

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 03.04.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/1853/2023, IA (IBC)/1584/2023, IA (IBC)/1635/2023, IA (IBC)/1741/2023 in Company Petition IB/308/2022
NAME OF THE COMPANY	Gayatri Projects Ltd
NAME OF THE PETITIONER(S)	State Bank of India
NAME OF THE RESPONDENT(S)	Gayatri Projects Ltd
UNDER SECTION	7 of IBC

ORDER

IA (IBC)/1853/2023

Orders pronounced, recorded vide separate sheets. In the result, this application is dismissed.

IA (IBC)/1584/2023 and IA (IBC)/1741/2023

Orders pronounced, recorded vide separate sheets. In the result, this application is disposed of.

Consequently, all adjustments made by MEIL are illegal and in violation of law and MEIL shall be obliged to refund such amounts, notwithstanding that these amounts have already been disbursed to the Statutory Authorities, who have not been impleaded as parties.

This order does not restrict the right of MEIL to claim any dues from the CD and any such claims shall be submitted to the Resolution Professional in accordance with the provisions of IBC.

IA (IBC)/1653/2023

Orders pronounced, recorded vide separate sheets. In the result, this application is dismissed.

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II**

**IA.No.1584 of 2023 in
CP (IB) No.308/7/HDB/2022**

**[Under Section 60(5) of the Insolvency and Bankruptcy Code,
R/W Rule 11 of the National Company Law Tribunal Rules, 2016]**

In the matter of M/s CIRP of M/s Gayatri Projects Limited

Between:

M/s.GuruRaghavendra Infrastructures,
@ (GRI) (A Partnership Firm), having its
Registered office at 2-293/82/C/16/A,
Plot # 16, Road No. 07, Jubilee Hills,
Hyderabad-500033, Telangana.
Represented by its Managing Partner
Mr. D.V. Krishna Reddy.

...Applicant

And

1. Sai Ramesh Kanuparth, (RP),
Resolution Professional Gayatri Projects
Limited, (in CIRP) having its registered
Office at 6-3-1090, TSR Towers,
Rajbhavan Road, Somajiguda,
Hyderabad-500016, India.
2. Superintendent Engineer, (Employer)
Indira Sagar Right Main Canal Circle,
Eluru, West Godavari District, AP.
3. M/s.MEIL-GAYATRI-ZVS-ITT, (Consortium)
(A Joint Venture unincorporated Company)
S-2, Technocrat Industrial Estate, Balanagar,
Hyderabad-500037.

...Respondents

Date of Order: 03.04.2024

Coram:

Hon'ble Rajeev Bhardwaj, Member (Judicial)
Hon'ble Sanjay Puri, Member (Technical)

Counsel/Parties present:

For the Applicant : Mr. P. Pratap Kumar, Advocate
For the Respondent No.1 : Mr. Ravi Kumar, Advocate
For the Respondent No.2 : Mrs. JVL Bharati, Advocate

Per: [Rajeev Bhardwaj, Member (Judicial)]

ORDER

1. The instant application has been filed under section 60(5) of the Insolvency and Bankruptcy Code read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking number of directions to the Respondents as how the amount released by the Respondent No.2 in the account of Respondent No.3 is to be disbursed etc.
2. Brief facts, necessary to dispose of the present application, as stated, are that:
 - 2.1 The Respondent No.2 awarded the contract of Package No.1 of “CHINTALAPUDI LIFT IRRIGATION SCHEME to a Consortium of M/s. MEIL-GAYATRI-ZVS-ITT, Respondent No.2 vide letter no.SE/ISMRC/DB/TO/ATO/CHLIS-1/128M dated 25.02.2009. Before the award of the contract, the members of the Consortium, M/s. MEIL-GAYATRI-ZVS-ITT entered into an agreement on 28.01.2009, defining their sharing ratio and scope of work. Another supplemental consortium agreement was executed on 25.02.2009 among the four members containing terms and conditions and their respective roles and scope of works. The Respondent No.2 further awarded two additional works to the Respondent No.3.

- 2.2 Regarding the additional work, it was agreed that the Respondent No.1 shall execute the work, value of which was Rs.1843.60 Crores.
- 2.3 The Respondent No.1 executed its part of additional work and sub-contracted major portion of the additional work to the Applicant vide agreement dated 07.11.2020. Both Applicant and Respondent No.1 agreed for the payment of the work as per terms and conditions of the agreement.
- 2.4 The Applicant addressed a letter dated 13.09.2023 to the Respondent No.3 enclosing the Bill No.4 (RA Bill 86) and 5 (RA Bill 87), both dated 05.09.2023 along with E-Invoices evidencing the payment of GST thereon and requested for the release of Rs.10.07 Crores, the due amount out of the total amount of Rs.17.93 Crores released by the Respondent No. 2 to the account of the Respondent No.3. Prior to this also, the Applicant wrote letters to the Respondent No.1 but no payment was released.
- 2.5 When nothing was heard from the Respondent No.3, another letter dated 29.09.2023 was sent to the Respondent No.1 to expedite the release of payment by relying upon section 20 (2) (b) of the IBC.
- 2.6 In the meanwhile, the C.P./IB/No.308/2022 filed under section 7 of the Insolvency and Bankruptcy Code, 2016 was admitted against the Respondent No.1 vide order dated 15.11.2022 by the NCLT, Hyderabad Bench-I.
- 2.7 In view of the CIRP, it is claimed that it is the duty of the resolution professional of the Respondent No.1 to preserve the assets value of the

Corporate Debtor. During the CIRP, the moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) is fundamental to the goal of value maximization of assets under the IBC. Reference has also been made to the decision of the Hon'ble Apex Court in *Gujarat Urja Vikas Nigam Limited versus Amit Gupta & Ors.* to submit that the NCLT has residuary jurisdiction to grant relief and this jurisdiction is also in contractual disputes in relation to the Insolvency Resolution Process of the Corporate Debtor. The executory contracts constitute a critical asset of the Respondent No.1 as it affects the ability of the Corporate Debtor to remain a viable enterprise. Therefore, such executory contracts are to be honoured.

- 2.8 In these circumstances, the Applicant has prayed for taking urgent steps for the recovery of amounts already released by the Respondent No.2 to the Respondent No.3 and remits the amount to the account of the Respondent No.1.
3. Both the Respondent No.1 and 3 have not denied that the contract was awarded by the Respondent No.2 to the Respondent No.3 vide agreement No. 2SE/2008-909 dated 27.02.2009 and further agreements dated 28.01.2009 and 25.02.2009 were executed among the members of the Consortium. It is also not denied that the additional work was awarded by the Respondent No.2 on 11.06.2011 and out of this work, the Respondent No.1 sub-contracted major portion of the work to the Applicant vide agreement dated 07.11.2020. Similarly, there is no denial that the amount of Rs.17,93,01,294/- was received from the Respondent No.2 on 28.08.2023 in respect of the works got allocated and executed by the Respondent No.1.

- 3.1 The Respondent No. 1 has referred to Clause 6 of the agreement dated 07.11.2020 to say that the Corporate Debtor was to release the payment to the Applicant through designated Escrow Account or Joint Account upon receiving the same from the Respondent No.3.
- 3.2 It is alleged that the Respondent No.3 has illegally adjusted the entire sum of Rs.17,93,01,294/- payable to the Respondent No.1. In the absence of the payment received from Respondent No.3, no further remittance could be made to the Applicant.
4. The Respondent No.3 quoted Clause 6.5(f) to claim that it was agreed by the parties that they are liable to bear/discharge their respective tax liability and the payments to be made to Consortium partners are subject to deduction of income tax at source and all other applicable taxes. It is also provided in Clause 15.4 of the supplementary agreement dated 25.02.2009 that if a party becomes bankrupt or insolvent, the other party shall be at liberty to take over the works of such insolvent party by giving notice to the liquidator/receiver etc. In view of the Respondent No.1 becoming bankrupt and facing liquidation proceedings, the responsibility & liability of execution of remaining portion of project & completion thereof as per the contract agreement (entered into with I & CAD department by Consortium) is burdened on the lead partner (MEIL).
- 4.1 It is claimed that the GST department informed the Respondent No.3 vide letter F.No. DGGI/INT/INTL.1484/2022-Gr-H, dated 25.08.2023 that Consortium availed input tax credit of Rs.7,09,74,786/- during the year 2021-22 and Rs. 6,75,37,040/- during 2019-20 & 2020-21 on account of Respondent No.1, who was actually ineligible, because M/s.

Gayatri Projects Limited did not file GSTR-1 return for the said GST received amount and this amount is also not reflected in GSTR2A of M/s. Gayatri Projects Limited. Therefore, the Respondent No.3 was forced to discharge the GST liability of Rs.13,85,11,826/-.

- 4.2 It is also referred in the tripartite agreement dated 19.02.2022 that the Respondent No.1 is liable to pay an amount of Rs.7,76,66,243/- towards GST and an amount of Rs.24,51,94,844/- was overdrawn by the Respondent No.1, which were actually to be received by M/s. Megha Engineering & Infrastructures Limited.
- 4.3 Thus, the payment of Rs.17,93,01,294/- received from the Respondent No.3 on 28.08.2023 in respect of the works executed by the Respondent No. 1 was adjusted against its liability i.e., payment of Rs.14,28,64,092/- to the GST department through cheque No.02016912, dated 31.08.2023. GST amount of Rs.3,28,41,323/- to M/s. Megha Engineering & Infrastructures Limited through cheque No.02016910, dated 31.08.2023, and paid an amount of Rs.35,95,879/- towards TDS of Respondent No.1 to Income Tax department (totalling to Rs.17,92,99,294).
- 4.4 Now there is no amount lying to the credit of Respondent No.1 in the bank account of the Respondent No.3. It is denied that any joint letter dated 04.09.2023 was received from the Applicant and Respondent No1. It is claimed that the Respondent No.3 came to know about the CIRP of Respondent No.1 when notice was received from NCLT, Hyderabad on 04.10.2023. The amount was paid by the Respondent No.3 as per terms and conditions of the agreement and further the liability of the Respondent No.1 towards the government departments.

5. **We have heard both the Learned Counsels and have also gone through the entire records.**

6. Indisputably, the Consortium consisting of (i) M/s. MeghaEngineering & Infrastructures Limited, Hyd (ii) M/s. Gayatri Projects Limited, Hyd (iii) Zarubezhvodstroy, Moscow, Russia and (iv) ITT Corporation India Pvt. Ltd, Vadodara was awarded contract by the Respondent No.2 vide letter dated 25.02.2009 and a Memorandum of understanding between Respondent No.1 and Respondent No.3 was executed on 11.06.2011. The contract in question was agreed to be executed by the Respondent No. 1 who further sub-contracted it to the Applicant. As per the arrangement between the Applicant and the Respondent No.1, the payment for the work executed by the Applicant was to be released by the Respondent No.2 in the account of the Respondent No.3 and then it was to be transferred to the Escrow account of the Respondent No.1 and Applicant. The Applicant submitted Bill No.4 (RA Bill 86) and 5 (RA Bill 87), against which payment of Rs.17.93 Crores was released by the Respondent No.2 in the account of the Respondent No.3. However, the Respondent No.3 instead of remitting the amount to the Escrow account, adjusted this payment in the following manner:

- a) *Payment of Rs.14,28,64,092/- through cheque No.02016912 dated 31.08.2023 to the GST Dept.*
- b) *Reimbursement of earlier paid GST amount of Rs.3,28,41,323/- to M/s. Megha Engineering & Infrastructures Limited through cheque No.02016910, dated 31.08.2023, and*
- c) *Paid an amount of Rs.35,95,879/- towards TDS of M/s. Gayatri Projects Limited to the Income Tax Department (totalling to Rs.17,92,99,294).*

7. The Respondent No.1 also went into CIRP vide order dated 15.11.2022 in CP(IB)No.308/7/HDB/2022 filed under Section 7 of the IBC by M/s. State Bank of India against M/s. Gayatri Projects Limited/Respondent No.1. The payment was released in favour of the Respondent No.3 by the Respondent No.2 after the CIRP period and thereafter adjustment was made by the Respondent No.3 against the pending GST and income tax liability.
8. Now the question arises whether the Respondent No.3 was competent to adjust this amount on its own towards the so-called tax liabilities of Respondent No.1 in view of moratorium under section 14 of IBC vide order dated 15.11.2022.
9. As per common parlance, the moratorium means *legally authorized period of delay in the performance of a legal obligation or the payment of a debt*. Under section 13(1)(a) of the Code, the adjudicating authority is required to impose a moratorium for matters referred to in section 14.
10. The purpose of inserting the provision relating to moratorium has been explained by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Ors. versus Union of India (UOI) and Ors (2019)4 SCC 17*** in the following words:

“...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”.

11. Again, the Hon’ble Supreme Court in *Sundaresh Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs (2023)1 SCC 472* reiterated its earlier position that Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process.

12. We need to interpret the provisions of IBC by keeping in view the object behind incorporating the concept of moratorium. Section 14 (1) provides for moratorium to protect the assets of the CD on one hand and section 14(2) read with section 20 and section 25(1) provides for maintaining the CD as a going concern so as to preserve the assets and property of the CD, thus achieving the purpose and object of Code i.e. “maximisation of the value of the assets” as provided in the preamble. Therefore, the scheme of the Code, does impose moratorium under section 14 to preserve the assets of the CD but such protection cannot be read to defeat the object and

purpose of the Code i.e. the requirement of maintaining the CD as a going concern, by making section 14(1) subject to section 14(2).

