IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI

CP IB NO. 519/(PB)/2022

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

Sinometal Resources Inc.
Having its Regd. Office at:
4455 Rue Cousens
Montreal QC H4S 1X5
Canada **...Operational Creditor**

VERSUS

Indo Alusys Industries Limited
Having its Regd. Office at:
B-292, Office NO. 303,
Chandra Kanta Complex,
New Ashok Nagar
New Delhi-110096

...Corporate Debtor

Order Delivered on: 17.05.2024

CORAM:
SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Sumeet Lall, Mr. Sidhant Kapoor, Mr. Nikhil Lal, Advs.
For the Respondent: Mr. Narendra M. Sharma, Ms. Shubhangi Tiwari, Advs.

O R D E R

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This is a Company Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 **('the Code')** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **M/s Sinometal Resources Inc. ('Operational Creditor')** for initiation of Corporate Insolvency Resolution Process **('CIRP')** against **M/s. Indo Alusys Industries Limited ('Corporate Debtor')**.

2. **M/s. Sinometal Resources Inc.** (Operational Creditor) is a corporation registered and organized under the laws of State of Canada, with Corporation No. 708472-2, having its office at 4455 Rue Cousens, Montreal QC H4S 1X5, Canada. **M/s. Indo Alusys Industries Limited** (Corporate Debtor) is a company registered under the Companies Act, 1956 [CIN-U74999DL1979PLC009937], having its registered office at B-292, Office No. 303, Chandra Kanta Complex, New Ashok Nagar, New Delhi-110096. The Corporate Debtor has Authorized Share Capital of Rs. 15,00,00,000 (Fifteen Crores) and Paid-Up Share Capital of Rs 8,50,79,000 (Eight Crores Fifty Lacs Seventy-Nine Thousands).

3. The present Petition was filed on 09.06.2022 and further on 20.10.2022, filed in compliance of order dated 03.10.2022, before this Adjudicating Authority by M/s. Sinometal Resources Inc. (Operational Creditor), duly authorized to initiate Corporate Insolvency Resolution Process **("CIRP**") proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**"Code'**). The total amount claimed is USD 5,87,040.78 (Five Lacs Eighty-Seven Thousand Forty Dollars and Seventy-Eight Cents) which is inclusive of the interest amount. As per the Part IV of the application the date of default is different for 2 commercial invoices i.e., 30.05.2019 and 28.06.2019.

4. The present petition was filed before this Adjudicating Authority ('AA') on earlier occasion also, however, the same was returned by the AA vide its order

dated 03.10.2022, being incomplete as there are settlement agreement between both the parties and the proof of service of demand notice were not attached. Thereafter, the financial creditor has filed another application on 20.10.2022.

5. **Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor**.

a) The Operational Creditor is engaged in the fabrication and manufacturing of ingots, billets, plates, sheets, and other aluminum products. The Operational Creditor and the Corporate Debtor have had a business relationship since 2015, with the Operational Creditor regularly supplying aluminum billets to the Corporate Debtor. On 28.12.2018, the Corporate Debtor issued a Purchase Order (PO) via email, numbered INDO-02-2018-19, seeking the supply of 279 MT of Aluminum Billet 6063 Alloy, Homogenized, and Duly End Cut in two different sizes. Subsequently, on 02.01.2019, both parties entered into a Sales Contract, numbered 18-P-551, for the supply of 276 MT of Aluminum Billets through two separate shipments.

b) In respect of the purchase order for 276 MT of Aluminum Billets, two invoices were raised by the Operational Creditor. Invoice 1, numbered SR-INV0000257, was issued on 31.01.2019, amounting to USD 302,829.65. Invoice 2, numbered SR-INV0000383, was issued on 11.03.2019, amounting to USD 300,228.15.

c) In terms of the Sales Contract dated 02.01.2019, the Corporate Debtor agreed to make a 20% advance payment and the balance payment of 80% within 120 days from the date of the bill of lading. The Operational Creditor duly supplied the goods as per the sales contract, and the 20% advance payment was also paid by the Corporate Debtor, amounting to USD 59,340 against Invoice 1 and USD 59,340 against Invoice 2. Thus, the balance amount legitimately due and payable by the Corporate Debtor is USD 243,489.65 against Invoice 1, which became due on 30.05.2019, and USD 240,888.15 against Invoice 2, which became due on 28.06.2019.

d) Considerable time has passed since the due date of payment for the outstanding balance under the invoices. The Operational Creditor has made several requests for payment through emails dated 24.06.2019 and 27.06.2019. Corporate Debtor in response to the email dated 24.07.2019 from the Operational Creditor, acknowledged the outstanding liability for both invoices and requested an additional 90 days from the due dates to make the payment. Despite repeated reminders from the Operational Creditor, the Corporate Debtor has failed to fulfill its contractual obligations. Furthermore, in email dated 24.07.2019, the Corporate Debtor explicitly acknowledged the operational debt and agreed to pay accruing interest at a rate of 1% per month.

