings were in relation to the operational requirements of the appellant; and

(iv) The application under Section 9 of the IBC is not barred by limitation.

19 Mr K Parameshwar, Counsel appearing on behalf of the respondent submitted that:

(i) The appellant's dealings have only been with the Proprietary Concern and not the respondent. While the respondent's MOA may have stated its intention to take over the Proprietary Concern, the respondent changed its intention through a subsequent Board resolution. Further, the Proprietary Concern exists till date and is an entity separate from the respondent. Thus, the respondent cannot be made liable for its debt;

(ii) There is no privity of contract between the appellant and the respondent, since the appellant's contract was with the Proprietary Concern and the payment of the advance to the Proprietary Concern was made by CMRL;

(iii) The appellant is not an operational creditor because:

a. The appellant did not provide any goods or services to the respondent, but only availed of goods or services from the Proprietary Concern. Hence, the appellant will not be an operational creditor within the meaning of Section 5(20) of the IBC; and

b. In any case, even if the debt exists, it is in the hands of CMRL, which has not legally transferred it to the appellant;

(iv) The application is barred by limitation since it was filed on 1 November 2017, more than three years after the date of default, *i.e.*, 7 November 2013; and

(v) The appellant is seeking to misuse the present proceedings under the IBC for recovering its dues.

20 The rival submissions will now be considered.

D Whether the appellant is an operational creditor

21 The primary submission of the respondent, which was accepted by the NCLAT, is that the appellant is not an operational creditor within the ambit of the IBC, and therefore its application under Section 9 of the IBC was not maintainable.

In order to assess this claim, we shall have to consider the relevant provisions, rules and regulations, the legislative history of the IBC and precedents of this Court.

D.1 Statutory Provisions

22 Section 5(20) of the IBC defines "operational creditor" in the following terms:

> "(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

Section 5(21) defines the meaning of "operational debt". Section 5(21), as it stood at the relevant time, was as follows:

> "(21) "operational debt" means a **claim in respect of the provision of goods or services** including employment or a debt in respect of the re-payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"
>
> (**emphasis supplied**)

An operational debt needs to involve a claim <u>in respect of</u> the provision of goods or services. The phrase "claim" is defined in Section 3(6) of IBC in the following terms:

> "(6) "claim" means—
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
>
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment,

> fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

23 Section 8 of the IBC explains the steps that the operational creditor needs to undertake prior to filing a claim of insolvency against the corporate debtor. At the relevant time, it stood as follows:

> "**8. Insolvency resolution by operational creditor.**—(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
>
> (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—
>
> (a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
>
> (b) the repayment of unpaid operational debt—
>
> (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
>
> (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.
>
> *Explanation.*—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred."

In accordance with Section 8(1), an operational creditor can send a demand notice to the corporate debtor when a default occurs, and in the manner which may be

prescribed. "Default" has been defined under Section 3(12) of the IBC, and it stood as follows at the relevant time:

> "(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not re-paid by the debtor or the corporate debtor, as the case may be;"

When the corporate debtor receives the demand notice, it has two options available under Section 8(2) of the IBC: *(i)* to highlight a pre-existing dispute in relation to the debt under question; or *(ii)* to prove that the debt has already been paid.

24 Rule 5 of the 2016 Application Rules provides the manner in which the demand notice under Section 8(1) has to be delivered. It provides thus:

> "**5. Demand notice by operational creditor.**—(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-
>
> (a) a demand notice in Form 3; or
>
> (b) a copy of an invoice attached with a notice in Form 4.
>
> (2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,
>
> (a) at the registered office by hand, registered post or speed post with acknowledgement due; or
>
> (b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.
>
> (3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any."