13. The emphasis of keeping the going concern is also seen from the various powers and authorisation which have been bestowed on the IRP/RP, especially sections 18, 19 and 20 which give a free hand to the IRP/RP to maintain the CD as a going concern and thus preserve and protect the value of the property of the CD. Therefore, section 14 (1) is not an absolute bar on IRP so as to restrict its powers and authorisations to maintain the CD as a going concern. In fact, sections 14(2), 20 and 25(1) operate as an exception to section 14(1). The powers under sections 14(2), 20 and 25(1) are exercised to undertake so as to preserve the property of the CD and maintain it as a going concern.
14. In the context of keeping the CD as a going concern, section 14(2) is relevant which provides that supply of *essential goods or services*, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) which was added with effect from 28 December 2019 provides that, where the IRP/ RP considers the supply of goods or services critical to protect and preserve the value of the CD and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.
15. The essential goods and services have been defined in Regulation 32, which means-

- (1) electricity;
- (2) water;
- (3) telecommunication services; and
- (4) information technology services,

To the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

16. The Legislature uses the word “mean” where it wants to exhaust the significance of the term defined and the word “includes” where it intends that, while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive. It has been held by the Hon’ble Supreme Court in ***Reclamation Corporation Ltd. versus Presiding Officer, Labour Court, (1990)3 SCC 682*** that when word “means” is employed it shows that the definition is hard and fast and no other meaning can be assigned to the word or expression “defined” that is put down in the definition. Thus, It is well-established rule of interpretation that the Legislature uses the word “means” where it wants to exhaust the significance of the term defined, and the word “includes”, where the term defined should retain its ordinary meaning, its scope should be widened by the specific enumeration of certain matters which its ordinary meaning may or may not convey so as to make it enumerative but not exhaustive. Accordingly, the term ‘means’ in a definition indicates that the no other meaning can be assigned to the expression that is put down in definition. Therefore, this tribunal is bound by the definition as provided in Regulation 32.

17. The Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Limited versus Mr. Amit Gupta & Ors. (2021)7 SCC 209* held that the inclusion of the Explanation to Section 14(1) and Section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a Corporate Debtor as a going concern is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. The Hon'ble NCLAT in *Harish Taneja RP versus Dakshin Haryana Bijli Vitran Nigam (2021) ibclaw.in 370 NCLAT* held that use of electricity for running the printing business of the CD cannot get protection as essential supply u/s 14 of the Code r/w CIRP Regulation 32. In another case, the Hon'ble NCLAT in *Shailesh Verma, RP versus Maharashtra State Electricity Distribution Company Ltd. (2022) ibclaw.in 677 NCLAT*, it was held that the scheme delineated by section 14(1) explanation as well as section 14(2A) is same, that is, all benefits, which were enjoyed by the Corporate Debtor given by government or authority should be continued, but subject to condition that there is no default of payment of current dues.
18. Section 30(2)(a) read with Regulation 31(a) CIRP Regulations, 2016, also makes it clear that dues to suppliers for essential goods and services supplied during the moratorium period are a part of the IRP costs and are required to be paid back in priority to any other creditor as a part of the resolution plan. The cost incurred to protect and preserve the value of the property of the corporate debtor or in running the business of the corporate debtor as a going concern is termed as Insolvency Resolution Process Cost. It is important to note that IRPC does not include any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP.

19. From the aforesaid discussion, we are of the view that the period can be divided into pre-CIRP and post-CIRP. For the Pre-CIRP period there is almost complete bar to claim dues except in the manner as provided under the IBC at the time of approval of the resolution plan or liquidation, but post CIRP it is also the duty of the IRP/RP to keep the corporate debtor as going concern and for this purpose he has to form opinion whether certain supplies as contained in Regulation 32 are essential.
20. The Hon'ble Supreme Court in ***Dena Bank versus C. Shiva kumar Reddy and Anr. (2021) ibclaw.in 69 SC*** held that the provisions of the IBC are designed to ensure that the business and/or commercial activities of the Corporate Debtor are continued by a Resolution Professional, post imposition of a moratorium, which would give the Corporate Debtor some reprieve from coercive litigation, which could drain the corporate debtor of its financial resources. This is to enable the Corporate Debtor to improve its financial health and at the same time repay the dues of its creditors.
21. In case of pre-CIRP tax liabilities, the Hon'ble Rajasthan High Court in ***Ultra Tech Nathdwara Cement Ltd. versus Union of India and Ors.. Civil Writ Petition No. 9480/2019 decided On: 07.04.2020*** held that no demands can be raised by any statutory body (*in this case the GST authorities*), for a period prior to the approval of resolution plan, and after the resolution plan is successfully being executed. To the same effect is the decision of the Hon'ble NCLT in ***Director General of Income Tax (Admn. & TPS) versus Synergies Dooray Automotive Ltd. [CA (AT) (Ins) No. 205 of 2017]*** which upheld the decision of the NCLT, Hyderabad that all statutory liabilities including taxes would be considered as operational debt. The NCLAT held that:

“29. ... As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of ‘Operational Debt’.”

22. The requirement of making payment of outstanding dues for the period prior to the CIRP has also been considered in the case of *Uttarakhand power corporation limited (UPCL) versus ANG industries limited Company Appeal (AT) (Insolvency) No.298 of 2017, dated 24-01-2018* wherein the Hon’ble NCLAT while allowing the application under section 14(2) of the code seeking for restoration of electricity supply to ensure that the Corporate Debtor remains a going concern, held that the UPCL (appellant) cannot recover the dues which are unpaid for the period prior to the insolvency. For the pre-CIRP claims, the appellant tribunal made the findings that the appellant has the right to submit claim before RP. Therefore, pre-CIRP payment to certain operational creditors cannot be made by RP. Such payment to the operational creditors is not only discriminatory to the other similarly situated creditors, but also dilutes the scheme of the Code.
23. Similarly, it was held by the Hon’ble NCLAT in *Vijay Kumar V Iyer versus Bharti Airtel Ltd [2020] ibclaw.in 18 NCLAT* that accounting conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The Code, 2016 provides the mechanism of moratorium during the CIRP till the resolution plan is approved or liquidation order is passed. The Code has a provision to

override other laws as enunciated above. Even if there are some such provisions in any other law, the Code 2016 will prevail over that.

24. The Hon'ble Supreme Court in its recent judgment in *Sundaresh Bhat versus Central Board of Indirect Taxes and Customs supra* while ratifying the primacy of IBC over the Customs Act in case of a clash, precluded the custom authorities (CBIC) from initiating actions to recover outstanding dues under the Customs Act against the distressed corporate debtor undergoing CIRP.
25. Hence, the dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be accordingly filed in accordance with the provisions of the IBC. Once the moratorium is kicked in, it does not allow to recover any amount from the CD nor CD can appropriate any amount towards its own dues as held by the Hon'ble NCLAT in *Ravi Kumar Tomar versus Newgen Speciality Plastics Ltd. (2022) ibclaw.in 652 NCLAT*.
26. In nutshell, the Code provides for a moratorium on all the past dues of the Corporate Debtor, therefore, the payment of pre-CIRP claims is also contrary to Section 14 of the code. The intention of the legislature behind providing the moratorium is "to provide the debtors a breathing spell in which he is to seek to reorganize his business" as held by the Hon'ble Supreme Court in *Innovative Industries Limited versus ICICI Bank Limited, 2018 (1) SCC 407*.
27. If the dues are received by the CD during the moratorium period like in the present case, it becomes the asset of the CD. In *Mr. Sudip Bhattacharya*

RP of Reliance Naval & Engineering Ltd. versus UCO Bank (2021) ibclaw.in 50 NCLT it was held after relying upon the decision in *Indian Overseas Bank versus Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited, [2017] ibclaw.in 50 NCLAT* that the amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the IB Code.

28. The amounts received by the Corporate Debtor during the CIRP are assets of the Corporate Debtor whose transfer to chosen creditor in priority without the process of resolution plan is prohibited. The amounts received towards interim finance during pendency of CIRP for which account was opened in the branch of Bank have to be held as amounts received by the Corporate Debtor during CIRP and are to be utilised as per the provisions of IBC, rules and regulations and the Resolution Professional is responsible for due utilisation of the same, strictly as per the provisions of IBC, rules and regulations and the resolution plan which was approved by the Adjudicating Authority.

29. The Hon'ble NCLAT in *SM Milkose Ltd. versus Parvinder Kumar Bhatt, Deputy Zonal Manager, Bank of India (2021) ibclaw.in 410 NCLAT* held that section 14 of the IBC, particularly sub-section (b) of section 14(1) prohibits “*transferring, encumbering, alienating or disposing of by the Corporate Debtor, any of its assets or any legal right or beneficial interest therein*”. It is quite clear about how accruals to the corporate debtor are to be treated during the currency of CIRP. This provision prohibits the Corporate Debtor, and the resolution professional who is managing the

affairs of the Corporate Debtor during CIRP, from transferring any of the Corporate Debtor's assets to creditors.

30. In view of law on the subject, we have to appreciate the prayer in the instant application wherein the amounts belonging to the CD were adjusted by the MEIL towards the payments of GST dues etc. on 31.08.2023 which is much after the CD was admitted into CIRP and when the moratorium was in force.
31. The Respondent No.3 has relied on the clause 5(d) of the tripartite agreement dated 19.02.2022 to establish its right to pay the GST by adjusting the amounts belonging to the CD. Clause 5(d) is extracted below:

d) The amounts so payable to GPL & GPL Subcontractor, other subcontractors i.e. (1) Sri Krishna Engineering Company, Rajahmundry (u) Gee Bee Constructions, Hyderabad (iii) Vennela Traders & Contractors, Tanuku, WG Dist. shall be debited by Consortium to the account of GPL before transferring to the same to their respective designated bank accounts/before issuance of cheques. All the applicable taxes & duties shall be debited to GPL. However, Consortium Lead Partner (ie. MEIL) shall have absolute right to appropriate/adjust the amounts payable to GPL's share in this Clause towards dues payable by GPL to MEIL, and towards undeposited GST etc., which are described in the recitals, and remit the same to MEIL's bank account

32. It is also important for us to look into clause 6.5(f) and clause 11.0 of the supplementary consortium agreement dated 25.02.2009, which are extracted below:

6.5(f) The above payments shall be subject to applicable income tax deduction at source by the Employer as well as by the Consortium as applicable from time to time. Any other taxes / deductions as applicable in accordance with the laws of India on behalf of the Consortium shall be borne by the Parties as applicable to their scope / nature of works. Any Income Tax refund shall be distributed between the

11.0 Taxes

11.1 Any and all taxes, duties or other form of Governmental withholding incurred by the Members will be to the account of the respective party.

11.2 In respect of the income tax the TDS shall be shared by all the parties in respective shares and in respect of other taxes and duties, royalties etc., the project manager shall apportion them depending upon the nature of job.

11.3 Service tax liability shall be discharged by the respective party according to its scope of work and re-imbursement claims from the employer.

33. The above mentioned clauses clearly shows that the taxes incurred by the members of Consortium will be paid by the respective party, thus the liabilities of tax incurred by the CD shall be paid only by the CD and the same if not paid cannot be adjusted by MEIL from the amounts of the CD.
34. Furthermore, it is crucial to acknowledge that the funds released by the Consortium ultimately belong to the sub-contractor. The Corporate Debtor was only entitled to receive a 15% margin from the Sub-contractor on the gross work bills and Escalation Bills, as outlined in Clause 3 of the Sub-contract Agreement dated November 7, 2020. This clause serves as evidence of the payments allocated to the CD from the funds released by the Consortium. The said clause is extracted below for a ready reference:

3) Payment Terms

a) GPL is entitled to receive 15% margin from GRI on Grass work bills and on Escalation bills.

b) The break up for payment of 15% margin to GPL by GRI in bills shall be as follows -

10% shall be taken in running bills and balance 5% from 7.5% Retention Money by producing Bank guarantee. The Bank guarantees shall be arranged by GPL and the banker charges and commission incurred towards arrangement of such Bank Guarantees shall be borne by GRI

35. Moreover, the claims of the GST were to the Consortium but not alone to the CD, thus the adjustment made by the MEIL towards such dues is to escape the liability of the Consortium as a whole.
36. Whatsoever may be the terms and conditions of the agreement, it will not supersede the provisions of the IBC as discussed in plethora of judgments referred above and thus, Respondent No.3's contention claiming unawareness of the CD being admitted into CIRP is not acceptable as ignorance of law is no excuse and the adjustments of amounts is contravention of section 14 of IBC.
37. Based on the aforementioned observations, it is evident that MEIL has violated section 14 of the Insolvency and Bankruptcy Code (IBC). Consequently, all adjustments made by MEIL are illegal and in violation of law, and MEIL shall be obligated to refund such amounts, notwithstanding that these amounts have already been disbursed to the Statutory Authorities, who have not been impleaded as parties.
38. This order does not restrict the right of MEIL to claim any dues from the CD and any such claims shall be submitted to the Resolution Professional in accordance with the provisions of IBC.

SD/-

(SANJAY PURI)
MEMBER (TECHNICAL)

SD/-

(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II**

**IA No.1635 of 2023 in
CP(IB) No.308/7/HDB/2022**

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016, read with Rule 11 of the National
Company Law Tribunal Rules, 2016*

In the matter of M/s. Gayatri Projects Limited

Between:

M/s.RVN Infra Private Limited,
H.No.8-2-293-82-NL, Plot No.79,
Road No.10C, MLA & MP Colony,
Jubilee Hills, Hyderabad - 500 034.
Represented by its Managing Director
Sri R.Venkatramaiah.