e) The Corporate Debtor has made partial payments totaling USD 50,000/- towards its outstanding liability of USD 484,377.8/- for both invoices. These payments were made in two installments of USD 25,000/- each, on 12.08.2019 and 27.08.2019, respectively. It is important to note that the Corporate Debtor has acknowledged its liability for the unpaid invoices on multiple occasions. On 13.12.2019, the Corporate Debtor once again acknowledged its liability and requested additional time to make the balance payment.

f) The Operational Creditor issued a statutory demand notice on 09.01.2020, as per Section 8 of the Insolvency and Bankruptcy Code, 2016, to the Corporate Debtor regarding unpaid dues. In response, the Corporate Debtor, via an email dated 17.01.2020, acknowledged the demand notice and admitted the liability, expressing its intention to settle the outstanding dues with the Operational Creditor. However, on 20.01.2020 the Corporate Debtor through its legal counsel replied to the demand notice dated 09.01.2020 wherein they have raised moonshine defense while acknowledging the liability.

g) The Corporate debtor vide email dated 20.03.2020 requested confirmation on Bank Accounts details of the Operational Creditor to remit the outstanding payment against both the invoices. Despite the confirmation,

the Operational Creditor has not received any payments from the Corporate Debtor.

h) Thus, the Corporate Debtor made acknowledgement on several occasions i.e., 24.07.2019, 26.07.2019, 12.08.2019, 27.08.2019, 13.12.2019, 17.01.2020, 20.01.2020, 10.02.2020 and 20.03.2020.

i) Furthermore, the Operational Creditor made efforts to resolve the issue with respect to outstanding payment with the Corporate Debtor amicably through a Settlement Agreement. A without prejudice settlement agreement was therefore reached between the Operational Creditor and the Corporate Debtor on 10.02.2020. However, this agreement was subsequently cancelled owing to false promises of corporate debtor.

j) The Operational Creditor has issued without prejudice notice to the corporate debtor on 18.02.2021 granting final opportunity to amicably settle the outstanding dues along with interest from original date of default i.e. 30.06.2019 within 7 days from the date of receipt of notice but no payment has been made by the Corporate Debtor till date.

6. **Submission by the Learned Counsel appearing on behalf of the Corporate Debtor**

a) The present application is a gross abuse of power and liable to be dismissed for since the operational creditor had previously filed the same application under section 9 of the Insolvency and Bankruptcy Code, 2016 on 09.06.2020 without enclosing the relevant documents or providing an explanation for the significant delay of approximately 2.5 years in filing the said application after the issuance of the demand notice.

b) The tribunal vide order dated 03.10.2022, returned the application to the Applicant with the direction to rectify the defects within 7 days. However, the Applicant failed to file the rectified application within the stipulated time, i.e., on or before 11.10.2022. Furthermore, the Applicant did not request an extension of time for filing the rectified application. The Applicant has adopted a wholly different stance by altering the narration

of facts and submissions, thereby contradicting itself in the present application.

c) The Applicant seeks to recover the settlement amount agreed upon between the parties in a settlement deed dated 10.02.2022, which was after the issuance of the demand notice dated 09.01.2020. Therefore, the alleged debt cannot qualify as "Operational Debt" in terms of Section 5(21) of the IBC, 2016. Hence, the present application is not maintainable. Both parties have negotiated the disputes arising from supplies made under a purchase order dated 28.12.2018 and a sale contract dated 02.01.2019 through the deed of settlement.

d) On perusal of terms of settlement deed, it is evident the Applicant consciously abandoned the demand notice and there is no provision stating that the demand notice would be revived on the failure of Corporate Debtor to pay the settlement amount. Clause 2 of the deed of settlement outlines the mechanism in case of failure to pay the settlement amount, without granting the Applicant any right to revive its demand notice issued under section 8 of IBC, 2016, it only stipulates that on failure to pay the settlement amount, corporate debtor would be liable to pay a higher rate of interest.

e) As per the settlement deed, the purchase order and sale contract have been superseded by schedule A. Mere breach of the settlement deed does not amount to operational debt. The Corporate Debtor in support of its contention relied on M/s Delhi Control Devices (P) Ltd. Vs. Fedders Electric and engineering Ltd wherein NCLT Allahabad held that "unpaid instalment as per the settlement agreement cannot be treated as operational debt as per Section 5(21) of IBC. The failure or breach of settlement agreement can't be a ground to trigger CIRP against Corporate Debtor under the provision of IBC 2016 and remedy may lie elsewhere not necessarily before the Adjudicating Authority".

f) The alleged unpaid operational debt is not due and payable by the Corporate Debtor. The transactions as to the Sale Contract was insured by the Applicant through Export Development Canada (EDC) and EDC has

already settled the amounts by paying the insurance amount to the Applicant. Moreover, the Applicant failed to disclose this vital information before this tribunal. Furthermore, the Applicant has never placed on record any affidavits or certificates as required under Section 9(3)(c), (d), and (e) of the Insolvency and Bankruptcy Code, 2016. Therefore, no operational debt is payable to the Operational Creditor in relation to the mentioned Purchase Order and Sale Contract.