Thus, under sub-Rule (1) of Rule 5, an operational creditor can send the demand notice under Section 8(1) of the IBC through two methods: *(i)* a demand notice in Form 3; or *(ii)* a copy of an invoice attached with a notice in Form 4. Form 3 requires the operational creditor to provide the following information in relation to the operational debt:

> "2. Please find particulars of the unpaid operational debt below:
>
> | **PARTICULARS OF OPERATIONAL DEBT** | | |
> |---|---|---|
> | 1. | TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE | |
> | 2. | AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM) | |
> | 3. | PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.
ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY) | |
> | 4. | DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS | |
> | 5. | RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY) | |
> | 6. | PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE | |
> | 7. | LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT | |
>
> "

In contrast, Form 4 provides:

> "[Name of operational creditor], hereby provides notice for repayment of the unpaid amount of INR [insert amount] that is in default as reflected in the invoice attached to this notice."

Hence, a demand notice for an operational debt by an operational creditor does not necessarily need to be accompanied by an invoice, but it may be sent where such debt arises under a "provision of law, contract or other document" and for which documents can be attached along with the demand notice.

25 The above conclusion is also supported by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016[15]. In relation to claims by operational creditors, Regulation 7, as it stood at the relevant time, provided thus:

> "**7. Claims by operational creditors.**
>
> (1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit proof of claim to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule:
>
> *Provided* that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.
>
> (2) The existence of debt due to the operational creditor under this Regulation may be proved on the basis of-
>
> (a) the records available with an information utility, if any; or
>
> (b) other relevant documents, including -

[15] "**CIRP Regulations 2016**"

> (i) a contract for the supply of goods and services with corporate debtor;
>
> (ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;
>
> (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or
>
> (iv) financial accounts."

Under Regulation 7(2), an operational creditor can prove their claim not only through "an invoice demanding payment for the goods and services supplied to the corporate debtor" (Regulation 7(2)(ii)) but also through "a contract for the supply of goods and services with corporate debtor" (Regulation 7(2)(i)).

26 Once the procedures under Section 8 of the IBC are completed by an operational creditor, it can file an application under Section 9 of the IBC to initiate the CIRP in relation to the corporate debtor. Section 9 provided as follows, at the relevant time:

> "**9. Application for initiation of corporate insolvency resolution process by operational creditor.**—(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.
>
> (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.
>
> (3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

> (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
>
> (e) any disciplinary proceeding is pending against any proposed resolution professional:
>
> Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.
>
> (6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

In accordance with Section 9(1), an operational creditor can file the application under Section 9 after ten days from the date of delivery of the notice under Section 8, if no payment or notice of an existing dispute is received. Section 9(3)(a) requires the application to be accompanied by a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor. This again highlights that it could be either one of the two, *i.e.*, an invoice or a demand notice.

27 Rule 6 of the 2016 Application Rules provides that the application under Section 9 has to be filed along with the details required in Form 5. Within Form 5, *inter alia*, the following details in relation to the operational debt are required to be provided:

> "**Part-V**
>
> | **PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]** |
> |---|

1.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)
2.	DETAILS OF RESERVATION/RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS
3.	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)
4.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)
5.	DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE
7.	A STATEMENT OF BANK ACCOUNT WHERE DEPOSITS ARE MADE OR CREDITS RECEIVED NORMALLY BY THE OPERATIONAL CREDITOR IN RESPECT OF THE DEBT OF THE CORPORATE DEBTOR (ATTACH A COPY)
8.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT

”

D.2 Legislative History

28 Unlike other foreign jurisdictions, which usually differentiate between secured and unsecured creditors only, the IBC is unique because it provides for two different classes of creditors: operational creditors and financial creditors. To understand the

position of the former within the framework of the IBC, it is important to understand the distinction between these two classes.