....Applicant

A n d

1. Mr.Sai Ramesh Kanuparthi,
Resolution Professional for
M/s.Gayatri Projects Limited,
Regd Office: B-1, 6-3-1090,
TSR Towers, Rajbhavan Road,
Somajiguda, Hyderabad – 500 082.
2. The Superintendent Engineer (Employer),
Indira Sagar, Right Main Canal Circle,
Eluru, West Godavari District,
Andhra Pradesh.

....Respondents

Date of Order: 03.04.2024

Coram:

Hon'ble Rajeev Bhardwaj, Member (Judicial)
Hon'ble Sanjay Puri, Member (Technical)

Counsel/Parties present:

For the Petitioner : Mr.P.Pratap, Advocate
For the Respondent No. 1 : Mr.Ravi Kumar, Advocate
For the Respondent No. 2 : Mr.J.V.L.Bharati, Advocate

Per: [Rajeev Bhardwaj, Member (Judicial)]

ORDER

1. The instant application has been filed by the Applicant, M/s.RVN Infra Private Limited (hereinafter referred as “RVNIPL”) under section 60(5) of Insolvency and Bankruptcy Code r/w rule 11 of the National Company Law Tribunal Rules, 2016 to direct the Resolution Professional to take urgent steps against the Respondent No.2/Employer/Department for release of the amounts due and payable.
2. The facts necessary to dispose of the present application are that:
 - 2.1 That the Respondent No.2 awarded contract of Package No.2 of the “Chintalpudi Lift Irrigation Scheme” to M/s.Gayatri Projects Limited (hereinafter referred as “GPL”) vide letter No.SE/ISMRC/DB/TO/ATO1/CHLIS-2/141M dated 27.02.2009. The Respondent No.2 gave additional works to “GPL” vide agreement No.80SE/18-2019 dated 04.10.2018.The “GPL” sub-contracted major part of the said work vide agreement dated 05.12.2020 to the Applicant “RVNIPL”.

- 2.2 As per the agreement dated 05.12.2020, “GPL” agreed to take 16% margin from the Applicant on gross work bills and escalation bills after deducting the GST and TDS.
- 2.3 It was also agreed by “GPL” that the amounts payable to the Applicant shall be released into the escrow account opened with the Bank of Baroda, Hyderabad vide escrow agreement dated 19.09.2022.
- 2.4 When the Respondent No.2 delayed the payment, the Applicant wrote a letter dated 07.09.2023 to the Respondent No.1 asking to take steps for the release of outstanding bills bearing Nos.244097/2023 (LS39) and 384605/2023 (LS40) and further to process the due bills as per the sub-contract agreement dated 05.12.2020. However, no action was taken by the Respondent No.1 for releasing the payment.
- 2.5 Meanwhile, the “GPL” was also put into CIRP Vide order dated 05.11.2022 and Mr. Sai Ramesh Kanuparthi was appointed as Resolution Professional of the Corporate Debtor.
- 2.6 It is claimed that the inaction on the part of Respondent No.1 is against the tenets of IBC and defeating the legislative intent and purpose of preserving the asset value of “GPL” during the CIRP. The scope of work is governed by the Agreement dated 05.12.2020 and is in the realm of ‘executory contract’. The financial viability of “GPL” also depends on its ability to draw benefits from its contractual arrangements and therefore ‘executory contract’ has a direct bearing on the viability of “GPL”.

- 2.7 The NCLT is fully competent under section 60(5) of the IBC to adjudicate this matter and in this regard has also relied upon the decision of the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited versus Amit Gupta & Others.***
- 2.8 Moreover, section 14 of IBC provides that all services, licences, permits, registrations, quotas, concessions, clearances or similar grants or rights given by any authority shall not be suspended or terminated on the grounds of insolvency. Any obligations arising from any arrangement with respect to such 'executory contracts' are also exempt from moratorium.
- 2.9 Therefore, the Applicant has prayed for the release of the due and payable amount against the bills bearing Nos.244097/2023 (LS39) and 384605/2023 (LS40) and further all the future bills that will be submitted as per agreement dated 05.12.2022. In the alternative, it is prayed that the Respondent No.1 be directed to include the payable amount in the CIRP costs and further to convene the meetings of CoC and SRA, if any, so that the Applicant may continue as sub-contractor of the Corporate Debtor.
3. In reply, the Respondent No.1 has contested the averments of the Application, but has not disputed the award of contract by the Respondent No.2 to Respondent No.1 and further that the Corporate Debtor gave a part of the work to the Applicant vide agreement dated 05.12.2020. However, the Respondent No. 1 submitted that:

- 3.1 As per the terms and conditions of the agreement, Respondent No.1 would transfer the amount to the Applicant after the same is received from the Respondent No.2. But, the Respondent No.2 has not made the payment of the running account bills and therefore the Respondent No.1 is not in a position to make any payment to the Applicant.
- 3.2 In these circumstances, it is submitted that the Respondent No.2 be directed to remit the amount to “GPL” against the pending bills so that needful may be done.
4. We have heard the Learned Counsels for both the parties and have also gone through the entire records.
5. There is no dispute that “GPL” was awarded contract vide agreement dated 05.12.2020 and further in pursuance of Agreement dated 04.09.2018, “GPL” sub-contracted some of the work to the Applicant vide Agreement dated 05.12.2020. The “GPL” went into CIRP as application under section 7 of the IBC was admitted vide order dated 15.11.2022.
6. The terms & conditions of the Agreement dated 05.12.2020 make it clear that Respondent No.1 was to transfer the due amount of the Applicant into the Escrow Account opened with the Bank of Baroda. However, the payment of the running account bills bearing No. Nos.244097/2023 (LS39) and 384605/2023 (LS40) has not been paid to the Applicant because the money was not received from the Respondent No.1 or Respondent No.2.

7. When moratorium under section 14 of IBC is made applicable regarding the affairs of the Corporate Debtor vide order dated 15.11.2022, the question arises about its impact on the payment of the bills of the Applicant.
8. As per common parlance, the moratorium means *legally authorized period of delay in the performance of a legal obligation or the payment of a debt*. Under section 13(1)(a) of the Code, the adjudicating authority is required to impose a moratorium for matters referred to in section 14.
9. The purpose of inserting the provision relating to moratorium has been explained by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Ors. versus Union of India (UOI) and Ors (2019)4 SCC 17*** in the following words:

“...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”.

10. Again, the Hon’ble Supreme Court in *Sundaresh Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs (2023)1 SCC 472* reiterated its earlier position that Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process.
11. We need to interpret the provisions of IBC by keeping in view the object behind incorporating the concept of moratorium. Section 14 (1) provides for moratorium to protect the assets of the CD on one hand and section 14(2) read with section 20 and section 25(1) provides for maintaining the CD as a going concern so as to preserve the assets and property of the CD and thus achieving the purpose and object of Code i.e. “maximisation of the value of the assets” as provided in the preamble. Therefore, the scheme of the Code, does impose moratorium under section 14 to preserve the assets of the CD but such protection cannot be read to defeat the object and purpose of the Code i.e. the requirement of maintaining the CD as a going concern, by making section 14(1) subject to section 14(2).
12. The emphasis of keeping the going concern is also seen from the various powers and authorisation which have been bestowed on the IRP/RP,

especially sections 18, 19 and 20 which give a free hand to the IRP/RP to maintain the CD as a going concern and thus preserve and protect the value of the property of the CD. Therefore, section 14 (1) is not an absolute bar on IRP so as to restrict its powers and authorisations to maintain the CD as a going concern. In fact, sections 14(2), 20 and 25(1) operate as an exception to section 14(1). The powers under sections 14(2), 20 and 25(1) are exercised to undertake so as to preserve the property of the CD and maintain it as a going concern.

13. In the context of keeping the CD as a going concern, section 14(2) is relevant which provides that supply of *essential goods or services*, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) which was added with effect from 28 December 2019 provides that, where the IRP/ RP considers the supply of goods or services critical to protect and preserve the value of the CD and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.
14. The essential goods and services have been defined in Regulation 32, which means-
 - (1) *electricity*
 - (2) *water;*
 - (3) *telecommunication services; and*
 - (4) *information technology services,*

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

15. The Legislature uses the word “mean” where it wants to exhaust the significance of the term defined and the word “includes” where it intends that while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive. It has been held by the Hon’ble Supreme Court in ***Reclamation Corporation Ltd. versus Presiding Officer, Labour Court, (1990)3 SCC 682*** that when word “means” is employed it shows that the definition is hard and fast and no other meaning can be assigned to the word or expression “defined” that is put down in the definition. It is well-established rule of interpretation that the Legislature uses the word “means” where it wants to exhaust the significance of the term defined, and the word “includes”, where the term defined should retain its ordinary meaning, its scope should be widened by the specific enumeration of certain matters which its ordinary meaning may or may not convey so as to make it enumerative but not exhaustive. Accordingly, the term ‘means’ in a definition indicates that the no other meaning can be assigned to the expression that is put down in definition. Therefore, the tribunal is bound by the definition as provided in Regulation 32.

16. The Hon’ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited versus Mr. Amit Gupta & Ors. (2021)7 SCC 209*** held that the inclusion of the Explanation to section 14(1) and section 14(2A) indicates that Parliament

has been amending the IBC to ensure that the status of a Corporate Debtor as a going concern is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. The Hon'ble NCLAT in *Harish Taneja RP versus Dakshin Haryana Bijli Vitran Nigam (2021) ibclaw.in 370 NCLAT* held that use of electricity for running the printing business of the CD cannot get protection as essential supply u/s 14 of the Code r/w CIRP Regulation 32. In another case, the Hon'ble NCLAT in *Shailesh Verma, RP versus Maharashtra State Electricity Distribution Company Ltd. (2022) ibclaw.in 677 NCLAT*, it was held that the scheme delineated by section 14(1) explanation as well as section 14(2A) is same, that is, all benefits, which were enjoyed by the Corporate Debtor given by Government or authority should be continued, but subject to condition that there is no default of payment of current dues.

17. Section 30(2)(a) read with Regulation 31(a) CIRP Regulations, 2016, also makes it clear that dues to suppliers for essential goods and services supplied during the moratorium period are a part of the IRP costs and are required to be paid back in priority to any other creditor as a part of the resolution plan. The cost incurred to protect and preserve the value of the property of the corporate debtor or in running the business of the corporate debtor as a going concern is termed as Insolvency Resolution Process Cost. It is important to note that IRPC does not include any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP.
18. From the aforesaid discussion, we are of the view that the period can be divided into pre-CIRP and post-CIRP. For the Pre-CIRP period there is

almost complete bar to claim dues except in the manner as provided under the IBC at the time of approval of the resolution plan or liquidation, but post CIRP it is also the duty of the IRP/RP to keep the corporate debtor as going concern and for this purpose he has to form opinion whether certain supplies as contained in Regulation 32 are essential.

19. The Hon'ble Supreme Court in ***Dena Bank versus C. Shivakumar Reddy and Anr. (2021) ibclaw.in 69 SC*** held that the provisions of the IBC are designed to ensure that the business and/or commercial activities of the corporate debtor are continued by a Resolution Professional, post imposition of a moratorium, which would give the Corporate Debtor some reprieve from coercive litigation, which could drain the Corporate Debtor of its financial resources. This is to enable the Corporate Debtor to improve its financial health and at the same time repay the dues of its creditors.

20. In case of pre-CIRP tax liabilities, the Hon'ble Rajasthan High Court in ***Ultra Tech Nathdwara Cement Ltd. versus Union of India and Ors.. Civil Writ Petition No. 9480/2019 decided On: 07.04.2020*** held that no demands can be raised by any statutory body (*in this case the GST authorities*), for a period prior to the approval of resolution plan, and after the resolution plan is successfully being executed. To the same effect is the decision of the Hon'ble NCLT in ***Director General of Income Tax (Admn. & TPS) versus Synergies Dooray Automotive Ltd. [CA (AT) (Ins) No. 205 of 2017]*** which upheld the decision of the NCLT, Hyderabad that all statutory liabilities including taxes would be considered as operational debt. The NCLAT held that:

“29. ... As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of ‘Operational Debt.’”

21. The requirement of making payment of outstanding dues for the period prior to the CIRP has also been considered in the case of *Uttarakhand power corporation limited (UPCL) versus ANG industries limited Company Appeal (AT) (Insolvency) No.298 of 2017, dated 24-01-2018* wherein the Hon’ble NCLAT while allowing the application under section 14(2) of the code seeking for restoration of electricity supply to ensure that the Corporate Debtor remains a going concern, held that the UPCL (appellant) cannot recover the dues which are unpaid for the period prior to the insolvency. For the pre-CIRP claims, the appellant tribunal made the findings that the appellant has the right to submit claim before RP. Therefore, pre-CIRP payment to certain operational creditors cannot be made by RP. Such payment to the operational creditors is not only discriminatory to the other similarly situated creditors, but also dilutes the scheme of the Code.
22. Similarly, it was held by the Hon’ble NCLAT in *Vijay Kumar versus Iyer versus Bharti Airtel Ltd [2020] ibclaw.in 18 NCLAT* that accounting conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The Code, 2016 provides the mechanism of moratorium during the CIRP till the resolution plan is approved or liquidation order is passed. The Code has a provision to

override other laws as enunciated above. Even if there are some such provisions in any other law, the Code 2016 will prevail over that.