g) The present application is barred by Law of Limitation as per the terms and conditions stipulated in the Sale Contract dated 02.01.2019. According to which, payment against purchase orders for the balance amount must be made within 120 days of the bill of lading. As per the material placed on record by the Applicant, it indicates the date of the Bill of Lading of the first invoice is 30.01.2019, making the payment due on or before 30.05.2019. The alleged default can be said to have occurred on 01.06.2019 while the present Application has been filed on 09.06.2022 i.e., after expiry of period of three years of the alleged default. Therefore, the present Application being barred by law of limitation is liable to be dismissed for being not maintainable.

h) The settlement was entered between the parties by way of settlement deed dated 10.02.2020 subsequent to purported demand notice under section 8 of IBC, 2016 dated 09.01.2020. According to Clause 4 of the settlement deed, it supersedes and overrides the sales contract, invoices, and payment terms. Relevant extract from the Deed of Settlement is reproduced as under:

> *"**4**. that all the disputes inter-se the parties to the present deed of settlement as on date have been completely, fully and conclusively settled and no party shall have any further claim against each other in future with respect to the claims of the respective parties in the present deed of settlement."*

Thus, all the pre-existing disputes pertaining to transaction are fully and conclusively settled by way of settlement deed and all the claims, contentions and averments of the Applicant in the demand notice, also

stood settled. Hence, Applicant cannot be relied on purported demand notice in support of present application.

i) The Demand Notice and the Deed of Settlement cannot operate simultaneously unless saved by specific terms in Settlement Deed. In the present case there is no clause for revival of Demand Notice instead, it provides for mechanism in case of failure of deed of settlement to recover the settlement amount by other process.

j) The Applicant after execution of the Settlement Deed on 10.02.2020 and thereafter alleged default, no statutory Demand Notice was issued, it is pertinent to note here that that the non-issuance of a demand notice under Section 8 is a prerequisite for an operational creditor before filing an application under Section 9 of the code which is not a curable defect under Section 9(5)(ii) of the code. Therefore, the present application is not liable to be admitted.

k) The Applicant entered into Sales Contract on 02.01.2019 for 276 MT Aluminum Billets 6063 Alloy in two lots of 138 MT each. As per the contract terms, Applicant is required to ship the first lot by 15.01.2019 and second lot by 25.01.2019. The time was the essence of Sales Contract because the Corporate Debtor had onward commitment for supply of final product in a timely manner. *Per contra* the first lot was shipped on 30.01.2019 and the second lot was shipped on 11.03.2019 i.e., after delay of 43 days. Consequently, several customers of Corporate Debtor have cancelled their orders and returned the delivered items. Further, the good supplied were also of inferior quality due to which the Corporate Debtor has received quality complaints from its customers.

l) The operational creditor was also informed of quality disputes with Mr. John, an authorized agent of the Applicant, during his visit to India on 09.12.2019. Mr. John acknowledged the fact and assured the Corporate Debtor of necessary adjustments against the invoices. Subsequently, the corporate debtor also formally intimated the operational creditor about the same via email dated 13.12.2019.

m) Both the parties were negotiating resolution of disputes regarding delayed shipment and the quality of goods.; However, the operational creditor abruptly issued a notice under section 8 of the IBC, 2016 for its illegitimate demands. It is worth mentioning here that the dispute is pre-existent with the operational creditor in terms of facts mentioned above. Furthermore, the Corporate Debtor also mentioned the same situation in reply dated 20.01.2020. Filing the present application while relying on the demand notice dated 09.01.2020, despite the pre-existing dispute between the parties, is not considered maintainable.

n) The original payment terms of the Purchase Order and subsequent Sale Contract stood substituted with Schedule-A of the Settlement Deed. Therefore, the Corporate Debtor is not obligated to make any payments as per Purchase Order and subsequent Sale Contract dated 02.01.2019. It is a settled principle that when parties agree to extinguish, alter, or rescind a contract, the original contract is no longer required to be performed, as per Section 62 of the Indian Contract Act, 1872.

o) That by the present averments, the Corporate Debtor is disputing the maintainability of the present application on the basis of operational debt claimed by the Applicant.

Analysis & Findings

7. We have heard the Learned Counsels for the Operational Creditor and the Corporate Debtor, and further perused the averments made in the petition, reply filed by the Corporate Debtor and written submissions presented by both the Operational Creditor and the Corporate Debtor. Since the registered office of the respondent Corporate Debtor is in Delhi, this Tribunal is having territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 9 of The Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor.

8. From the perusal of records put forth by the operational creditor, it is observed that the operational creditor has issued two invoices dated 31.01.2019 and

11.03.2019 to the corporate debtor against the purchase order dated 28.12.2018. As per Part IV of the application the date of default is 30.05.2019 for Invoice No. 1 & 28.06.2019 for Invoice No. 2. Corporate debtor contended that, in terms of Sales Contract dated 02.01.2019 the present application is barred from limitation as per the Limitation Act, 1963 because the Invoice No. 1 fell due on 30.05.2019 and the application is filed on 09.06.2022.