29 The primary source is Volume I of the Report of the Bankruptcy Law Reforms Committee[16]. It notes that "[e]nterprises have financial creditors by way of loan and debt contracts as well as operational creditors such as employees, rental obligations, utilities payments and trade credit"[17]. It provides that a corporate debtor will have financial and operational liabilities, and explains the difference as follows[18]:

> "Liabilities fall into two broad sets: liabilities based on financial contracts, and liabilities based on operational contracts. Financial contracts involve an exchange of funds between the entity and a counterparty which is a financial firm or intermediary. This can cover a broad array of types of liabilities: loan contracts secured by physical assets that can be centrally registered; loan contracts secured by floating charge on operational cash flows; loan contracts that are unsecured; debt securities that are secured by physical assets, cash flow or are unsecured. **Operational contracts typically involve an exchange of goods and services for cash. For an enterprise, the latter includes payables for purchase of raw-materials, other inputs or services, taxation and statutory liabilities, and wages and benefits to employees.**"
>
> (**emphasis supplied**)

Further, the Report also notes[19]:

> "Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as

[16] "**BLRC Report**"
[17] Pg 22, available at <https://www.ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf> accessed on 13 January 2022
[18] *Ibid*, Pg 54
[19] *Ibid*, Pg 77

> a loan or a debt security. **Operational creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease.** The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt."
>
> (**emphasis supplied**)

30 It is thus clear that operational creditors are those whose debt arises from operational transactions, *i.e.*, transactions which are undertaken in relation to the operation of an enterprise. As the examples in the BLRC Report suggest, these generally include transactions involving goods or services which are considered necessary for the operational functioning of an entity.

31 The Joint Parliamentary Committee Report on the IBC differentiates between financial and operational creditors in the following terms[20]:

> "Clause 21 appended with the Bill which states as under:- "**The committee has to be composed of members who have the capability to assess the commercial viability of the corporate debtor and who are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. Operational creditors**

[20] Pg 14, available at <https://www.ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf > accessed on 13 January 2022

> **are typically not able to decide on matters relating to commercial viability of the corporate debtor, nor are they typically willing to take the risk of restructuring their debts in order to make the corporate debtor a going concern.** Similarly, financial creditors who are also operational creditors will be given representation on the committee of creditors only to the extent of their financial debts. Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, any resolution plan must ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).""
>
> (**emphasis supplied**)

32 This makes it clear that another point of difference between financial and operational creditors would be in the nature of their role in the Committee of Creditors[21], because it is assumed the operational creditors will be unwilling to take the risk of restructuring their debts in order to make the corporate debtor a going concern. Thus, their debt is not seen as a long-term investment in the going concern status of the corporate debtor, which would incentivize them to restructure it, but merely as a one-off transaction with the corporate debtor for certain goods or services.

[21] "**CoC**"

D.3 Judicial Precedent

33 In **Swiss Ribbons (P) Ltd.** v. **Union of India**[22] ("**Swiss Ribbons**"), the constitutionality of certain provisions of the IBC was challenged, with the focus being on the difference of rights provided to the financial and operational creditors. After observing the difference in the methods through which financial creditors and operational creditors trigger a proceeding under the IBC, the two-judge Bench of the Court noted that there was an intelligible differentia between financial and operational creditors. The Court held:

> "50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. **Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute**

[22] (2019) 4 SCC 17

resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

[…]

75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. **On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of**

> **business.** The BLRC Report, already quoted above, makes this abundantly clear."
>
> (**emphasis supplied**)

34 In **Pioneer Urban Land and Infrastructure Ltd.** v. **Union of India**[23] ("**Pioneer Urban**"), a three-judge Bench of this Court had to adjudicate upon a constitutional challenge to the amendments made to the IBC, through which allottees of real estate projects had been declared to be financial creditors. In highlighting the differences between home buyers and operational creditors, the Court noted that: *first*, generally operational creditors are suppliers of goods and services whereas the home buyer advances money to the developer, so that the debtor is the supplier (of the flat); *second*, an operational creditor has no interest in or stake in the corporate debtor, unlike a home buyer who is vitally concerned with the real estate project; and *third*, in an operational debt, there is no consideration for the time value of money since the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor whereas in real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. The Court held:

> "42. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by the learned counsel on behalf of the petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational

[23] (2019) 8 SCC 416

debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, **what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition.** Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. **One other important distinction is that in an operational debt, there is no consideration for the time value of money—the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees.** In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving “exchange” i.e. advances paid only in order to obtain a flat/apartment. What

> is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. **One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for homebuyers/allottees to approach NCLT under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors.** This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws."
>
> (**emphasis supplied**)

35 In **Innoventive Industries Ltd.** v. **ICICI Bank**[24], a two judge Bench of this Court explained the framework of the IBC in relation to an operational creditor triggering the CIRP. The Court held:

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

[24] (2018) 1 SCC 407

36 In **Mobilox Innovations (P) Ltd.** v. **Kirusa Software (P) Ltd.**[25] ("**Mobilox Innovations**"), a two-judge Bench of this Court explained the process for an operational creditor initiating CIRP in respect of a corporate debtor. The Court held:

> "33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form.

[25] (2018) 1 SCC 353

Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [Section 9(5)(i)(b)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [Section 9(5)(i)(c)], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [Section 9(5)(i)(d)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [Section 9(5)(i)(e)], it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso [Section 9(5)(ii)(a)]. It may also reject the application where there has been repayment of the operational debt [Section 9(5)(ii)(b)], or the creditor has not delivered the invoice or notice for payment to the corporate debtor [Section 9(5)(ii)(c)]. It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [Section 9(5)(ii)(d)]. Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any

> proposed resolution professional, the application may be rejected [Section 9(5)(ii)(e)]."

It further noted that when a notice is received by a corporate debtor under Section 8(2), it is enough that a dispute is pending and it is not necessary that a suit/arbitration also be pending:

> "38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. **We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is**

> **for this reason that it is enough that a dispute exists between the parties.**"
>
> (**emphasis supplied**)

This observation of the Court led to the amendment of the IBC through Act 26 of 2018.

37 The final observation of the Court in **Mobilox Innovations** (supra) has also been reiterated by another two-judge Bench of this Court in **Kay Bouvet Engg. Ltd.** v. **Overseas Infrastructure Alliance (India) (P) Ltd.**[26] ("**Kay Bouvet**"), where the Court observed:

> "19. It could thus be seen that this Court has held that one of the objects of IBC qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It has been held that it is for this reason that it is enough that a dispute exists between the parties."

38 The decisions of this Court in **Mobilox Innovations** (supra) and **Kay Bouvet** (supra) highlight its concern that operational creditors may initiate insolvency proceedings against corporate debtors for miniscule amounts of debt, which in turn could jeopardize the financial health of the corporate debtor. Indeed, in **Swiss Ribbons** (supra), this Court observed that the IBC was not akin to a recovery legislation for creditors, but is a legislation beneficial for the corporate debtor:

[26] (2021) 10 SCC 483

> "28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. **The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.** The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."
>
> (**emphasis supplied**)

D.4 Analysis

39 In the present case, there are few undisputed facts: *(i)* the appellant and the Proprietary Concern entered into a contract for supply of light fittings, since the appellant had been engaged for a project by CMRL; *(ii)* CMRL, on the appellant's behalf, paid a sum of Rs 50 lakhs to the Proprietary Concern as an advance on its order with the appellant; *(iii)* CMRL cancelled its project with the appellant; *(iv)* the Proprietary Concern encashed the cheque for Rs 50 lakhs anyways; and *(v)* the appellant paid the sum of Rs 50 lakhs to CMRL.

PART D

40 There is some factual controversy in relation to whether the appellant promptly informed the Proprietary Concern of the termination of its project with CMRL. The appellant alleges that they communicated it on the very same day (2 January 2014), while the respondent alleges that the Proprietary Concern only became aware of it through the appellant's letter dated 23 July 2016. For the purposes of the present appeal, it is unnecessary to resolve this dispute. The Proprietary Concern has consistently maintained that they would be willing to refund the sum of Rs 50 lakhs if CMRL approached them directly. Thus, their ostensible dissatisfaction with the behavior of the appellant plays no part in the debt arising from the refund.