23. The Hon'ble Supreme Court in its recent judgment in ***Sundaresh Bhat versus Central Board of Indirect Taxes and Customs supra*** while ratifying the primacy of IBC over the Customs Act in case of a clash, precluded the custom authorities (CBIC) from initiating actions to recover outstanding dues under the Customs Act against the distressed Corporate Debtor undergoing CIRP.
24. Hence, the dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be accordingly filed in accordance with the provisions of the IBC. Once the moratorium is kicked in, it does not allow to recover any amount from the CD nor CD can appropriate any amount towards its own dues as held by the Hon'ble NCLAT in ***Ravi Kumar Tomar versus Newgen Speciality Plastics Ltd. (2022) ibclaw.in 652 NCLAT.***
25. In nutshell, the Code provides for a moratorium on all the past dues of the corporate debtor, therefore, the payment of pre-CIRP claims is also contrary to Section 14 of the code. The intention of the legislature behind providing the moratorium is "to provide the debtors a breathing spell in which he is to seek to reorganize his business" as held by the Hon'ble Supreme Court in ***Innovative Industries Limited v ICICI Bank Limited, 2018 (1) SCC 407.***

26. If the dues are received by the CD during the moratorium period like in the present case, it becomes the asset of the CD. In ***Mr. Sudip Bhattacharya RP of Reliance Naval & Engineering Ltd. versus UCO Bank (2021) ibclaw.in 50 NCLT*** it was held after relying upon the decision in ***Indian Overseas Bank versus Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited, [2017] ibclaw.in 50 NCLAT*** that the amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the IB Code.
27. The amounts received by the Corporate Debtor during the CIRP are assets of the Corporate Debtor whose transfer to chosen creditor in priority without the process of Resolution Plan would be prohibited. The amounts received towards interim finance during pendency of CIRP for which account was opened in the branch of Bank have to be held as amounts received by the Corporate Debtor during CIRP and are to be utilised as per the provisions of IBC, Rules and Regulations and the Resolution Professional is responsible for due utilisation of the same, strictly as per the provisions of IBC, Rules and Regulations and the Resolution Plan which was approved by the Adjudicating Authority.
28. The Hon'ble NCLAT in ***SM Milkose Ltd. versus Parvinder Kumar Bhatt, Deputy Zonal Manager, Bank of India (2021) ibclaw.in 410 NCLAT*** held that Section 14 of the IBC, particularly sub-section (b) of section 14(1) prohibits “*transferring, encumbering, alienating or disposing of by the Corporate Debtor, any of its assets or any legal right or beneficial interest therein*”. It is quite clear about how accruals to the

Corporate Debtor are to be treated during the currency of CIRP. This provision prohibits the Corporate Debtor, and the Resolution Professional who is managing the affairs of the Corporate Debtor during CIRP, from transferring any of the Corporate Debtor's assets to creditors.

29. In view of the legal enunciation as discussed above, we are of the view that there is no merit in the application and the Applicant has also failed to show that the outstanding payment do not pertain to pre-CIRP. Hence, the amount claimed is to be disbursed as per section 53 IBC and accordingly the application is dismissed.

SD/-

**SANJAY PURI
MEMBER (TECHNICAL)**

SD/-

**RAJEEV BHARDWAJ
MEMBER (JUDICIAL)**

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II**

**IA No.1741 of 2023 in
CP(IB) No.308/7/HDB/2022**

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016, read with Rule 11 of the National
Company Law Tribunal Rules, 2016*

In the matter of M/s CIRP of M/s Gayatri Projects Limited

Between:

M/s.Sri Krishna RVN Infra Private Limited,
Rep. by its Partner Sri B.Rama Rao,
Having its office at: D.No.80-30-09/5,
3rd Street, Jayasri Gardens,
Jawaharlal Nehru Road,
Rajahmundry – 533 103,
E.G.District, Andhra Pradesh

....Applicant

A n d

1. M/s.Gayatri Projects Limited,
Rep.by Mr.K.Ramesh, Resolution Professional,
Corporate Office: B-1, T.S.R. Towers,
6-3-1090, Rajbhavan Road,
Somajiguda,Hyderabad – 500 082.

....Respondents No.1

2. M/s.Meil-Gayatri-ZVS-ITT Consortium,
Represented by its lead member,
M/s.Megha Engineering & Infrastructure Ltd.,
No.52, Industrial Estate, Bala Nagar,
Hyderabad, Telangana.

....Respondents No.2

3. M/s.GuruRaghavendra Infrastructures,
B-2-293/82/C/16/A, Plot No.6,
Road No.7, Jubilee Hills,
Hyderabad, Telangana.

....Respondents No.3
....Respondents

Date of Order: 03.04.2024

Coram:

Hon'ble Rajeev Bhardwaj, Member (Judicial)
Hon'ble Sanjay Puri, Member (Technical)

Counsel/Parties present:

For the Petitioner : Mr.V.V.S.N.Raju, Advocate
For the RespondentNo.1 : Mr.Ravi Kumar, Advocate
For the RespondentNo. 2 : Mr.V.S.R.Avadhani, Advocate

Per: [Rajeev Bhardwaj, Member (Judicial)]

ORDER

1. The instant application has been filed by the Applicant, M/s.Sri Krishna Engineering Company & Others (hereinafter referred as “SKEC”), represented by its partner Sri B.Sai Rama Rao under section 60(5) of Insolvency and Bankruptcy Code r/w Rule 11 of the National Company Law Tribunal Rules, 2016 to direct the Respondents to remit an amount of Rs.2,22,83,714/- to the account of the Applicant.
2. Brief facts necessary to dispose of the present application, as stated, are that:
 - 2.1 The Consortium consisting of M/s.MEIL-GAYATRI-ZVS-IIT (hereinafter referred to as **Consortium/Respondent No.2**) was awarded the contract of “Chintalpudi Lift Irrigation Scheme” project vide letter No.SE/ISRMC/DB/TO/ATO/CHLIS-1/128M dated 25.02.2009. Prior to

this, the members of the Consortium entered into an agreement on 08.01.2009 defining their sharing ratio and scope of work. Another supplementary agreement dated 25.02.2009 was executed regarding the work of the Consortium members.

- 2.2 The member of the Consortium, M/s.MEIL completed its work and additional two more works were awarded to the Respondent No.2 by the Government vide letters dated 05.10.2018 and 26.06.2020.
- 2.3 It was agreed by the members of the Consortium that the additional work may be completed by the M/s.Gayatri Projects Limited (hereinafter called as **CD/Respondent No.1**) and accordingly, Memorandum of Understanding (MOU) dated 11.11.2020 was executed.
- 2.4 The Respondent No.1 further sub-contracted some part of the work vide agreement dated 09.02.2021 to the Applicant.
- 2.5 Regarding the payment, a Tripartite Agreement dated 19.02.2022 was entered into amongst Respondent No.1, Respondent No.2 and GRE sub-contractor. The Applicant has been receiving the payment from time to time and the last payment was received on 21.03.2022.
- 2.6 The Respondent No.3 received payment of Rs.17,93,01,294/- against the RA bills Nos.86 & 87, out of which an amount of Rs.2,22,83,714/- was to be paid to the Applicant. Meanwhile, the "GPL" was also put into CIRP vide order dated 05.11.2022 and Respondent No.1 was appointed as Resolution Professional of the Corporate Debtor.

- 2.7 Regarding the payment, letter was written on 04.09.2023 to the Respondent No.2, but no such payment was made. Another request was made vide e-mail dated 06.10.2023, but there was no result.
- 2.8 In these circumstances, the Applicant has prayed for issuing directions to remit Rs.2,22,83,714/- in its account or in the alternate issue other directions for recovery of the said amount.
3. Both the Respondent No.1 and 2 have not denied that the contract was awarded to the Respondent No.2 vide agreement dated 25.02.2009 and agreements dated 28.01.2009 and 25.02.2009 were executed among the members of the consortium. It is also not denied that the additional work was awarded to the Respondent No.1 by the Respondent No.2 and out of this work, the Respondent No.1 sub-contracted a portion of the work to the Applicant vide agreement dated 09.02.2021. Similarly, there is no denial that the amount of Rs.17,93,01,294/- was received on 28.08.2023 in respect of the works allocated and got executed by the Respondent No.1.
- 3.1 Respondent No. 1 has referred to Clause 6 of the agreement dated 07.11.2020 to say that the Corporate Debtor was to release the payment to the Applicant through designated Escrow Account or Joint Account upon receiving the same from the government.
- 3.2 It is alleged that the Respondent No.2 has illegally adjusted the entire sum of Rs.17,93,01,294/- payable to the Respondent No.1. In the absence of the payment received from Respondent No.2, no further remittance could be made to the Applicant.

4. The Respondent No.2 quoted Clause 6.5(f) to claim that it was agreed by the parties that they are liable to bear/discharge their respective Tax Liability and the payments to be made to Consortium partners are subject to deduction of income tax at source and all other applicable taxes. It is also provided in Clause 15.4 of the supplementary agreement dated 25.02.2009 that if a party becomes bankrupt or insolvent, the other party shall be at liberty to take over the works of such insolvent party by giving notice to the liquidator/receiver etc. In view of the Respondent No.1 becoming bankrupt and facing liquidation proceedings, the responsibility & liability of execution of remaining portion of project & completion thereof as per the contract Agreement (entered into with I&CAD Department by Consortium) is burdened on the Lead Partner (MEIL).
- 4.1 It is claimed that the GST Department informed the Respondent No.2 vide letter F.No.DGGI/INT/INTL.1484/2022-Gr-H, dated 25.08.2023 that Consortium availed input tax credit of Rs.7,09,74,786/- during the year 2021-22 and Rs.6,75,37,040/- during 2019-20 & 2020-21 on account of Respondent No.1, who was actually ineligible, because M/s.Gayatri Projects Limited did not file GSTR-1 return for the said GST received amount and this amount is also not reflected in GSTR2A of M/s.Gayatri Projects Limited. Therefore, the Respondent No.2 was forced to discharge the GST liability of Rs.13,85,11,826/-. It is also referred in the agreement dated 19.02.2022 that the Respondent No.1 is liable to pay an amount of Rs.7,76,66,243/- towards GST and an amount of Rs.24,51,94,844/- was overdrawn by the Respondent No.1,

which was actually to be received by M/s.Megha Engineering & Infrastructures Limited.

- 4.2 However, the “SKEC” is not a party to the Tripartite Agreement dated 19.02.2022 executed among Respondent Nos.1 to 3, but its name is mentioned as one of the recipients of the amounts to be received by the Respondent No. 1 from the Respondent No. 2.
- 4.3 Thus, the payment of Rs.17,93,01,294/- received from the I& CAD department on 28.08.2023 in respect of the works got executed by the Respondent No.1 was adjusted against its liability i.e., payment of Rs.14,28,64,092/- to the GST department through cheque No.02016912, dated 31.08.2023, GST amount of Rs.3,28,41,323/- to M/s.Megha Engineering & Infrastructures Limited through cheque No.02016910, dated 31.08.2023, and an amount of Rs.35,95,879/- towards TDS of Respondent No.1 to Income Tax department (totalling to Rs.17,92,99,294/-).
- 4.4 Now there is no amount lying to the credit of Respondent No.1 in the bank account of the Respondent No.2. It is claimed that the Respondent No.2 came to know about the CIRP of Respondent No.1 when notice was received from NCLT, Hyderabad on 04.10.2023. The amount was paid by the Respondent No.2 as per terms and conditions of the agreement and further the liability of the Respondent No.1 towards the government departments.
5. We have heard both the Learned Counsels and have also gone through the entire records.

6. Indisputably, the Consortium consisting of (i) M/s.Megha Engineering & Infrastructures Limited, Hyd (ii) Gayatri Projects Limited, Hyd (iii) Zarubezhvodstroy, Moscow, Russia and (iv) ITT Corporation India Pvt. Ltd, Vadodara was awarded contract by the government and a Memorandum of Understanding was executed among the members of the Consortium. The contract in question was agreed to be executed by the Respondent No. 1 who further sub-contracted a part of it to the Applicant. As per the arrangement between the Applicant and the Respondent No.1, payment was to be released by the Principal employer in the Escrow account of the Respondent No.1 and Applicant. Against the Bill No.4 (RA Bill 86) and 5 (RA Bill 87), payment of Rs.17.93 Crores was released by the Principal employer in the account of the Respondent No.2, wherein the Applicant is entitled to receive an amount of Rs. 2,22,83,714/- However, the Respondent No.2 instead of remitting the amount to the Escrow account, adjusted this payment which includes the amount due to the Applicant in the following manner:

- a) *Payment of Rs.14,28,64,092/- through cheque No.02016912 dated 31.08.2023 to the GST Dept.*
- b) *Reimbursement of earlier paid GST amount of Rs.3,28,41,323/- to M/s. Megha Engineering & Infrastructures Limited through cheque No.02016910, dated 31.08.2023, and*
- c) *Paid an amount of Rs.35,95,879/- towards TDS of M/s. Gayatri Projects Limited to the Income Tax Department (totalling to Rs.17,92,99,294).*

7. The Respondent No.1 also went into CIRP vide order dated 15.11.2022 in CP(IB)No.308/7/HDB/2022 filed under Section 7 of the IBC by M/s. State

Bank of India against M/s. Gayatri Projects Limited/Respondent No.1. The payment was released in favour of the Respondent No.2 by the Principal Employer after the CIRP period and thereafter adjustment was made by the Respondent No.2 against the pending GST and income tax liability.