9. The Operational creditor has relied on email dated 24.07.2019, 26.07.2019, 13.12.2019, 17.01.2020, 20.01.2020, 10.02.2020 and 20.03.2020 wherein the corporate debtor had acknowledged its liability against the above said invoices to the tune of USD 434,377.80/-. On this we are inclined to discuss the observations and ruling of the Hon'ble supreme court in the following matter:

Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330: 2021 SCC OnLine SC 543 at page 380

> *"111. As per Section 18 of the Limitation Act, an acknowledgment of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgment is signed. Such acknowledgment need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgment must be made before the relevant period of limitation has expired."*

10. Thus, the contentions made by the Corporate Debtor pertaining to maintainability of present application on account of limitation period cannot be sustained because the alleged operational debt for the invoices SR-INV0000257 and SR-INV0000383 to the tune of USD 603,057.80/- has been acknowledged by the corporate debtor on multiple occasions. The latest acknowledgement being of 20.03.2020 extended the limitation period for further 3 years from the date of the latest acknowledgement and the present application was filed on 09.06.2022. Hence, in view of the above, we are of opinion that the limitation period for the above said invoices got extended and the present application has been filed with the limitation period as per Section 18 of Limitation Act, 1963.

11. It is pertinent that the 'Operational Creditor' had sent a Demand Notice dated 09.01.2020 to the 'Corporate Debtor' under Section 8 of The Insolvency and Bankruptcy Code, 2016 for payment of outstanding dues amounting to USD 4,63,179.63 (inclusive of the interest amount) which is equivalent to the tune of Rs. 3,28,85,780 (Rupees Three Crores Twenty-Eight Lacs Eighty-Five Thousand Seven Hundred and Eighty). Therefore, the present petition meets the threshold limit of Rs. 1 crore, as required by Section 4 of the Code.

12. So far as the issue on Demand Notice is concerned, the Corporate Debtor contends that the parties has entered into a settlement after the issuance of Demand Notice which superseded the Sale Contract, Invoices and Payment Terms and thereby abandoning the Demand Notice dated 09.01.2020. Further, Corporate Debtor pressed upon the fact that the present application is not maintainable in terms of Section 8 as no subsequent demand notice was issued before filing of the present application.

13. *Per Contra* the Applicant contended that the present application has been filed for the operational debt due from the Corporate Debtor in terms of Sales Contract and Invoices issued against the delivery of 276 MT of Aluminum Billets. The parties have entered into the Settlement Deed only to reduce interest on the original outstanding amount from the agreed rate of 12% per annum to 4.25% per annum with an understanding that the original claims of the Operational creditor will remain alive on failure of Corporate Debtor to honor the Settlement Deed. The Corporate Debtor relied on clause 4 of the Settlement Deed wherein it is expressly mentioned that the parties would not make any further claim against each other in future and only be allowed for previous claims of Operational Creditor. Thus, as per Settlement Deed Applicant is entitled to claim entire outstanding amount along with interest at 12% per annum from Corporate Debtor under the Sales Contract and Invoices. Further Clause 2 of the Settlement Agreement clarifies that in the event Corporate Debtor fails to clear the outstanding debt, settlement deed will get terminated and parties would be relegated to their original obligations. Extract of Clause 2 is reproduced below:

"**2**. it is agreed by and between the parties that in the event the First Party fails to pay any installment to the Second Party, within the time frame as set out in Schedule-A, then this Deed of Settlement shall come to an end and the First Party shall be liable to pay to the Second Party and the Second Party shall be entitled to recover from the First Party interest @ 12% Per Annum instead of 4,25% Per Annum as agreed herein on the entire outstanding balance principle sum."

14. On this we are inclined to discuss the observations made by the Hon'ble National Company Law Appellate Tribunal in the following case:

Priyal Kantilal Patel v. IREP Credit Capital (P) Ltd., 2023 SCC OnLine NCLAT 51

*"**12**. The Judgment which has been relied by Learned Counsel for the Appellant "Amrit Kumar Agrawal" (supra) was a case where section 7 application was filed on the ground of default in payment of settlement agreement where the court held that default in payment of settlement agreement does not constitute a financial debt. The facts of the present case are clearly distinguishable. Present is not a case where Section 7 Application has been filed only on the ground of default in the settlement agreement rather section 7 application has been filed on the basis of original financial debt which was extended by the Financial Creditor to the Corporate Debtor. The mere fact that in earlier company petition, consent terms was arrived, which consent terms was breached by the corporate debtor, the financial debt which was claimed by the financial creditor would not be wiped out nor the nature and character of financial debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving premium to the corporate debtor who breach the consent terms. Another Judgment which has been relied on by Learned Counsel for the Appellant is "Dr. Gopal Krishnan MS", (supra) which is also Judgment relying on "Amrit Kumar Agrawal". The court in the facts of the said case came to the conclusion that debt is not a financial debt. The above Judgment is also clearly distinguishable.*

***13**. It is relevant to notice that in clause 9 of the consent terms there was clear stipulation that financial creditor shall be entitled to revive the company petition, the mere fact that instead of reviving company petition, a fresh company petition has been filed under section 7 shall not be reason to reject the company petition and not to entertain the said company petition."*

In Priya Kantilal Patel *(Supra)*, it was observed that the section 7 application filed by the Applicant was founded on the Financial Debt originally owed by the Corporate Debtor, rather than on the consent terms agreed upon by the parties. Also in the present case, the application filed by the Operational Creditor is based on the original debt owed by the Corporate Debtor, supported by Invoices, Purchase Orders, and Sale Contracts, and not on the basis of this Settlement Deed. Therefore, the present application cannot be challenged on the grounds that the parties entered into a settlement deed after the issuance of the demand notice.

