

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 801 of 2018

[Arising out of order dated 31st October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in C.P. (IB) No. 130 of 2017]

IN THE MATTER OF:

IMECO Limited,
26, R. N. Mukherjee Road,
Kolkata – 700 001.

....Appellant

Vs

BEML Limited,
BEML Soudha,
No. 23/1, 4th Main,
Sampangiramanagar,
Bengaluru - 560027.

....Respondent

Present:

For Appellant: Ms. Varsha Banerjee, Mr. Kunal Godhwani and Mr. Mukund Rawat, Advocates.

For Respondent: Mr. Samir Malik and Mr. Aditya Sharma, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

‘M/s IMECO Limited’ (hereinafter referred to as ‘Appellant’) claiming to be an ‘Operational Creditor’ having executed several sub-contracts for the Respondent – ‘BEML Ltd.’ (hereinafter referred to as ‘Corporate Debtor’) in respect whereof the Respondent allegedly committed default regarding outstanding amount of Rs.38,77,88,860/- is aggrieved of rejection of CP (IB) No. 130 of 2017 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) in terms of impugned order passed by Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench on 31st October, 2018, which has been assailed by the Appellant through the medium of instant appeal on the grounds set out in the memo of appeal to which we will advert later.

2. Facts of the case may briefly be noticed. The parties i.e. the Appellant and the Respondent reached an understanding to participate in tenders floated by Railways for execution of certain works and a Memorandum of Agreement (MOA) dated 18th September, 2017 came to be executed inter-se the parties by virtue whereof they decided to jointly take up the Railway contracts for supply and retro-fitment of middle berths on longitudinal side

wall of coaches and cushioning of berths. In terms of the Agreement, it was the Respondent who had to participate in the tendering process and work orders were to be obtained by it from the Railways. Appellant had to execute the work for which payments in terms of the work order would be paid to it on back-to-back basis i.e. in proportion to and in relation to receipt of payment from Railways for the executed works. Appellant was not entitled to participate directly in the tendering process. However, both parties were required to work closely so that the execution of allotted work adhered to the timelines. The Agreement in question envisaged a strategic alliance inter-se the parties with liability of each party being mutually agreed between the parties prior to any commitment made by Respondent to the Railways in regard to the project under execution. The MOA contained an arbitration clause for settlement of disputes inter-se the parties in regard to the subject matter of agreement. Out of 44 contracts awarded to Appellant admittedly payments have been settled in regard to 32 contracts while payments qua remaining 12 contracts remain to be settled. It is not in dispute that the Appellant filed WP No. 162 of 2012 before the Hon'ble High Court of Calcutta wherein, inter-alia, relief in regard to payment of outstanding amounts from Respondent and Railways was sought. The Writ Petition was disposed of in terms of order dated 18th December, 2012 with direction to the South-Eastern Railways to release the funds allotted to it for payment towards fitment of longitudinal berths on the basis of claim of Respondent, in its favour, within two months with further direction to the Respondent to release such payment in favour of the Appellant within one

month from the date of its receipt from South-Eastern Railways. The decision of Hon'ble High Court is stated to have been challenged in appeal by Railways and the appeal is stated to be pending disposal.

3. Before proceeding to appreciate the case setup by the Appellant before the Adjudicating Authority as also before this Appellate Tribunal, in the context of contractual relationship inter-se the parties, it would be appropriate to notice that there is no tripartite agreement between the Appellant, Respondent and the Indian Railways. The Ministry of Railways with a view to enhance passenger carrying capacity as also to boost Revenue introduced the scheme for provision of middle berths along the longitudinal side of coaches in trains. Zonal Railway Divisions invited tenders for supply and retro-fitment of longitudinal middle berths for certain types of coaches. Respondent associated with the Appellant to participate in the tender floated by Railways and in furtherance of same Memorandum of Agreement dated 18th September, 2007 was entered into between the parties. Being the lowest tenderer, the Respondent emerged as the successful bidder. The Railways accordingly issued Letter of Acceptance in its favour. Appellant submitted work contract proposals to Respondent for approval which issued Letter of Acceptance, in furtherance whereof Appellant executed the work for which it raised invoices upon the Respondent. It is not in dispute that in all 44 contracts were executed inter-se the parties. According to Appellant payment has been made in regard to 32 contracts but payment with respect to 12 contracts was lying outstanding. The scheme of provision of