41 We have to now consider the 'debt' in the present appeal. According to the appellant, it is the advance payment CMRL made on their behalf to the Proprietary Concern, which was encashed even though the project between CMRL and the appellant was terminated. On the other hand, the respondent has attempted to urge that there was no privity of contract between the appellant and the respondent, and that CMRL had not transferred the debt to the appellant. We reject both these submissions. It is amply clear from the facts that the debt arises from purchase orders between the appellant and the Proprietary Concern (which is the underlying contract), regardless of whether CMRL may have made the payment on behalf of the appellant. Thus, the ultimate dispute still remains between the appellant and the Proprietary Concern, and the debt arises from that.

42 It is then that we come to the core of the dispute – while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent's submission, which was accepted by the NCLAT, seeks to narrowly define operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the corporate debtor. For reasons which shall follow, we reject this argument.

43 *First,* Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. *Second*, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a *sine qua non*, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of

goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. *Finally*, the judgment of this Court in **Pioneer Urban** (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.

44 In **Phoenix ARC (P) Ltd.** v. **Spade Financial Services Ltd.**[27], a three-judge Bench of this Court purposively interpreted Section 21(2) of the IBC in order to understand who should be excluded from the CoC due to their being a "related party". The Court held:

[27] (2021) 3 SCC 475

> "99. Accepting the submission of Mr Viswanathan would allow the statutory provision to be defeated by a related party of a corporate debtor creating commercial contrivances which have the effect of denuding its status as a related party, by the time that the CIRP is initiated. The true test for determining whether the exclusion in the first proviso to Section 21(2) applies must be formulated in a manner which would advance the object and purpose of the statute and not lead to its provisions being defeated by disingenuous strategies.
>
> […]
>
> 104. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a "related party" before the corporate debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors."

Thus, the Court struck a balance between the text of the statute and the purpose which it sought to achieve by excluding those related party financial creditors who ceased to be related parties only in order to circumvent the exclusion under the first proviso to Section 21(2).

45 Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for

the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.

46 In doing so, we are cognizant of the observations of this Court in judgments such as **Swiss Ribbons** (supra), that IBC proceedings should not become recovery proceedings. However, in the present case, the dispute is not in relation to the quality of the services provided by the Proprietary Concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project.

E Evidentiary value of respondent's MOA

47 Having established that the appellant is an operational creditor, we must now analyze whether the debt owed to the appellant can actually be realized from the respondent. In the present case, it is uncontested that the appellant entered into a contract with the Proprietary Concern and continued communications with them till the very end, finally sending its notice under Section 8(1) of the IBC to the respondent.

48 The dispute revolves around the MOA of the respondent, dated 24 January 2014, which states:

> "(A) THE MAIN OBJECTS OF THE COMPANY TO BE PURSUED BY COMPANY ON ITS INCORPORATION:
>
> […]
>
> 4. To take over the existing Proprietorship firm Viz. M/S. Hitro Energy Solutions having its registered office at Chennai."

The NCLT understood this to be undeniable proof that the respondent had taken over the business and liabilities of the Proprietary Concern, while the NCLAT took a different position.

49 We must first consider the relevant statutory provisions. Section 4 of the Companies Act 2013 [28] defines an MOA. Section 4(1) provides the relevant information that an MOA shall provide, which includes, in sub-Clause (c), that it should provide "the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof".

50 Section 10(1) of CA 2013 elucidates the legal effect of an MOA in the following terms:

> "**10. Effect of memorandum and articles.**—(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles."