15. Further, the Corporate Debtor present its case while relying on **Trafigura India (P) Ltd. v. TDT Copper Ltd., 2022 SCC OnLine NCLAT 3885**. The relevant para of is extracted below:

> *"**9.** The Ld. Counsel for the Respondent during the course of arguments and in his reply along with written submissions submitted that the Appellant has filed the Section 9 Application in respect of claims arising under the Settlement Agreement dated 20.11.2018 and not under the MSA dated 27.01.2016. As per the pleadings of the Appellant before the Tribunal the cause of action for the application arose on the Corporate Debtor's alleged default in making payments under the Settlement Agreement. In this connection referred to part-IV of the Section 9 Application filed by the Appellant before the Adjudicating Authority relevant portion at page 265 of the Appeal which deals with particulars of 'operational debt' wherein total amount of debt due as on 24.10.2019 is Rs. 59,72,40,162/- and the Appellant has relied upon the terms of settlement agreement dated 20.11.2018, executed between the Corporate Debtor and the Operational Creditor and as amended by the Notice of Extension dated 30.04.2019 addressed by the Operational Creditor to the Corporate Debtor."*

Pari Materia, the present case differs significantly from Trafigura India (P) Ltd. (Supra). The application at hand relies on invoices, sales contracts, and purchase orders, not on a settlement agreement between the Applicant and the Corporate Debtor. Therefore, Trafigura India (P) Ltd. (Supra) cannot be

considered relevant, as the facts of this case differ from those in the aforementioned case.

16. The coordinate benches of National Company Law Tribunal have discussed the same issue in the following matters:

AFCO Energy (P) Ltd. v. Kiran Global Chem Ltd., 2021 SCC OnLine NCLT 7225

> *"**12**. It is further submitted by the Operational Creditor, between the date of last payment made on 07.06.2019 and till date, the Corporate Debtor has not made any payment and there is no dispute on the debt amount as the same is admitted by the Corporate Debtor under the Settlement Agreement. As on 25.12.2019, the total outstanding due in terms of Settlement Agreement is USD 3,33,509.33/-*
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> *…*
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> *…*
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> *…*
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> ***17**. In view of the above observations, this Bench is inclined to admit this Application as the Applicant has made out a case and also satisfied this Adjudicating Authority for admitting this application. It is also proved that there is a debt due and payable by the Corporate Debtor and they have defaulted in making a payment as per the agreement dated 26.04.2019. The Corporate Debtor prayed to this Tribunal to keep this application in abeyance for a period 6 months, this is not valid ground for keeping in abeyance this Application for long period."*

Delta Electro Mechanical Pvt. Ltd. Vs. Sahara Hospitality Ltd., 2022 SCC OnLine NCLT 216

> *"**8**. In view of the above facts and circumstances and breach of the settlement agreement by the Corporate Debtor further the existence of debt and default has been proved by the Operational Creditor and at the very outset the Corporate Debtor has accepted it's liability in view of its Settlement Agreement thereby acknowledging its liability which is due and payable against the facilities extended by the Operational Creditor.*
>
> ***9**. Further the Corporate Debtor has also nothing stated on the merits of the case nor has denied the liability accrued with regards*

to the facilities extended. Hence it is clear that the liability to repay falls on the Corporate Debtor.

***10**. For the foregoing reasons, the above Company Petition is liable to be admitted, and accordingly the same is admitted by passing the following…..”*

Another bench in **Pawan Putra Securities Private Limited Vs. Wearit Global Limited, 2022 SCC OnLine NCLT 6547,** has observed that:

*“**22**. But the proposition has to be considered along with the facts of each case in which the proposition was given. In Brand Realty Services supra the Operational Creditor had filed the section 9 petition for default in payment with respect to the settlement agreement and not invoices. Similarly, Delhi Control Devices supra, the Operational Creditor therein had withdrawn the notice sent under section 8 of the Code in terms of the settlement agreement and had later filed a petition under section 9 of the Code without sending a demand notice under section 8 of the Code.”*

In AFCO Energy Pvt. Ltd *(Supra)* and Delta Electro Mechanical Pvt. Ltd. *(Supra),* the Coordinate benches of National Company Law Tribunal admitted the position that there is no bar on initiation of Corporate Insolvency Resolution Process where the Corporate Debtor has admitted its liability for its outstanding debt in the Settlement Agreement. The Corporate debtor had relied on M/s. Brand Realty Services Ltd. Vs. Mis. Sir John Bakeries India Pvt. Ltd., CP (IB) 1677(ND)/2019 and Delhi Control Devices (P) Limited v. Fedders Electric and Engineering Ltd., CP (IB)-343/ALD/2018, in view of Pawan Putra *(supra)* the facts of both the cases are different from the present case.