8. Now the question arises whether the Respondent No.2 was competent to adjust this amount on its own towards the so-called tax liabilities of Respondent No.1 in view of moratorium under section 14 of IBC vide order dated 15.11.2022.
9. As per common parlance, the moratorium means *legally authorized period of delay in the performance of a legal obligation or the payment of a debt*. Under section 13(1)(a) of the Code, the adjudicating authority is required to impose a moratorium for matters referred to in section 14.
10. The purpose of inserting the provision relating to moratorium has been explained by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Ors. versus Union of India (UOI) and Ors(2019)4 SCC 17*** in the following words:

“...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”.

11. Again, the Hon'ble Supreme Court in ***Sundaresh Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs (2023)1 SCC 472*** reiterated its earlier position that Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process.

12. We need to interpret the provisions of IBC by keeping in view the object behind incorporating the concept of moratorium. Section 14 (1) provides for moratorium to protect the assets of the CD on one hand and Section 14(2) read with section 20 and section 25(1) provides for maintaining the CD as a going concern so as to preserve the assets and property of the CD, thus achieving the purpose and object of Code i.e. “maximisation of the value of the assets” as provided in the preamble. Therefore, the scheme of the Code, does impose moratorium under section 14 to preserve the assets of the CD but such protection cannot be read to defeat the object and

purpose of the Code i.e. the requirement of maintaining the CD as a going concern, by making section 14(1) subject to section 14(2).

13. The emphasis of keeping the going concern is also seen from the various powers and authorisation which have been bestowed on the IRP/RP, especially sections 18, 19 and 20 which give a free hand to the IRP/RP to maintain the CD as a going concern and thus preserve and protect the value of the property of the CD. Therefore, section 14 (1) is not an absolute bar on IRP so as to restrict its powers and authorisations to maintain the CD as a going concern. In fact, sections 14(2), 20 and 25(1) operate as an exception to section 14(1). The powers under sections 14(2), 20 and 25(1) are exercised to undertake so as to preserve the property of the CD and maintain it as a going concern.
14. In the context of keeping the CD as a going concern, section 14(2) is relevant which provides that supply of *essential goods or services*, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) which was added with effect from 28 December 2019 provides that, where the IRP/ RP considers the supply of goods or services critical to protect and preserve the value of the CD and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

15. The essential goods and services have been defined in Regulation 32, which means-

- (1) electricity;
- (2) water;
- (3) telecommunication services; and
- (4) information technology services,

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

16. The Legislature uses the word “mean” where it wants to exhaust the significance of the term defined and the word “includes” where it intends that, while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive. It has been held by the Hon’ble Supreme Court in ***Reclamation Corporation Ltd. versus Presiding Officer, Labour Court, (1990)3 SCC 682*** that when word “means” is employed it shows that the definition is hard and fast and no other meaning can be assigned to the word or expression “defined” that is put down in the definition. Thus, it is well-established rule of interpretation that the Legislature uses the word “means” where it wants to exhaust the significance of the term defined, and the word “includes”, where the term defined should retain its ordinary meaning, its scope should be widened by the specific enumeration of certain matters which its ordinary meaning may or may not convey so as to make it enumerative but not exhaustive. Accordingly, the term ‘means’ in a definition indicates that the no other meaning can be

assigned to the expression that is put down in definition. Therefore, the tribunal is bound by the definition as provided in Regulation 32.

17. The Hon'ble Supreme Court in ***Gujarat UrjaVikas Nigam Limited versus Mr. Amit Gupta &Ors. (2021)7 SCC 209*** held that the inclusion of the Explanation to section 14(1) and section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a Corporate Debtor as a going concern is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. The Hon'ble NCLAT in ***Harish Taneja RP versus Dakshin Haryana BijliVitrان Nigam (2021) ibclaw.in 370 NCLAT*** held that use of electricity for running the printing business of the CD cannot get protection as essential supply u/s 14 of the Code r/w CIRP Regulation 32. In another case, the Hon'ble NCLAT in ***ShaileshVerma, RP versus Maharashtra State Electricity Distribution Company Ltd. (2022) ibclaw.in 677 NCLAT***, it was held that the scheme delineated by section 14(1) explanation as well as section 14(2A) is same, that is, all benefits, which were enjoyed by the Corporate Debtor given by Government or authority should be continued, but subject to condition that there is no default of payment of current dues.
18. Section 30(2)(a) read with Regulation 31(a) CIRP Regulations, 2016, also makes it clear that dues to suppliers for essential goods and services supplied during the moratorium period are a part of the IRP costs and are required to be paid back in priority to any other creditor as a part of the resolution plan. The cost incurred to protect and preserve the value of the property of the corporate debtor or in running the business of the corporate

debtor as a going concern is termed as Insolvency Resolution Process Cost. It is important to note that IRPC does not include any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP.

19. From the aforesaid discussion, we are of the view that the period can be divided into pre-CIRP and post-CIRP. For the Pre-CIRP period there is almost complete bar to claim dues except in the manner as provided under the IBC at the time of approval of the resolution plan or liquidation, but post CIRP it is also the duty of the IRP/RP to keep the Corporate Debtor as going concern and for this purpose he has to form opinion whether certain supplies as contained in Regulation 32 are essential.
20. The Hon'ble Supreme Court in *Dena Bank versus C. Shivakumar Reddy and Anr. (2021) ibclaw.in 69 SC* held that the provisions of the IBC are designed to ensure that the business and/or commercial activities of the Corporate Debtor are continued by a Resolution Professional, post imposition of a moratorium, which would give the Corporate Debtor some reprieve from coercive litigation, which could drain the corporate debtor of its financial resources. This is to enable the Corporate Debtor to improve its financial health and at the same time repay the dues of its creditors.
21. In case of pre-CIRP tax liabilities, the Hon'ble Rajasthan High Court in *Ultra Tech Nathdwara Cement Ltd. versus Union of India and Ors. Civil Writ Petition No. 9480/2019, decided on 07.04.2020* held that no demands can be raised by any statutory body (*in this case the GST authorities*), for a period prior to the approval of resolution plan, and after

the resolution plan is successfully being executed. To the same effect is the decision of the Hon'ble NCLT in ***Director General of Income Tax (Admn. & TPS) versus Synergies Dooray Automotive Ltd. [CA (AT) (Ins) No. 205 of 2017]*** which upheld the decision of the NCLT, Hyderabad that all statutory liabilities including taxes would be considered as operational debt. The NCLAT held that:

“29. ... As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of ‘Operational Debt’.”

22. The requirement of making payment of outstanding dues for the period prior to the CIRP has also been considered in the case of ***Uttarakhand power corporation limited (UPCL) versus ANG industries limited Company Appeal (AT) (Insolvency) No.298 of 2017, dated 24-01-2018*** wherein the Hon'ble NCLAT while allowing the application under section 14(2) of the code seeking for restoration of electricity supply to ensure that the Corporate Debtor remains a going concern, held that the UPCL (appellant) cannot recover the dues which are unpaid for the period prior to the insolvency. For the pre-CIRP claims, the appellant tribunal made the findings that the appellant has the right to submit claim before RP. Therefore, pre-CIRP payment to certain operational creditors cannot be made by RP. Such payment to the operational creditors is not only discriminatory to the other similarly situated creditors, but also dilutes the scheme of the Code.

23. Similarly, it was held by the Hon'ble NCLAT in *Vijay Kumar V Iyer versus Bharti Airtel Ltd [2020] ibclaw.in 18 NCLAT* that Accounting conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The Code, 2016 provides the mechanism of moratorium during the CIRP till the resolution plan is approved or liquidation order is passed. The Code has a provision to override other laws as enunciated above. Even if there are some such provisions in any other law, the Code 2016 will prevail over that.
24. The Hon'ble Supreme Court in its recent judgment in *Sundaresh Bhat versus Central Board of Indirect Taxes and Customs supra* while ratifying the primacy of IBC over the Customs Act in case of a clash, precluded the custom authorities (CBIC) from initiating actions to recover outstanding dues under the Customs Act against the distressed Corporate Debtor undergoing CIRP.
25. Hence, the dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be accordingly filed in accordance with the provisions of the IBC. Once the moratorium is kicked in, it does not allow to recover any amount from the CD nor CD can appropriate any amount towards its own dues as held by the Hon'ble NCLAT in *Ravi Kumar Tomar versus Newgen Speciality Plastics Ltd. (2022) ibclaw.in 652 NCLAT*.
26. In nutshell, the Code provides for a moratorium on all the past dues of the Corporate Debtor, therefore, the payment of pre-CIRP claims is also contrary to Section 14 of the code. The intention of the legislature behind

providing the moratorium is “to provide the debtors a breathing spell in which he is to seek to reorganize his business” as held by the Hon’ble Supreme Court in *Innovative Industries Limited versus ICICI Bank Limited, 2018 (1) SCC 407*.

27. On the other hand, if the dues are received by the CD during the moratorium period, it becomes the asset of the CD. In *Mr. Sudip Bhattacharya RP of Reliance Naval & Engineering Ltd. versus UCO Bank (2021) ibclaw.in 50 NCLT* it was held after relying upon the decision in *Indian Overseas Bank versus Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited, [2017] ibclaw.in 50 NCLAT* that the amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the IB Code.
28. The amounts received by the Corporate Debtor during the CIRP are assets of the Corporate Debtor whose transfer to chosen creditor in priority without the process of resolution plan is prohibited. The amounts received towards interim finance during pendency of CIRP for which account was opened in the branch of Bank have to be held as amounts received by the Corporate Debtor during CIRP and are to be utilised as per the provisions of IBC, rules and regulations and the Resolution Professional is responsible for due utilisation of the same, strictly as per the provisions of IBC, rules and regulations and the resolution plan which was approved by the Adjudicating Authority.

29. The Hon'ble NCLAT in *SM Milkose Ltd. versus Parvinder Kumar Bhatt, Deputy Zonal Manager, Bank of India (2021) ibclaw.in 410 NCLAT* held that Section 14 of the IBC, particularly sub-section (b) of section 14(1) prohibits “*transferring, encumbering, alienating or disposing of by the Corporate Debtor, any of its assets or any legal right or beneficial interest therein*”. It is quite clear about how accruals to the Corporate Debtor are to be treated during the currency of CIRP. This provision prohibits the Corporate Debtor, and the resolution professional who is managing the affairs of the corporate debtor during CIRP, from transferring any of the Corporate Debtor's assets to creditors.
30. In view of law on the subject, we have to appreciate the prayer in the instant application wherein the amounts belonging to the CD were adjusted by the MEIL towards the payments of GST dues on 31.08.2023 which is much after the CD was admitted into CIRP and when the moratorium was in Force.
31. The Respondent No.2 has relied on the clause 5(d) of the tripartite agreement dated 19.02.2022 to establish its right to pay the GST by adjusting the amounts belonging to the CD. Clause 5(d) is extracted below:
- d) The amounts so payable to GPL & GPL subcontractor, other subcontractors i.e. (1) Sri Krishna Engineering Company, Rajahmundry (u) Gee Bee Constructions, Hyderabad (iii) Vennela Traders & Contractors, Tanuku, WG Dist. shall be debited by Consortium to the account of GPL before transferring to the same to their respective designated bank accounts/before issuance of cheques. All the applicable taxes & duties shall be debited to GPL. However, Consortium Lead*

Partner (ie. MEIL) shall have absolute right to appropriate/adjust the amounts payable to GPL's share in this Clause towards dues payable by GPL to MEIL, and towards undeposited GST etc., which are described in the recitals, and remit the same to MEIL's bank account

32. It is also important for us to look into clause 6.5(f) and clause 11.0 of the Supplementary Consortium Agreement dated 25.02.2009 which are extracted below:

6.5(f) The above payments shall be subject to applicable income tax deduction at source by the Employer as well as by the Consortium as applicable from time to time. Any other taxes / deductions as applicable in accordance with the laws of India on behalf of the Consortium shall be borne by the Parties as applicable to their scope / nature of works. Any Income Tax refund shall be distributed between the

11.0 Taxes

11.1 Any and all taxes, duties or other form of Governmental withholding incurred by the Members will be to the account of the respective party.

11.2 In respect of the income tax the TDS shall be shared by all the parties in respective shares and in respect of other taxes and duties, royalties etc., the project manager shall apportion them depending upon the nature of job.

11.3 Service tax liability shall be discharged by the respective party according to its scope of work and re-imburement claims from the employer.

33. The above mentioned clauses clearly shows that the taxes incurred by the members of consortium will be paid by the respective party, thus the liabilities of tax incurred by the CD shall be paid only by the CD and the same if not paid cannot be adjusted by MEIL from the amounts of the CD.
34. Furthermore, it is crucial to acknowledge that the funds released by the Consortium ultimately belong to the sub-contractor. The Corporate Debtor

was only entitled to receive a 15% margin from the sub-contractor on the gross work bills and escalation bills, as outlined in Clause 3 of the sub-contract agreement dated February 9, 2021. This clause serves as evidence of the payments allocated to the CD from the funds released by the Consortium. The said clause is extracted below for a ready reference:

3) Payment Terms

a) GPL is entitled to receive 15% margin from SKEC on Grass work bills and on Escalation bills.

b) The break up for payment of 15% margin to GPL by SKEC in bills shall be as follows -

10% shall be taken in running bills and balance 5% from 7.5% Retention Money by producing Bank guarantee. The Bank guarantees shall be arranged by GPL and the banker charges and commission incurred towards arrangement of such Bank Guarantees shall be borne by SKEC

35. Moreover, the claims of the GST vide its notices was to the Consortium and not to the CD only, thus the adjustment made by the MEIL towards such dues is to escape the liability of the Consortium as a whole.
36. Whatsoever may be the terms and conditions of the agreement, it will not supersede the provisions of the IBC. Respondent No.2's contention claiming unawareness of the CD being admitted into CIRP is also not acceptable as ignorance of law is no excuse and adjustments of amount is in contravention of section 14 of IBC.
37. Based on the aforementioned observations, it is evident that MEIL has violated section 14 of the Insolvency and Bankruptcy Code (IBC).