[28] "**CA 2013**"

51 Further, Section 13 provides the requirements for the alteration of an MOA. The relevant parts of Section 13 are as follows:

> "**13. Alteration of memorandum.**—(1) Save as provided in Section 61, a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum.
>
> […]
>
> (6) Save as provided in Section 64, a company shall, in relation to any alteration of its memorandum, file with the Registrar—
>
> (a) the special resolution passed by the company under sub-section (1);
>
> (b) the approval of the Central Government under sub-section (2), if the alteration involves any change in the name of the company.
>
> […]
>
> (9) The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with clause (a) of sub-section (6) of this section.
>
> (10) No alteration made under this section shall have any effect until it has been registered in accordance with the provisions of this section.
>
> […]"

Thus, for the alteration of the MOA of a company in relation to its objects, a Special Resolution has to be first passed under Section 13(1). It then has to be filed with the Registrar in accordance with Section 13(6)(a). Further, under Section 13(9), when the alteration is made to the objects in the MOA, the Registrar shall register it and certify it within a period of thirty days from the filing of the Special Resolution in

accordance with Section 13(6)(a). Finally, Section 13(10) provides that no alteration made under the Section shall have effect unless it is registered in accordance with the provisions of the Section.

52 A company's MOA is its charter and outlines the purpose for which the company has been created. Some of those purposes/objects have to then be placed in the MOA, in accordance with Section 4(1)(c) of the CA 2013. In the 19th edition of *A Ramaiya's Guide to the Companies Act*, it has been stated[29]:

> "[s 4.2.3] Objects for which the company is proposed to be incorporated and any matter considered necessary for the furtherance of its objectives
>
> […]
>
> It is pertinent to note that section 4(1)(c) speaks about 'the objects for which the company is proposed to be incorporated'. This implies that the company contemplates to pursue its objects either immediately after incorporation or within a reasonable period of time. It is the duty of the registrar to verify whether the objects included in the draft memorandum are indeed the ones which the company proposes to pursue upon incorporation. He should satisfy himself on this score by verifying the documents/ information provided by the company."

The object clause in an MOA is considered to be representative of the purpose of a company and it is expected that the company will fulfill/attempt to fulfill the objects it has laid out in its MOA.

53 In the present case, the MOA of the respondent unequivocally states that one of its main objects is to take over the Proprietary Concern. However, the respondent

[29] (LexisNexis, 2020)

has produced a resolution dated 1 September 2014 passed by its Board of Directors, purportedly resolving to not take over the Proprietary Concern. The resolution states:

> "CERTIFIED TRUE COPY OF THE RESOLUTION PASSED AT THE MEETING OF BOARD OF DIRECTORS HELD AT 10.00 AM ON 1st SEPTEMBER 2014 AT THE REGISTERED OFFICE OF THE COMPANY AT CHENNAI.
>
> "RESOLVED THAT the company do hereby decided not to take over the Proprietorship concern M/S.HITRO ENERGY SOLUTIONS as envisaged in clause 4 of main objects of the Memorandum of Associations of the Company.""

In support of the resolution, the respondent has also produced a certification from the banker of the Proprietary Concern, Indian Bank, Mylapore Branch, on 10 April 2018 and from the Chartered Accountants of the Proprietary Concern, K R Sarangapani and Co, on 27 April 2018.

54 Admittedly, there was no reference to the resolution in the counter-statement dated 18 January 2018 and additional counter-statement dated 9 March 2018 filed by the respondent before the NCLT. However, in their appeal filed before the NCLAT, the respondent states that the resolution was, in fact, brought to the notice of the NCLT:

> "(xii). It is submitted that a Board resolution dt 01.09.2014 of M/s. Hitro Energy Solutions Pvt Ltd coupled with the Auditor Certificate dated 01.09.2014 was also placed on record and brought to the attention and Notice of the Learned NCLT Tribunal, Chennai in which it was resolved that clause 4 of the Memorandum of Association of the M/s. Hitro Energy Solutions Pvt Ltd i.e to take over the existing proprietorship concern i.e M/s. Hitro Energy Solutions will not be given effect

> to and as such the Proprietorship concern namely M/s. Hitro Energy Solutions will continue. Thus M/s. Hitro Energy Solutions is continuing its business as a proprietary concern."