In the present case, pursuant to Settlement Deed no payments were made by the Corporate Debtor and as per express terms, Corporate Debtor remain liable to pay outstanding dues as per original conditions i.e., current outstanding along with interest @ 12% per annum. Also, it is nowhere mentions that the Demand Notice dated 09.01.2020 is withdrawn. Thus, the contentions raised by the Corporate Debtor have no merit in light of precedents cited above and the present application filed by the Operational Creditor under Section 9 of the

IBC 2016 is deemed maintainable as Demand Notice under Section 8 is considered appropriate and should not be rejected.

17. The Hon'ble NCLAT in the matter of **Ahluwalia Contracts (India) Ltd. v. Jasmine Buildmart (P) Ltd., 2023 SCC OnLine NCLAT 579** vide its order dated 01.09.2023 relied on Ahluwalia Contracts (India) Limited v. Logix Infratech Private Limited, 2022 SCC OnLine NCLAT 3797 and held that the breach of a settlement agreement, when it relates to the mode of payment for an underlying operational debt, does not render a Section 9 Application for insolvency proceedings as not maintainable. The Settlement Agreement/Memorandum of Understanding entered between the parties was related to the mode and manner of payment, and the failure to make payment did not absolve the Corporate Debtor from its debt and default. The relevant extracted is reproduced below:

> *"11. In the above judgment, it is clearly held that Memorandum of Understanding entered between the parties was only with regard to mode and manner of payment and that too after final bill certificate which was duly signed by both the parties. It was held that Application under Section 9 ought not to have been rejected. Present is also a case where the operational debt arose out of contract awarded by the Corporate Debtor to the Operational Creditor, with regard to which RA Bill Nos. 49 and 50 final bills were issued. Present is not a case that Corporate Debtor denied his liability to pay the bills rather during pendency of earlier Section 9 Application entered into settlement dated 16.12.2017 for payment of the amount.*
>
> *15. We have already noticed the nature of operational debt claimed in Section 9 Application, which arose out of construction contract granted to the Operational Creditor by the Corporate Debtor. Settlement during earlier Section 9 proceeding was only mode of payment to the operational debt. The facts of the present case are clearly distinguishable. The judgment of this Tribunal in "Trafigura India Private Limited v. TDT Copper Ltd." does not come to any aid to the Appellant."*

18. The Corporate Debtor has raised an objection regarding the maintainability of the present application, contending that the Applicant failed to comply with the requirements of Section 9(3)(c), (d), and (e) of the Insolvency and Bankruptcy Code, 2016. From the perusal of submissions, it is the admitted fact that the

sale transaction between the Corporate Debtor and the Applicant is insured by Export Development Canada (EDC), and the amounts pertaining to this transaction have already been settled. The insured amount has been paid to the Applicant, thereby fulfilling the obligations related to the transaction. Per Contra the Applicant contented that the insurance taken by Operational Creditor to cover the underlying transaction is distinct and independent from the Corporate Debtor's liability to make payment of its outstanding debt. And it does not confer any right to Corporate Debtor to not make payments to Operational Creditor. The Hon'ble NCLAT in the matter of **Milan Aggarwal v. Saudi Basic Industries Corpn., 2023 SCC OnLine NCLAT 2317** categorically held that Corporate Debtor cannot take shelter on the ground that Operational Creditor has received the claimed amount from insurance Company. The Corporate Debtor is still liable to pay its debt and the Operational Creditor is under obligation to return the money to the Insurance Company. Thus, we are inclined to accept the Applicant's contention and mere fact that payment has already been made to the operational creditor in relation to the operational debt cannot be the sole grounds for rejecting the present application.

19. As far as the compliance of Section 9(3)(c), (d) & (e) is concerned, it a trite law and well settled by the Hon'ble Supreme Court in the matter of **Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.** that the certificate of financial institution confirming there is no payment of unpaid Operational Debt by the Corporate Debtor, shall not be a pre-condition to trigger Corporate Insolvency Resolution Process under the Code. Hence, the current Section 9 application's admissibility cannot be refuted solely on the grounds of compliance of certificates of Section 9(3)(c), (d), and (e) of the Insolvency and Bankruptcy Code, 2016.

The relevant extract of **Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674 : (2018) 2 SCC (Civ) 706 : 2017 SCC OnLine SC 1493** is reproduced below:

> ***"16.*** *When we come to clause (c) of Section 9(3), it is equally clear that 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 is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. This becomes clearer when we go to clause (d) of Section 9(3) which requires such other information as may be specified has also to be furnished along with the application.

When Form 5 under Rule 6 is perused, it becomes clear that Part V thereof speaks of particulars of the operational debt. There are 8 entries in Part V dealing with documents, records and evidence of default. Item 7 of Part V is only one of such documents and has to be read along with Item 8, which speaks of other documents in order to prove the existence of an operational debt and the amount in default. Further, Annexure III in the Form also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only "if available". This would show that such accounts are not a precondition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given, if Section 9 is to be read with the Adjudicating Authority Rules and the Forms therein, all of which set out the statutory conditions necessary to invoke the Code."