longitudinal middle berths in coaches was called off by the Railway Board on 18th February, 2009 which also directed that the payments be made to the contracting agency for the work already executed by the contractors till the issue of notification calling off the scheme, on the basis of quantification of work done. Appellant's case is that it had manufactured the material prior to suspension of scheme by Railway Authorities and this fact was certified by the Respondent. The Railway Board directed the Chief Mechanical Engineer of Railways for reconciliation and settlement of the pending bills. However, the Respondent failed to discharge its liability towards the Appellant who was constrained to file W.P. No.162 of 2012 before the Hon'ble High Court of Calcutta against the Respondent and the Ministry of Railways. The Writ Petition came to be disposed of in terms of order dated 18th October, 2012 recognising the Appellant's claim. The Appellant also claims to have obtained information from Respondent through RTI to the effect that the amount outstanding as on 31st March, 2009 amounts to Rs.43,08,96,214/- subject to reconciliation. According to Appellant, it repeatedly approached the Respondent for release of aforesaid amount but the same not having been done, demand notice under Section 8(1) of the I&B Code was issued to Respondent on 9th August, 2017. Since the demand was not complied with, Appellant filed application under Section 9 of the I&B Code before the Adjudicating Authority which came to be rejected in terms of the impugned order.

4. The impugned order is assailed on the ground that the work carried out by the Appellant prior to change in policy had been duly certified by the Respondent itself and the certificate clearly spelled out that the goods had been manufactured by the Appellant and were awaiting dispatch, therefore, it does not lie in the mouth of Respondent that the goods were not of standard quality and process of fitment of berths was not carried out by the Appellant. It is further submitted on behalf of Appellant that in response to the RTI Application of the Appellant, Respondent has, vide its letter dated 15th June, 2015 acknowledged the outstanding debt of Rs.43,08,96,214/- as on 31st March, 2009, which has not been paid and such default alone justified admission of application under Section 9 of the Code.

5. Per contra it is argued on behalf of the Respondent that the debt of the Appellant is not payable on account of the Payment Terms providing for back-to-back basis. It is further submitted that for the 12 outstanding contracts Appellant did not fit the middle berths on to the railway carriages. Moreover, Respondent has not received money from the concerned Zonal Railways, thus under Clause 9 of the LOAs, the payment terms are not triggered and the Respondent is not in default in payment of any money owed to the Appellant. It is further submitted that the Appellant had agitated the issue in the Writ Petition, which was decided on 18th October, 2012 acknowledging and confirming the back-to-back payment mechanism contracted between the parties. According to Respondent, there is a pre-existing dispute between the parties in form of the Writ Petition, decision

rendered wherein stands challenged in appeal before the Division Bench. It is submitted that the information provided in reply to Appellant's RTI Application is not an admission of debt and relates to amount which has already been disbursed to Respondent for the works executed. This fact has been admitted by the Appellant in its rejoinder. According to learned counsel for Respondent, the Appellant had no locus to issue the demand notice, payments being liable to be made on back-to-back basis, no debt is recoverable as on date and there is a pre-existing dispute between the parties which justified rejection of the application under Section 9 of the I&B Code.

6. We have given our thoughtful consideration to the submissions made at the Bar. It has been noticed elsewhere in this judgment that there is no tripartite agreement between the Railways (Employer), the Respondent (Contractor) and the Appellant (Subcontractor). Admittedly, Respondent entered into a contract with the Southern Railway for fitment of longitudinal middle berth in Sleeper Class Coaches. Respondent also entered into a contract with the Appellant for execution of the works allotted to it by Southern Railways, which was in the form of 'Memorandum of Agreement' (MOA) executed on 18th September, 2007. It is not in dispute that the business relationship between the parties is governed by the MOA. Therefore, it is imperative to ascertain the import of provisions in MOA entitling the Appellant to payment for the works executed. The MOA is reproduced hereinbelow:-