Consequently, all adjustments made by MEIL are illegal and in violation of law and therefore, MEIL is directed to refund the said amount, notwithstanding that this amount has already been disbursed to the Statutory Authorities, who have not been impleaded as parties.

38. However, it is made clear that this order does not restrict the right of MEIL i.e., Respondent No.2 to claim any dues from the Corporate Debtor and any such claim shall be submitted to the Resolution Professional in accordance with the provisions of IBC.

SD/-

**SANJAY PURI
MEMBER (TECHNICAL)**

SD/-

**RAJEEV BHARDWAJ
MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH-II, HYDERABAD**

I.A. No. 1853/2023

IN

CP(IB) No. 308/07/HDB/2022

Under Section 60(5) of The Insolvency and Bankruptcy
Code, 2016 r/w. Rule 11 of NCLT Rules, 2016

In the matter of M/s CIRP of M/s Gayatri Projects Limited

Between:

M/S CH VEERRAJU & B VENKATESWARA RAO,

Represented by its Managing Partner Sri. B Venkateshwara Rao.

85-42-03, 4th Floor, Sai Sannidhi Residency,

Model Colony, Rajamahendravaram(Urban),

East Godavari, Andhra Pradesh – 500103

...Applicant

A n d

1. GAYATRI PROJECTS LIMITED,

Having its registered office at

B-1, T. S. R. towers, 6-3-1090,

Raj Bhavan Road, Somajiguda, Hyderabad - 500082.

...Respondent No.1

2. CA Sai Ramesh Kanuparthi,

Resolution Professional of Gayatri Projects Limited,

Plot No.6-B, Beside TDP Office,

Road No.2, Banjara Hills,

Hyderabad - 500034.

...Respondent No.2

Date of Order: 03.04.2024

Date of Order: 03.04.2024

CORAM:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Applicant :Mr. V.V.S.N. Raju and Associates

For the Respondent : Mr.CA Sai Ramesh Kanuparthi

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. The present Application is filed under section 60(5) of the Insolvency and Bankruptcy Code 2016 (IBC) read with rule 11 of NCLT Rules, 2016 by M/s CH Veerraju & B. Venkateswara Rao (hereinafter called as '**Applicant**') represented through its Managing Partner, Sri. B. Venkateshwara Rao seeking directions to Respondent No.1 & 2, not to include the due amounts in the assets of the Corporate Debtor (hereinafter called as **CD/Respondent No.1**) which are to be released under sub-contracts to the Applicant as per the terms of contract.

Petitioner's Case

2. The M/S Ch Veeraju & B. Venkateshwara Rao is involved in civil engineering contracts, while the Corporate Debtor, Gayatri Projects Limited

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is engaged in construction. The Corporate Debtor was awarded contracts by the National Highway Authority of India and Irrigation and Command Area Development, Andhra Pradesh (referred to as 'I&CAD' or 'Government' for the Polavaram Project). The details of the relevant works for this matter are as follows:

3. Polavaram Projects Right Main Canal- Package-IV

- 3.1 The Respondent No.1 secured a contract for construction work from the Irrigation and Command Area Development, Andhra Pradesh, in collaboration with Jai Prakash Associates Limited (Joint Venture). The project involved excavation, embankment formation, and the construction of Cross Masonry & Cross Drainage works (CM & CD Works), along with tasks like investigation, designing, and estimating for the Polavaram Projects Right Main Canal-Package - IV, covering a stretch from 71.50 kms to 105.100 kms. Further they assigned work orders to the Applicant through a sub-contract agreement dated 20.11.2008, amounting to Rs. 159 crores. Additionally, another sub-contract agreement was made on 30.09.2012 for Rs. 24.99 crores. The second agreement pertained to the execution of Polavaram right main canal, Package IV, involving the construction of CM & CD works and the building of an under tunnel at Km 97.920. (*The copies of the said Agreements dated 20.11.2008 and 30.09.2012 are enclosed as Annexure I & II respectively*).
- 3.2 The Applicant has been carrying out assigned works as per sub-contract terms, with a significant portion already completed. Funding for the works came from the Applicant's resources and loans, as the Corporate

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Debtor did not contribute any amount. As per the arrangement, the Corporate Debtor was supposed to settle the bills after receiving funds from the Principal. The Corporate Debtor was entitled to a commission from the Principal's funds, while the rest was to be paid to the Applicant. Essentially, a part of the funds represented the Corporate Debtor's commission, and the remainder constituted the Applicant's share, was held in trust by the Corporate Debtor as per the contract.

- 3.3 The Principal retained 5% of the gross bill amount as a security deposit from the amounts payable to the Applicant, and a similar amount was held back by the Corporate Debtor from the Applicant. Till now, Rs. 4,32,61,963/- has been retained as a security deposit by the Corporate Debtor from the payments made to the Applicant. This amount is held in trust or under contractual arrangement for the Applicant's benefit and does not constitute part of the Corporate Debtor's assets. According to the sub-contract terms, the Principal withheld certain amounts (as per EPC agreement conditions) while settling bills for completed work. These retained amounts, totaling Rs. 6,72,46,337/-, are due to the Applicant. The sum pertains to completed work, except the handing-over process and miscellaneous works.
- 3.4 The Irrigation and Command Area Development (I&CAD) issued orders vide G.O. Ms. No. 22 dated 23.02.2015 allowing price variation (Price Escalation) from 01.04.2013, to all works under its department. Following guidelines, the price adjustment components were determined and approved by the Government vide ENC memo No. ENC/PIP/DCE/OTI/AE/12/RMC dated 12.07.2015, in accordance with the guidelines issued by the Government vide aforesaid orders as an

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intermediate component. The Corporate Debtor and the Applicant reached an agreement with the meeting dated December 22, 2015. According to item No.14 of the said meeting, any excess rates received from the Principal, as indicated in RA bills, over the working through rate (Expenditure) under CC lining would be shared jointly by the Corporate Debtor and the Applicant. Furthermore, in accordance with Paragraph 4 of (n), at the completion of the entire project, the percentage of each component would be reconciled, and any necessary adjustments would be made in the final bill.

3.5 Additionally, an amount of Rs. 2,76,19,646/- for price escalation sharing was determined based on the existing price escalation components, which have been approved by the government. The final components will be determined during the final billing, and these amounts will be paid to the Applicant after receiving funds from the Principal. Furthermore, in line with Paragraph 14 of the Memorandum of Understanding (MOU), a claim of Rs. 2,00,00,000/- is to be paid to the Applicant by the Corporate Debtor upon receiving claims from the Principal. The total amount in this category is Rs. 4,76,19,646/-. *(A Copy of the same are enclosed as Annexure III).*

3.6 In addition to the mentioned amounts, the government through GO.Ms.No.58 dated 08.05.2018 implemented the Goods and Services Tax (GST) instead of the existing tax procedure. Specifically, in 7 (c) (i), it is outlined that revised estimates need separate approval, with a distinction for works executed prior to 01.07.2017 and those done after 01.07.2017, incorporating GST provisions. Supplemental agreements are required for work done post-01.07.2017, with GST added to the bill

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amount. Subsequently, GO.Ms.No.129 dated 30.12.2018 was issued, releasing 5% towards GST as interim relief to contractors of ongoing works as of 01.07.2017. Furthermore, GO.Ms.No.196 dated 23.09.2022 mandated a GST rate of 18% for works executed after 18.07.2022. Benefiting from these orders, the Corporate Debtor has partially collected GST amounts from the Principal. The remaining benefit was to be realized after completing the procedure with the Irrigation and Command Area Development (I & CAD) Department. This statutory benefit is applicable to the Applicant as per their agreement conditions, amounting to Rs. 1,36,09,548/-. *(Copy of the GO.Ms.No.58 dated 08.05.2018; GO.Ms.No.129 dated 30.12.2018 and GO.Ms.No.196 dated. 23.09.2022 are together marked as Annexure-IV).*

3.7 According to the Irrigation and Command Area Development (I&CAD) order GO RT No. 109 dated 02.03.2020, an amount of Rs. 29.9145 crores + Rs. 17.9847 Crores (approximately 60% price adjustment) totaling Rs. 47.863 crores is due for the excess quantity of earthwork executed or to be executed beyond 125% of initial bill of measurements (IBM) quantities from km 71.500 to km 105.100+2.465. The concerned I&CAD Department agreed to release funds upon project completion. Consequently, the Applicant is entitled to receive Rs. 21,72,87,506/- as per the agreed rate. Further, Applicant carried out and continues to perform the work to maintain the Corporate Debtor's status as a going concern. *(A Copy of the Said G.O RT No. 109 is enclosed as Annexure - V).*

3.8 An amount of Rs. 1,67,31,049/- is for reimbursing the excess recovered amounts compared to what the Corporate Debtor retrieved. Additionally,

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Rs. 10,42,415/- is related to the Tax Deducted at Source (TDS) which the Principal already paid, and the Corporate Debtor forwarded the sum to the Income Tax Department, causing extra financial burden on the Applicant. Furthermore, bills submitted by the Applicant for completed work, known as Running Account Bills or RA Bills remain unpaid. Despite the Principal releasing the funds, the Corporate Debtor has retained these amounts for work already accomplished. The total outstanding amounts in this category is up to Rs. 4,53,83,900/-.

3.9 The amounts that need to be released under the sub-contract, and are not considered part of the assets of the Corporate Debtor, are outlined below. A significant portion of these amounts is still pending with the I &CAD. The specific amounts belonging to the Applicant have been tabulated as follows:

S.No	Category	Total amounts to be released to applicant	Amounts already released by I&CAD to the CD	Amounts to be released by I&CAD to CD
1	Security Deposit	Rs4,32,61,923	-	Rs 4,32,61,923
2	Withheld quantities/amounts as per EPC Agreements Conditions	Rs6,72,46,337	-	Rs 6,72,46,337
3	Price Escalation Sharing as per MoU dated 22.12.2015	Rs4,76,19,646	-	Rs 4,76,19,646
4	Reimbursement of GST	Rs1,36,09,548	-	Rs1,36,09,548
5	Excess Earthwork over and above 125% as per GO RT No 109 Dt 02.03.2020	Rs21,72,87,506	-	Rs21,72,87,506
6	Reimbursement of recoveries	Rs 1,67,31,049	Rs 1,67,31,049	-
7	Reimbursement of TDS	Rs10,42,215	Rs10,42,215	-
8	Running Account bills(RA) Bills	Rs 4,53,83,900	Rs 4,53,83,900	

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	Total Amount	Rs 45,21,82,124	Rs 6,31,57,164	Rs38,90,24,960
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3.10 The Applicant has been consistently carrying out the works in accordance with the sub-contract terms. The I&CAD has regularly extended the contract period, with a forthcoming extension anticipated until 30.06.2024. It is crucial to note that the continuous progression of the project is essential and for this the I&CAD to release funds and bring the entire project to its logical conclusion. The Applicant is dedicated to fulfilling the sub-contract agreement's terms and conditions and has secured funds from various sources, including borrowings, to execute the project. Assets have been established for the I&CAD using the Applicant's funds. Depriving the Applicant of these funds would result in irreparable loss. Such deprivation contradicts the doctrine of unjust enrichment outlined in the provisions of the IBC, 2016. *(A Copy of Extension of Time for PIFRMC Package No IV granted up to 30.06.2023 and A Copy of the Extension of Time recommendation letter to the Government from Agreement Authority is enclosed as Annexure - VIII)*

3.11 It is pertinent to note that the Applicant has to exert additional efforts to fulfill the department's requirements in line with contractual obligations, considering both completed and pending work, to facilitate fund release. The amount involved and invested by the Applicant is substantial. Consequently, the Applicant will persist in their endeavors to meet the I&CAD's expectations by completing the work in accordance with the contractual obligations.

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4. Six Laning of Indore-Dewas Road Project:

4.1 The consortium comprising M/s. Gayatri Projects Limited and DLF emerged as the successful bidder for the Six Laning of Indore Dewas NH 3, covering from km 577.550 to km 610.000 and from km 0.000 to km 12.600 in Indore. The National Highway Authority of India (NHAI) issued the Letter of Acceptance, referenced as NHAI/Phase-V/MP/2009-10/021 dated 25.03.2010, for the project's execution. Subsequently, at the consortium's request, a concession agreement was executed between NHAI and the Concessionaire, M/s Indore Dewas Tollways Limited, following the Letter of Award (LOA). The agreement encompassed various aspects, including the Six Laning of Indore-Dewas on NH-3, spanning approximately 45.05 km in the State of Madhya Pradesh. The project falls under NHDP Phase-V and is designated as a BOT (Toll) initiative, operating on the design, build, finance, operate, and transfer (DBFOT) pattern. *(Copy of the same are enclosed as Annexure VI).*

4.2 The Concessionaire, M/s Indore Dewas Tollways Limited, assigned the EPC Contract to the Respondent/Corporate Debtor, Gayatri Projects Limited. Subsequently, Gayatri Projects Limited sub-contracted the DLC and PQC work at the Indore Bypass Section from Ch. 591 to Ch. 610 and from Ch. 1.000 to Ch. 12.600 to the Applicant, following agreed terms and conditions. The Applicant and Gayatri Projects Limited entered into a sub-contract agreement on 08.02.2011 to execute the PQC & DLC work on Indore bypass, spanning from km 591.000 to km 610.000 and from km 0.000 to km 12.600. It is asserted that the amounts due to the Applicant should be released by the Concessionaire after the issuance of the taking over certificate. However, based on the

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12% annual report filed by Indore Dewas Tollways Limited for the FY 2021-22, there is an ongoing arbitration proceeding involving NHAI, the Corporate Debtor, and Indore Dewas Tollways Limited. Consequently, the amounts owed to the Applicant have not been released. (*Copy of the 12th annual report is enclosed as Annexure VII*).