20. The Corporate Debtor further objected the validity and enforceability of the Sales Contract entered into between the parties on 02.02.2019. the Corporate Debtor submitted that the parties have novated the contract in terms of Section 62 of Indian Contract Act, 1872 by way of settlement deed dated 10.02.2020 and as a consequence, the Applicant cannot claim the amount outstanding as per the invoices and sales contract. By entering into settlement, the parties have superseded the earlier payment terms as well as obligations and therefore, original contract need not be performed. Per Contra the Operational Creditor relied on the judgment of Hon'ble Supreme Court in the matter of **Lata Construction v. Rameshchandra Ramniklal Shah (Dr), (2000) 1 SCC 586,** and asserted that the settlement agreement entered between the parties have not superseded the Sales Contract. The relevant extract of **Lata**

Construction v. Rameshchandra Ramniklal Shah (Dr), (2000) 1 SCC 586 is reproduced below:

> ***"9.*** *We may, at this stage, refer to the provisions of Section 62 of the Indian Contract Act which provides as under:*
> *"62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."*
> *This provision contains the principle of "novation" of contract.*
> ***10.*** *One of the essential requirements of "novation", as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract."*

Peri Materia in the present case the sales contract only elucidates the terms and conditions as to the purchase order of 276 MT Aluminum Billets but the Settlement Agreement provides for different rate of interest as a Settlement from the agreed rate of interest on the outstanding dues. Thus, it can be concluded that both the agreements are different from each other and independent in its own way.

Further, the coordinate bench of the national company law tribunal in the matter of **Compuage Infocom Ltd. v. Presto Info Solutions (P) Ltd., CP IB 244(ND)2021** has admitted the position that alteration in the rate of interest cannot be termed as novation of contract under Section 62 of Indian Contract Act, 1872 as the same also cannot be inferred from the illustrations given under section 62. Thus, we are of considered opinion that the contentions of Corporate Debtor assert no merit and both the agreements have their own value in the transaction forming distinct liabilities against each other.

Hence, the present applications is maintainable in the eyes of law and complies with the Code.

21. In order to determine the admissibility of petition for initiating CIRP under Section 9 of the Code, the judgment of the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353** is to be taken into consideration. The said judgment makes it clear that in order to initiate CIRP proceedings under Section 9 of the Code, the Adjudicating Authority has to determine the existence of Operational Debts, default in Operational Debt and the existence of dispute between the parties prior to issuance of demand notice under Section 8.

22. In the first instance, to determine as to whether the said amount claimed by the Operational Creditor would fall under the ambit of 'Operational 'Debt', it is pertinent to analyze the definition of 'Operational Debt' as stipulated under Section 5(21) of The Insolvency and Bankruptcy Code, 2016. Under the said Section, the 'Operational Debt' is defined as: *"A claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"*.

    While analyzing the present facts in the light of said definition under Section 5(21), it is observed that the Operational Creditor has engaged in the fabrication and manufacturing of ingots, billets, plates, sheets, and other aluminum products. The Operational Creditor entered into a Sales Contract dated 02.01.2019 with the Corporate Debtor for the supply of 276 MT Aluminum Billets via two separate shipments and shipping term being CIF against with two invoices bearing no. SRINV0000257 and SR-INV0000383 were issued to the Corporate Debtor to the tune of Rs. 603,057.80/-. As per the terms of the sales contract the corporate debtor was under an obligation to make 20% advance payment and the balance within 120 days against the bill of lading date. The Corporate Debtor has mad ethe 20% advance payment and further USD 50,000/- on another date while acknowledging the balance payment. However, no payments were made against the outstanding of USD 434,377/- along with interest as admitted by the Corporate Debtor vide email dated 24.-07.2019.

23. Furthermore, on the consideration of the transactional invoices, as annexed by the Operational Creditor, and placed before us, we are of the view that there had been a transaction between the Operational Creditor and the Corporate Debtor and that the Operational Creditor has supplied the Aluminum Billets to the Corporate Debtor and therefore, is claiming the outstanding payment in respect of the invoices so raised. Hence, this Adjudicating Authority is inclined towards believing that the debt claimed by the petitioner as per sales contract of 276 MT Aluminum Billet comes under the purview of 'Operational Debt' within the meaning of Section 5(21) of the Code and the default has been occurred in terms of Section 3(12) of the Code.

24. It is observed that as per the requirement of Section 8(2)(a) of the Code, the Corporate Debtor is required to bring into notice of the Operational Creditor, existence of any dispute within 10 days of the receipt of the statutory demand notice issued and delivered by the Operational Creditor u/s 8(1) of the Code. In the present case, the Corporate Debtor has filed reply via email dated 17.01.2020 to the demand notice dated 09.01.2020 sent by the Operational creditor to the Corporate Debtor. Thereafter, the corporate debtor had sent a subsequent reply to the Demand notice on 20.01.2020. Therefore, the Corporate Debtor has fulfilled the requirement of sending reply to demand notice within the stipulated period of 10 days of the receipt of demand notice as laid down under said Section 8(2)(a) of the Code.