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MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (hereinafter referred to as "MoA") for execution of Railway contract for supply of Retrofitment of Middle Berths on Longitudinal Side Wall of Coaches and Cushioning of Berths, is made and entered into at Bangalore;

between

M/s BHARAT EARTH MOVERS LIMITED (hereinafter referred to as "BEML"), a Government of India undertaking having its registered office at BEML SOUDHA, 23/1, 4th Main, SR Nagar, Bangalore-560027, Kamataka, which term shall mean and include wherever the context so required or permits their respective heirs, legal representatives, executors, administrators, its successors in interest, nominees and assigns of the ONE PART;

and

M/s IMECO LIMITED (hereinafter referred to as "IMECO") having its registered office at 26, R N Mukherjee Road, Kolkata -700 001, West Bengal, which term shall mean and include wherever the context so requires or permits their respective heirs, legal representatives, administrators, executors, nominees and assigns of the OTHER PART;

WHEREAS, BEML a Mini Ratna Category-1 Public Sector Undertaking, under Ministry of Defence, Government of India, is a leading organisation in India engaged in the design, development, manufacture and marketing of a variety of earthmoving & construction equipment like Bulldozers, Hydraulic Excavators, Wheel Loaders, Walking Dragline, Electric Rope Shovels, Dump Trucks, Motor Graders etc; railway equipment like Passenger Coaches, Stainless Steel EMU Metro Coaches, AC/DC EMUs, Rail Buses, OHE Inspection Cars, Track Laying Equipment, Spoil Disposal Units etc.; Diesel Engines; and defence equipment like Heavy Duty 4X4, 6X6, 8X8 & 10X10 Trucks, Trailers, Heavy Recovery Vehicles, Armoured Recovery Vehicles, Crash Fire Tenders, Weapon Loading Systems, PMS Bridge System etc; and

WHEREAS, IMECO is one of the largest engineering organizations in India with a stellar reputation for the quality of services provided to various sectors of industries including Power, Steel, Cement, Paper, Fertiliser, Chemicals, Refineries etc.

WHEREAS, IMECO have required expertise and infrastructure for supply and execution of different types of EPC contracts including that for Supply and Retrofitment of middle berths on longitudinal side wall of coaches and cushioning of berths.

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WHEREAS, IMECO has well equipped manufacturing facility for manufacture and fabrication of pressed, fabricated & welded structures and products including Berths at Kharagpur, West Bengal.

WHEREAS, IMECO has expressed its desire to BEML to jointly take up contracts from Railways involving Supply and Retrofitment of middle berths on longitudinal side wall of coaches and cushioning of berths and is ready to enter into a MoA for the above purpose and such contracts will be executed jointly by both the Parties.

WHEREAS, BEML is already engaged in the line of manufacture of Railway Coaches with its manufacturing facility at Bangalore and KGF and have accepted the above proposal of IMECO and decided to enter into this MoA.

BEML and IMECO are hereinafter collectively referred to as "Parties" and individually as "Party".

2. PURPOSE

Indian Railways have decided to retrofit the extra middle berth in all their 3 tier coaches at various locations / sites of Zonal Railways and to provide cushion seats in all their general coaches. Hence, BEML and IMECO wish to associate themselves by entering into this MoA to participate in the tenders being floated by Zonal Railways.

3. PRODUCTS / SERVICES

Services like retrofitment of longitudinal middle berth in all 3 tier coaches and to provide cushion seats in all general coaches of Indian Railways shall be considered for business cooperation. Other new products / services may also be considered for cooperation at a later date, as required.

4. ROLE OF PARTIES

4.1 The role and responsibility of each Party has been discussed and agreed as under:

a. BEML

- All Tenders relating to the above project invited by Indian / Zonal Railways will be quoted and participated by BEML and orders will be obtained by BEML.
- ✓ BEML will discuss, negotiate and finalise the contracts with Indian Railways.
- ✓ BEML will place work order on IMECO, based on IMECO's offer for berths, parts & aggregates specifying schedules, LD & payments etc.
- ✓ BEML team will execute the order and IMECO will assist in completing the contract on time.



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- Payments to IMECO as per the work order will be paid on back-to-back basis i.e., in proportion to and in relation to receipt of payment from railways.