- 4.3 As stipulated in clause 8.1 of the sub-contract agreement dated 08.02.2011, the Applicant is required to submit its final claim within thirty days after the issuance of the taking over certificate for the sub-contract works. In the current situation, the Applicant has submitted its final claim for settlement to the Corporate Debtor. However, the non-issuance of the taking over certificate between the Corporate Debtor and the other parties, including the Concessionaire, has led to the withholding of the bill amounts from being released to the Applicant.
- 4.4 Out of the amounts owed by the Concessionaire/Corporate Debtor to the Applicant, an amount of Rs. 1,75,50,666/- has been retained as a security deposit from the Corporate Debtor's payable sum to the Applicant. It is asserted that due to the non-issuance of the taking over certificate, the Concessionaire has held onto these amounts, resulting in pending bills raised by the Applicant for the completed works (Pre-Final Bill). In this context, it is claimed that the Concessionaire has been withholding these amounts due to the non-issuance of the taking over certificate. The total sum involved is Rs. 1,07,51,536/-.
- 4.5 According to the technical terms of the sub-contract, the Concessionaire/Corporate Debtor retained certain amounts (withheld quantities/amounts as per EPC Agreement Conditions) while settling the

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bills. These withheld amounts, totaling Rs. 3,01,35,544/-, are payable to the Applicant upon the issuance of the taking over certificate. Additionally, the Corporate Debtor has not disbursed the amounts for taxes and duties, totaling Rs. 67,55,093/- as per the sub-contract agreement terms. Furthermore, an amount of Rs. 1,19,17,497/- is earmarked for the reimbursement of amounts recovered in excess of what the Corporate Debtor retrieved.

- 4.6 The mentioned amounts rightfully belong to the Applicant, and the Corporate Debtor does not possess any rights or interests in these sums. The following amounts are to be released under the sub-contract, and they do not constitute assets of the Corporate Debtor. The details are as follows:

S.No	Category	Total amounts to be released to the applicant herein	Amount already released by Concessionaire	Amount to be released by Concessionaire
1	Security Deposit	Rs1,75,50,666	-	Rs1,75,50,666
2	Pre-Final Bill	Rs1,07,51,536	-	Rs1,07,51,536
3	Withheld quantities/amounts as per EPC agreement conditions	Rs3,01,35,544	-	Rs3,01,35,544
4	Reimbursement of Duties and Taxes	Rs67,55,093	-	Rs67,55,093
5	Reimbursement of Recoveries	Ra1,19,17,749	-	Rs1,19,17,749
	Total amount	Rs7,71,10,588	-	Rs7,71,10,588

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- 4.7 An amount of Rs. 7,71,10,588/-, corresponding to the work completed by the Applicant, is expected to be paid once the arbitration proceedings are concluded. However, a petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (IB Code) was filed by the Financial Creditor with CP No. 308/7/HDB/2022, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. By an order dated 15.11.2022, this Authority initiated CIRP for the Corporate Debtor and appointed CA Sai Ramesh Kanuparthi as the Interim Resolution Professional (IRP), later confirmed as the Resolution Professional. Subsequently, the Resolution Professional issued a public announcement in newspapers, inviting claims from the creditors of the Corporate Debtor. Pursuant to the provisions of the IB Code, 2016, the Resolution Professional is mandated to gather information related to the assets, finances, and operations of the Corporate Debtor to determine its financial position and take control and custody of the assets belonging to the Corporate Debtor.
- 4.8 It is alleged that the Resolution Professional misunderstood the legal position and categorized the Applicant as an operational creditor and divided the amounts into admitted and contingent liabilities. Despite the Applicant's efforts to clarify and emphasize key aspects such as sub-contracts, payment mechanisms, and the use of Applicant's funds for project assets, the Resolution Professional has not acknowledged these points. Requests have been made to segregate the specified amounts from the Corporate Debtor's assets for immediate release. Furthermore, the Resolution Professional's failure to recognize the legal position has led to a misclassification of the Applicant as an operational creditor. The Applicant has also highlighted that funds related to the Indore Dewas

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Bypass works are pending due to ongoing arbitration proceedings. The Resolution Professional is urged to segregate these amounts and avoid inclusion in the Corporate Debtor's assets.

4.9 There has been an exchange of correspondence between the Applicant and the Resolution Professional, and a brief overview of the submitted claims is as follows:

- i. On 06.02.2023, the Applicant filed a claim (FORM B) for Rs. 31,20,05,206/-
- ii. On 16.02.2023, the Respondent emailed, admitting Rs. 8,20,81,642, with Rs. 22,99,23,564 under verification.
- iii. On 31.07.2023, the RP informed the Applicant of admitted amount Rs. 9,19,59,800/-, Rs. 9,31,25,983/- as a Contingent Claim, Rs. 10,33,85,274/- under verification, and Rs. 2,35,34,190/- not admitted, seeking comments.
- iv. On 07.09.2023, the Applicant emailed and submitted comments, introducing a contingent claim of Rs. 21,72,87,506, pursuant to GO RT No. 109 dated 02.03.2020.
- v. On 09.09.2023, the Respondent submitted claim reconciliation.
- vi. Responding on 25.09.2023, the Applicant requested admission of the entire claim amount of Rs. 52,90,44,920/-.
- vii. On 19.10.2023, the RP shared a reply from GPL Accounts, seeking comments. A significant portion of the claim is still under consideration.
- viii. Also, on 19.10.2023, the Respondent sent another email as under:

Dear Sir

Based on further verification of your claim and clarifications given by you and discussed had with you, your updated claim status is given below:

<i>S.no</i>	<i>Particulars</i>	<i>Polavaram Project</i>	<i>Indore Site</i>	<i>Total</i>
<i>1</i>	<i>Claim admitted</i>	<i>3,52,7,872</i>	<i>1,58,49,296</i>	<i>5,11,29,168</i>
<i>2</i>	<i>Contingent Claim</i>	<i>13,63,87,906</i>	<i>-</i>	<i>13,63,87,906</i>
<i>3</i>	<i>Under Verification</i>	<i>25,08,65,081</i>	<i>6,12,61,292</i>	<i>31,21,26,273</i>
<i>4</i>	<i>Claim not admitted</i>	<i>2,96,49,265</i>	<i>-</i>	<i>2,96,49,265</i>

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	<i>Total Claimed</i>	<i>Amount</i>	45,21,82,124	7,71,10,588	52,92,92,712
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A note on claim of Polavaram Project. We will revert back for the claim under verification shortly."

- 4.10 It is stated that before the email dated 26.10.2023 (containing the letter dated 25.10.2023) sent by the Applicant to the Respondent, the Applicant due to a lack of clarity and knowledge submitted its proof of claim in FORM B dated 06.02.2023, amounting to Rs. 31,20,05,206/-. In this communication, the Applicant explicitly requested the Respondent to segregate the assets/amounts of the Applicant from the assets of the Corporate Debtor. ***(A copy of this letter is enclosed as Annexure-X, and a copy of the calculation sheet category-wise is enclosed as Annexure XI)***. Additionally, the Applicant made an alternative request to the RP to include the assets belonging to the Applicant into CIRP Costs.
- 4.11 In light of the aforesaid, the Applicant vide email dated 26.10.2023 submitted his position as a sub-contractor to the Resolution Professional and accordingly requested the Resolution Professional to re-examine the matter and segregate the sub-contract proceeds from the assets of the Corporate Debtor and take steps to pay the Applicant after deducting the amounts of the Corporate Debtor as per the aforesaid sub-contracts. Accordingly, the amount payable as revenue share has to be excluded from the assets of Corporate Debtor for the purpose of CIRP and the Information Memorandum should provide clear and detailed narrations in this regard.

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4.12 It is also clear from the provisions of section 18 that assets owned by a third party in possession of Corporate Debtor held under trust or under contractual arrangements, etc., shall not be included in the assets of the Corporate Debtor under section 18 of IBC, 2016

S. 18

Explanation. - For the purposes of this 1 [section), the term "assets" shall not include the following, namely: - (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment

4.13 The Applicant executed works under sub-contracts dated 20.11.2008, 08.02.2011, & 30.09.2012, benefiting third parties, namely NHAI and Polavaram Project Authority. These entities are obligated to pay for the executed works. The amounts owed by the beneficiaries rightfully belong to the Applicant, and as per the sub-contract terms, they are shared between the Corporate Debtor and the Applicant. Despite the Corporate Debtor being the contract awardee, it holds these amounts under contractual arrangements for the Applicant's benefit. The entire work was financed by the Applicant, with no contribution from the Corporate Debtor or any other stakeholder. Hence, the Applicant is the sole beneficiary entitled to the released and yet-to-be-released amounts from these beneficiaries.

4.14 It is asserted that the amounts owed to the Applicant for the executed work under the sub-contract should be promptly paid from the funds released by the beneficiaries. Any outstanding amounts, yet to be released by the beneficiaries to the Corporate Debtor's account, should also be expeditiously paid to the Applicant upon release.

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- 4.15 Furthermore, the RP erroneously categorized dues into pre-CIRP and post-CIRP categories, contrary to IBC provisions. The amounts in question, received or pending, are contractual benefits under sub-contracts, not forming part of CD's assets. The RP's response was seen as a mere formality, lacking a clear stance on the contractual arrangement.
- 4.16 The doctrine of unjust enrichment underscores that one should not profit at the expense of others unless such gains are given gratuitously by the other party. Notably, the Financial Creditors have made no contributions to the contract execution and are not entitled to the proceeds resulting from the Applicant's fund utilization. Mixing or including amounts paid by the beneficiary, in return for the Applicant's executed work per sub-contracts, with the Corporate Debtor's assets would cause irreparable loss to the Applicant.
- 4.17 Applicant has relied on established legal position laid by this Authority in cases like *Peeyush Sharma versus Sutanu Sinha and M/s. Litostroj Power D.O.O vs IVRCL Ltd* to highlight the sub-contractors' right to receive security deposits and other payments per sub-contract terms without incorporating those amounts into the Corporate Debtor's assets.
- 4.18 It is claimed that the substantial amount of Rs. 52,92,92,712/- is crucial for the Applicant's operations. Any inaction by the RP for GPL/Respondent hampers the legislative intent of the IB Code 2016, causing financial constraints for the Applicant. Consequently, with no alternative, the Applicant is compelled to seek directions from this Adjudicating Authority against the Respondent.

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Respondents Case:

5. The Corporate Debtor has not received specific payments for Running Account bills from I & CAD Department, Government of Andhra Pradesh, and the Concessionaire. In an email dated 19.10.2023, Respondent No. 2 provided information regarding the status of claims submitted by the Applicant as under:

Sl No.	Particulars	Polavaram Project in Rs.	Indore Site in Rs.	Total in Rs.
1.	Claim admitted	3,52,79,872/-	1,58,49,296/-	5,11,29,168/-
2.	Contingent Claim	13,63,87,906/-	-	13,63,87,906/-
3.	Under verification	25,08,65,081/-	6,12,61,292/-	31,21,26,373/-
4.	Claim not admitted	2,96,49,265/-	-	2,96,49,265/-
	Total amount Claimed	45,21,82,124	7,71,10,558/-	2,96,49,265/-

- 5.1 The claims of the Applicant against the Corporate Debtor are acknowledged, and submitted that the payment will be made only upon approval and payment of the bills by I& CAD Department, Andhra Pradesh, and the Concessionaire to the Respondent No.1 (Corporate Debtor). The Respondent No.2 undertakes to abide by the terms of the Work Orders qua the Applicants dues.
- 5.2 The Respondent No.1 (Corporate Debtor) maintains that the claims presented by the Applicant relate to a period well before the initiation of the Corporate Insolvency Resolution Process (CIRP) and will be addressed either in the resolution plan or through liquidation, as deemed appropriate. In the light of above contentions answering Respondent prayed for the dismissal of present Application.

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6. We have heard learned counsel for both the parties and perused the records
7. The CD is engaged in the business of construction and was awarded various works by the NHAI and CAD (Polavaram Project) jointly with Jaiprakash Associate Ltd for the work of excavation, forming embankment and construction of cross masonry & cross drainage works including investigation, designing and estimation of polavaram projects (“**Polavaram Project**”) and the Six Laning of Indore-Dewas Road Project (“**Indore-Dewas Road Project**”) wherein the CD entered into EPC agreement with the NHAI (“**Principal Employer**”).
8. The CD assigned the work orders to the Applicant vide sub-contracts dated 20.11.2008, 30.09.2012 and 08.02.2011. Based on these sub-contracts, the Applicant claimed Rs. 45,21,82,124/- and Rs.7,71,10,588 towards Polavaram Project and Indore-Dewas Road Project, respectively
9. The Respondent No.1 also went into CIRP vide order dated 15.11.2022 in CP(IB)No.308/7/HDB/2022 filed under Section 7 of the IBC by M/s. State Bank of India against M/s. Gayatri Projects Limited/Respondent No.1
10. When moratorium under section 14 of IBC is made applicable regarding the affairs of the Corporate Debtor vide order dated 15.11.2022, the question arises about its impact on the payment of the claims of the Applicant.
11. As per common parlance, the moratorium means *legally authorized period of delay in the performance of a legal obligation or the payment of a*

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debt. Under section 13(1)(a) of the Code, the Adjudicating Authority is required to impose a moratorium for matters referred to in section 14.