25. It is also observed that the Corporate Debtor attempted to show that there is a 'Pre-existing dispute' between the parties which has arisen before the receipt of demand notice sent by the Operational Creditor to the Corporate Debtor. The Corporate Debtor disputes both on the shipping and quality of goods. The Corporate Debtor asserted that as per the sales contract, the Applicant was obliged to ship first lot by 15.01.2019 and Second Lot by 25.01.2019. however, the first lot was shipped on 30.01.2019 and second lot on 11.03.2019, thereby causing delay of 14 and 43 days respectively and many customers cancelled their orders leading to substantial financial losses to the Corporate Debtor. Moreover, the corporate Debtors also contended that the goods supplied by the

Operational creditor are of inferior quality and it has received various quality complains from the customers and many customers too have returned the good on the pretext of being inferior quality.

26. In **Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353**, the Hon'ble Supreme Court has held that *"an application under Section 9 of the Code is not maintainable and ought to be rejected on there being a "pre-existing dispute"*. The Hon'ble Supreme Court had held that *"so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application"*. Therefore, to admit or reject this application, it is pertinent to adjudicate upon the issue as to whether there exists any 'Pre-Existing Dispute' as claimed by the Corporate Debtor.

27. On going through the records, it is observed that the Corporate Debtor had sent several emails to the Operational Creditor making the acknowledgement of the debt claimed by the Operational Creditor. Furthermore, the Corporate Debtor had not raised any dispute in respect of the alleged debt in the acknowledgement-emails, before receipt of the statutory demand notice and rather, raised it for the first time in its reply dated 17.01.2020. Albeit the Corporate debtor submitted that the Applicant was informed about the quality dispute with Mr. John, an authorized Agent of the Applicant during his visit on 09.12.2019 and also mentions that they discussed adjustments against the said invoices. In support of this, the Corporate Debtor has relied on email dated 13.12.2019. the extract of email dated 13.12.2019 is provided below:

From: Pradeep
Date: 2019-12-13 17:57
To: Crystal Chan
CC: [All] John Lee; Colin Chang; Joanna Hao; Victor Tee
Subject: Re: Remittance Advise

Dear Crystal,

Mr John has visited us on 9 th and also visited the plant , he has been appraised of the current situation we are facing .
We are in the process of finding a resolution with our banks , which may take some time to materialise , maybe another 4-8 weeks
We are also working to find pvt equity solution to settle our creditors including Sino dues .
It is our endeavour to clear the dues soon , but as things are now it may take sometime .
It is requested to bear with us till February/ March by then we should be able to advice confirmed dates of the balance payments .

Regards

Pradeep Jain

Furthermore, on the appreciation of documents placed before us, we are of the view that any such dispute as claimed by the Corporate Debtor was never in existence before the issuance of demand notice and the email dated 13.12.2019 cannot substantiate any intimation as to dispute as raised by the corporate debts.

28. Thus, Corporate Debtor had not enclosed any other relevant document in support of its claim as to the existence of a 'Pre-Existing Dispute' between the Operational Creditor and the Corporate Debtor. Furthermore, the email dated 13.12.2019 placed on record never shows that there has been an intimation of pre-existing dispute between the parties. We are of the view that mere sending of notice as to the existence of a dispute, without any substantiating document in the said regard, is a mere contention and cannot be acted upon. Therefore, the defense of the Corporate Debtor does not substantiate any plausible ground for rejecting the instant application. Hence, the defense of the Corporate Debtor appears to be moonshine.

29. Therefore, in view of the transactional invoices and other documents placed before us, by both the parties, we are satisfied that there exists an 'Operational Debt' and that the Corporate Debtor has defaulted in the payment of such debt. Hence, we are of the view that there is a debt due and payable and that there has been default on the part of the Corporate Debtor.

30. In view of the above facts and circumstances, we are satisfied that the present petition filed by the Operational Creditor fulfils the criteria laid down under the provisions of Section 9(5) of the Insolvency and Bankruptcy Code. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. In the light of the above facts and circumstances, it is, hereby ordered as follows: -

a) The application bearing **CP (IB) No. 519/ND/2022** filed by, **M/s. Sinometal Resources Inc.,** the Operational Creditor, under Section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **M/s. Indo Alusys Industries Ltd.,** the Corporate Debtor, stands **admitted**.

b) The Applicant has not proposed the name of any IRP in Part-III of the application and leaves it at the discretion of this Adjudicating Authority. Therefore, Mr. Satish Kumar Chugh**,** Registration Number IBBI/IPA-003/00270/2020-2021/13196, Email: skchugh111@gmail.com included in the list of Insolvency Professionals approved by IBBI for the period January 01- June 30,2024 is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code, subject to submission of his consent in Form AA with disclosure and a valid Authorization of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. It is pertinent to mention that the IRP has a valid AFA.

c) We direct the Applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Satish Kumar Chugh, to meet out the expenses to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this

order by the Operational Creditor. The amount, however, be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

d) We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(a)The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
> *(b)Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
> *(c)Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
> *(d)The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor."*
> *(e)The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period."*

e) It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the

surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

f) The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.

g) In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

h) A copy of the order shall be communicated to the Applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Let copy of the order be served to the parties.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)