The NCLT in its judgment dated 6 December 2018 made no mention of this resolution or the auditor's certificate. The conduct of the respondent in bringing up this resolution for the first time before the NCLAT would lead to an adverse inference against them for having suppressed this document earlier, if at all it was in existence.

55 In any case, Section 13 of CA 2013 provides for the procedure which has to be followed when the MOA is to be amended. In cases where the object clause is amended, it requires the Registrar to register the Special Resolution filed by the company. However, the respondent has provided no proof that: *(i)* the purported resolution dated 1 September 2014 was a Special Resolution; *(ii)* it was filed before the Registrar; and *(iii)* that the Registrar ultimately did register it. Thus, in terms of Section 13(10) of CA 2013, the purported amendment to the MOA would not have any legal effect.

56 Consequently, the MOA of the respondent still stands and the presumption will continue to be in favor of the appellant. Thus, it can be concluded that the respondent took over the Proprietary Concern and was liable to re-pay the debt to the appellant. Hence, the application under Section 9 of the IBC was maintainable.

F Whether the application under Section 9 is barred by limitation

57 The respondent urged that the application under Section 9 is barred by limitation. The respondent has argued that the date of default mentioned by the appellant is 7 November 2013, when the cheque was issued by CMRL to the Proprietary Concern. As such, the submission is that the limitation of three years under Article 137 of the Limitation Act 1963[30] would expire on 7 November 2016, while the application under Section 9 was only filed on 1 November 2017.

58 In **B.K. Educational Services (P) Ltd.** v. **Parag Gupta & Associates**[31] ("**B.K. Educational Services**"), a two-judge Bench of this Court held that the Limitation Act would apply to applications filed under Sections 7 and 9 of the IBC. The Court held:

> "42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

59 The respondent's submission that limitation commences from 7 November 2013 has to be rejected. In its application under Section 9, the appellant has mentioned this as the date on which the debt became due. However, as noted in

[30] "**Limitation Act**"
[31] (2019) 11 SCC 633

B.K. Educational Services (supra), limitation does not commence when the debt becomes due but only when a default occurs. As noted earlier in the judgment, default is defined under Section 3(12) of the IBC as the non-payment of the debt by the corporate debtor when it has become due.

60 In the present case, CMRL issued the cheque of Rs 50,00,000 to the Proprietary Concern on 7 November 2013. However, at that time, it was issued as an advance payment for the purchase order of the appellant. It was only on 2 January 2014 that CMRL terminated its project with the appellant, and it was after this that the Proprietary Concern encashed the cheque. Subsequently, correspondence was exchanged between the appellant and the Proprietary Concern in July 2016 in relation to the re-payment of the amount. Thereafter, a joint meeting was also held on 4 August 2016. Till this point in time, both the parties were in negotiation in relation to the re-payment and the minutes of meeting show that the Proprietary Concern was willing to make the re-payment if CMRL issued a letter stating that they will not pursue a claim in the future or if the appellant provided a bank guarantee for the amount.

61 A final letter was addressed by the appellant to the Proprietary Concern on 27 February 2017, demanding the payment on or before 4 March 2017. The Proprietary Concern replied to this letter on 2 March 2017, finally refusing to make re-payment to the appellant. Consequently, the application under Section 9 will not be barred by limitation.

G Conclusion

62 Therefore, we answer the three issues formulated earlier in the following terms:

(i) The appellant is an operational creditor under the IBC, since an 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor;

(ii) The respondent will be considered to have taken over the Proprietary Concern in accordance with its MOA; and

(iii) The application under Section 9 of the IBC is not barred by limitation.

63 The appeal is allowed by setting aside the impugned judgment and order of the NCLAT dated 12 December 2019. Since the CIRP in respect of the respondent is ongoing due to this Court's order dated 18 November 2020, no further directions are required.

PART G

64 Pending application(s), if any, stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[Surya Kant]

…….....J.
[Vikram Nath]

New Delhi;
February 04, 2022