12. The purpose of inserting the provision relating to moratorium has been explained by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Ors. versus Union of India (UOI) and Ors (2019)4 SCC 17*** in the following words:

"...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".

13. Again, the Hon'ble Supreme Court in ***Sundaresh Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs (2023)1 SCC 472*** reiterated its earlier position that section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures

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ensure the curtailment of parallel proceedings and reduce the possibility of conflicting outcomes in the process.

14. We need to interpret the provisions of IBC by keeping in view the object behind incorporating the concept of moratorium. Section 14 (1) provides for moratorium to protect the assets of the CD on one hand and Section 14(2) read with section 20 and section 25(1) provides for maintaining the CD as a going concern so as to preserve the assets and property of the CD and thus achieving the purpose and object of Code i.e. “maximisation of the value of the assets” as provided in the preamble. Therefore, the scheme of the Code, does impose moratorium under section 14 to preserve the assets of the CD but such protection cannot be read to defeat the object and purpose of the Code i.e. the requirement of maintaining the CD as a going concern, by making section 14(1) subject to section 14(2).

15. The emphasis of keeping the going concern is also seen from the various powers and authorisation which have been bestowed on the IRP/RP, especially sections 18, 19 and 20 which give a free hand to the IRP/RP to maintain the CD as a going concern and thus preserve and protect the value of the property of the CD. Therefore, section 14 (1) is not an absolute bar on IRP so as to restrict its powers and authorisations to maintain the CD as a going concern. In fact, sections 14(2), 20 and 25(1) operate as an exception to section 14(1). The powers under sections 14(2), 20 and 25(1) are exercised to undertake so as to preserve the property of the CD and maintain it as a going concern.

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16. In the context of keeping the CD as a going concern, section 14(2) is relevant which provides that supply of *essential goods or services*, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) which was added with effect from 28 December 2019 provides that, where the IRP/ RP considers the supply of goods or services critical to protect and preserve the value of the CD and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

17. The essential goods and services have been defined in Regulation 32, which means-

- (1) *electricity;*
- (2) *water;*
- (3) *telecommunication services; and*
- (4) *information technology services,*

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

18. The Legislature uses the word “mean” where it wants to exhaust the significance of the term defined and the word “includes” where it intends that while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive. It has been held by the Hon’ble Supreme Court in *Reclamation Corporation Ltd. versus Presiding Officer, Labour*

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Court, (1990)3 SCC 682 that when word “means” is employed it shows that the definition is hard and fast and no other meaning can be assigned to the word or expression “defined” that is put down in the definition. It is well-established rule of interpretation that the Legislature uses the word “means” where it wants to exhaust the significance of the term defined, and the word “includes”, where the term defined should retain its ordinary meaning, its scope should be widened by the specific enumeration of certain matters which its ordinary meaning may or may not convey so as to make it enumerative but not exhaustive. Accordingly, the term ‘means’ in a definition indicates that the no other meaning can be assigned to the expression that is put down in definition. Therefore, the tribunal is bound by the definition as provided in Regulation 32.

19. The Hon’ble Supreme Court in *Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta &Ors. (2021)7 SCC 209* held that the inclusion of the Explanation to section 14(1) and section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a corporate debtor as a going concern is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. The Hon’ble NCLAT in *Harish Taneja RP versus Dakshin Haryana Bijli Vitran Nigam (2021) ibclaw.in 370 NCLAT* held that use of electricity for running the printing business of the CD cannot get protection as essential supply u/s 14 of the Code r/w CIRP Regulation 32. In another case, the Hon’ble NCLAT in *Shailesh Verma, RP versus Maharashtra State Electricity Distribution Company Ltd. (2022) ibclaw.in 677 NCLAT*, it was held that the scheme delineated by section 14(1) explanation as well as section 14(2A) is same, that is, all benefits, which were enjoyed by the Corporate Debtor given by

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government or authority should be continued, but subject to condition that there is no default of payment of current dues.

20. Section 30(2)(a) read with Regulation 31(a) CIRP Regulations, 2016, also makes it clear that dues to suppliers for essential goods and services supplied during the moratorium period are a part of the IRP costs and are required to be paid back in priority to any other creditor as a part of the resolution plan . The cost incurred to protect and preserve the value of the property of the corporate debtor or in running the business of the corporate debtor as a going concern is termed as Insolvency Resolution Process Cost. It is important to note that IRPC does not include any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP.
21. From the aforesaid discussion, we are of the view that the period can be divided into pre-CIRP and post-CIRP. For the Pre-CIRP period there is almost complete bar to claim dues except in the manner as provided under the IBC at the time of approval of the resolution plan or liquidation, but post CIRP it is also the duty of the IRP/RP to keep the Corporate Debtor as going concern and for this purpose he has to form opinion whether certain supplies as contained in Regulation 32 are essential.
22. The Hon'ble Supreme Court in *Dena Bank versus C. Shiva kumar Reddy and Anr. (2021) ibclaw.in 69 SC* held that the provisions of the IBC are designed to ensure that the business and/or commercial activities of the Corporate Debtor are continued by a Resolution Professional, post imposition of a moratorium, which would give the Corporate Debtor some reprieve from coercive litigation, which could drain the Corporate Debtor of

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its financial resources. This is to enable the Corporate Debtor to improve its financial health and at the same time repay the dues of its creditors.

23. In case of pre-CIRP tax liabilities, the Hon'ble Rajasthan High Court in *Ultra Tech Nathdwara Cement Ltd. versus Union of India and Ors.. Civil Writ Petition No. 9480/2019 decided on: 07.04.2020* held that no demands can be raised by any statutory body (*in this case the GST authorities*), for a period prior to the approval of resolution plan, and after the resolution plan is successfully being executed. To the same effect is the decision of the Hon'ble NCLT in *Director General of Income Tax (Admn. & TPS) v. Synergies Dooray Automotive Ltd. [CA (AT) (Ins) No. 205 of 2017]* which upheld the decision of the NCLT, Hyderabad that all statutory liabilities including taxes would be considered as operational debt. The NCLAT held that:

“29. ... As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of ‘Operational Debt’.”

24. The requirement of making payment of outstanding dues for the period prior to the CIRP has also been considered in the case of *Uttarakhand power corporation limited (UPCL) versus ANG industries limited Company Appeal (AT) (Insolvency) No.298 of 2017, dated 24-01-2018* wherein the Hon'ble NCLAT while allowing the application under section 14(2) of the code seeking for restoration of electricity supply to ensure that the Corporate Debtor remains a going concern, held that the UPCL (appellant) cannot

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recover the dues which are unpaid for the period prior to the insolvency. For the pre-CIRP claims, the appellant tribunal made the findings that the appellant has the right to submit claim before RP. Therefore, pre-CIRP payment to certain operational creditors cannot be made by RP. Such payment to the operational creditors is not only discriminatory to the other similarly situated creditors, but also dilutes the scheme of the Code.

25. Similarly, it was held by the Hon'ble NCLAT in *Vijay Kumar V Iyer Vs. Bharti Airtel Ltd [2020] ibclaw.in 18 NCLAT* that accounting conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The Code, 2016 provides the mechanism of moratorium during the CIRP till the resolution plan is approved or liquidation order is passed. The Code has a provision to override other laws as enunciated above. Even if there are some such provisions in any other law, the Code 2016 will prevail over that.
26. The Hon'ble Supreme Court's recent judgment in *Sundaresh Bhat versus Central Board of Indirect Taxes and Customs supra* where the Court, while ratifying the primacy of IBC over the Customs Act in case of a clash, precluded the custom authorities (CBIC) from initiating actions to recover outstanding dues under the Customs Act against the distressed corporate debtor undergoing CIRP.
27. Hence, the dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be accordingly filed in accordance with the provisions of the IBC. Once the moratorium is kicked in, it does not allow to recover any amount from the CD nor CD can

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appropriate any amount towards its own dues as held by the Hon'ble NCLAT in *Ravi Kumar Tomar versus Newgen Speciality Plastics Ltd. (2022) ibclaw.in 652 NCLAT*.

28. In nutshell, the Code provides for a moratorium on all the past dues of the corporate debtor, therefore, the payment of pre-CIRP claims is also contrary to Section 14 of the code. The intention of the legislature behind providing the moratorium is “to provide the debtors a breathing spell in which he is to seek to reorganize his business” as held by the Hon'ble Supreme Court in *Innovative Industries Limited v ICICI Bank Limited, 2018 (1) SCC 407*.
29. If the dues are received by the CD during the moratorium period like in the present case, it becomes the asset of the CD. In *Mr. Sudip Bhattacharya RP of Reliance Naval & Engineering Ltd. versus UCO Bank (2021) ibclaw.in 50 NCLT* it was held after relying upon the decision in *Indian Overseas Bank versus Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited, [2017] ibclaw.in 50 NCLAT* that the amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the IB Code.
30. The amounts received by the Corporate Debtor during the currency of the CIRP are assets of the corporate debtor whose transfer to chosen creditor in priority without the process of resolution plan would be prohibited. The amounts received towards interim finance during pendency of CIRP for which account was opened in the branch of Bank have to be held as amounts received by the Corporate Debtor during CIRP and are to be utilised as per

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the provisions of IBC, rules and regulations and the Resolution Professional is responsible for due utilisation of the same, strictly as per the provisions of IBC, rules and regulations and the resolution plan which was approved by the Adjudicating Authority.

31. The Hon'ble NCLAT in *SM Milkose Ltd. versus Parvinder Kumar Bhatt, Deputy Zonal Manager, Bank of India (2021) ibclaw.in 410 NCLAT* held that section 14 of the IBC, particularly sub-section (b) of section 14(1) prohibits “*transferring, encumbering, alienating or disposing of by the Corporate Debtor, any of its assets or any legal right or beneficial interest therein*”. It is quite clear about how accruals to the corporate debtor are to be treated during the currency of CIRP. This provision prohibits the corporate debtor, and the resolution professional who is managing the affairs of the corporate debtor during CIRP, from transferring any of the corporate debtor's assets to creditors.
32. In view of enunciation of law as how the pre-CIRP and post-CIRP dues are to be dealt with, we have to address the contention of the Applicant that the claims are to be treated as assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment.
33. The RP has no domain to deal with any other property of the Corporate Debtor, which is not the part of the assets of CD as provided under section 18 of IBC. The relevant provisions are extracted below:

Section 18 of IBC

The interim resolution professional shall perform the following duties, namely:-

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Explanation.-For the purposes of this [section] the term "assets" shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

34. In ‘Trust’, there is fiduciary relationship between a trustor and trustee. In common parlance, there are three parties in a trust: the beneficiary, the trustee, and the settlor. The individual who reposes confidence is settlor of the trust. The “trustee” is the individual who accepts the confidence. The “beneficiary” is one for whose benefit the trustee accepts the confidence. There is also trust in commercial transactions.

35. To understand this position, we may also refer to the decision in ***The Official Liquidator, High Court, Madras, representing Manasuba and Co. (P) Ltd. in liquidation versus N. Chandranarayanan 1972 SCC Online Mad 158:***

“It is held therein that it is settled law that where a fiduciary relationship is established between the company and a third party and moneys are paid by the third party to the company in a situation in which the company occupies a fiduciary relationship, with an obligation to either use the money for a specified purpose or to retain and keep it with the company to meet certain contingencies, the said sum would be impressed with a fiduciary character and would not form part of the general assets of the company. Property thus held by an insolvent company in a fiduciary capacity, burdened with certain fiduciary obligations, is treated as property held in trust for the purposes of the insolvency laws and property held for a specific purpose. Such property or money held for a specific purpose is by law treated as clothed with a species

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of trust governed by the same principles and rules which apply to property held in express trust.

36. The aforementioned ruling clearly indicates that nature of trust depends upon express or implied contract between the parties.
37. In view of explanation to section 18 of IBC which is similar to section 36(4)(a), the trust is created when assets owned by a third party is in possession of the Corporate Debtor and this definition is further enlarged by including that assets held in trust for the third party is also 'trust' for the transactions under the IBC. In this case, the Applicant claims that the CD is trustee of the money to be received for the execution of the work from the principal employer for the benefit of the Applicant being beneficiary of the trust.
38. The parties agreed as how the money is to be paid to the Applicant and there is nothing of the sort of trust. Parties have made this arrangement for their convenience and not with any specific object to create trust. The sub-contract between CD and the Applicant cannot be considered a contract with a sole fiduciary relationship. Instead, it is evidently a commercial contract that derives its validity from the main contract between CD and the principal employer.
39. The entire claims raised by the Applicant are in the nature of security deposits, withheld amounts as per EPC agreement, price escalation sharing as per MOU, reimbursement of GST etc. which in view of our above discussion do not come within the purview of fiduciary relationship, hence shall be treated as assets of the CD.

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40. After careful consideration of the aforementioned observations and findings, it is unequivocally established that the contract between the Applicant and the CD does not establish any assets owned by a third party in the possession of the CD, whether held under trust or contractual arrangement, including bailment. Hence, we are of the view that there is no merit in the application and the amount claimed is to be disbursed as per section 53 IBC and accordingly the application is dismissed.

SD/-

(SANJAY PURI)
MEMBER (TECHNICAL)

SD/-

(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)

R.K./SC