b. IMECO

- IMECO will offer its services to BEML for submission of tenders wherever required or any other services BEML may require.
- IMECO will purchase and supply all the new seats and bought out components and other items, and BEML will purchase whenever required for completing the work as per the schedule.
- IMECO will mobilise tools and tackles, plant and machinery etc. to undertake the work at various locations and work shop.
- IMECO shall undertake the Supply and Retrofitment of Middle berths as well as all allied activities associated with it through its project teams on mutually agreed terms.
- The above Project will be carried out at various sites / locations as required by Indian / Zonal Railways. IMECO will be responsible to maintain all such sites and the committed delivery schedule under the supervision of BEML team.
- IMECO shall not participate directly in the tenders floated by Indian Railways for Retrofitment of middle berth and cushion seat / back rest or outside India relating to the Indian Railways projects.
- IMECO will be responsible for all the statutory requirements like PF, ESI and Insurance etc. for their employees, as per the contractual obligations.
- LD, if any, levied due to delayed supply / completion of the contract beyond the delivery date stipulated in the contract, shall be borne by IMECO back-to-back. Both parties will work closely to ensure timely execution of the contracts.
- All the conservancy cess charges, legal charges and water charges etc. recovered by Railway shall be borne by IMECO. All such costs will be reimbursed by BEML as per the contract for each project / order.

4.2 All the Parties will bear their own costs and there will not be any obligation on Either Party to share or reimburse cost for either of the Parties.

4.3 For the purpose of this MoA, both the Parties will nominate a Nodal Officer for participation and execution of Tenders / Contracts involving "Supply and Retrofitment of middle berths on longitudinal side wall of coaches and cushioning of berths".

5. RELATIONSHIP BETWEEN THE PARTIES

The relationship between the Parties is in the nature of strategic alliance and the liabilities of each Party shall be mutually agreed between BEML and IMECO prior to BEML entering into any commitment to the above Railway Project.

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6. EXCLUSIVITY

Both the Parties will exclusively work with each other for the project of Supply and Retrofitment of Middle berths and to provide cushion seats and shall maintain close coordination to secure maximum business in common mutual interest.

7. CONFIDENTIALITY

All information and documents exchanged between the Parties pursuant to this MoA shall not, under any circumstances, be released by the receiving Party to any other third party or to public without prior written consent of the originating Party. This rule is obligatory for each Party for a period of two years from the date of termination of this MoA without considering the way it happened.

8. TERMINATION

This MoA shall, unless otherwise extended by mutual agreement of the Parties, terminate upon happening of any of the following events:

- (a) Termination by mutual consent.
- (b) Termination by either Party due to breach of any of the covenants hereof by the Other, with three months prior notice to the defaulting Party.
- (c) In case of termination, the contents of Article No.7 are obligatory to the full extent.
- (d) On completion of the said work including contractual and warranty obligations.

Notwithstanding the above, termination shall not prejudice any obligation that has arisen prior to the date of effective termination between the Parties and / or obligation of either Party to any other third party.

9. VALIDITY

This MoA will be valid initially for a period of five (5) years from the date of execution and may be extended mutually thereafter till the completion of the Railway Project.

10. DISPUTE SETTLEMENT

Disputes, if any, arising out of this MoA will be mutually discussed and settled without any obligation on either Party, failing which, they shall be referred to arbitration under the Arbitration and Conciliation Act, 1996 and Rules made thereunder ("RULES") as are in force at the time of any such arbitration. For the purpose of such arbitration, there shall be a sole arbitrator, if so agreed between the Parties or three arbitrators who may be appointed in accordance with the RULES. The arbitration shall take

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place in Bangalore and all arbitration proceedings shall be conducted as laid down under the RULES, in English. The arbitration award shall be final and binding on the Parties. Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

11. GOVERNING LAW

This MoA shall be governed by the laws of the Republic of India.

IN WITNESS WHEREOF, the Parties hereto have set their respective hands to this MoA on _____ September 2007 written in the presence of witnesses.

for BEML



P. Dwarakanath
P. Dwarakanath
Chief General Manager

for IMECO



L.D. Agarwal
L.D. Agarwal
Director

WITNESS

1. *Soma Sundaram*
(K. Soma Sundaram)
DGM (Marketing)

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WITNESS

1. *D.K. Agarwal*
D.K. Agarwal
32, TTK Road
Chennai 600018

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7. A bare look at the MOA brings it to fore that the parties, being desirous of associating themselves to participate in the tenders being floated by Zonal Railways for the retro-fitment of longitudinal middle berth in Sleeper Class Coaches, entered into MOA assigning distinct roles to each of them. It was agreed that all tenders relating to this project will be quoted, process participated and allotments obtained by the Respondent and after it finalizes the contract with the Railways, it will place work order on the Appellant. It is clearly stipulated in MOA that the order will be executed by Respondent and the Appellant will assist it in completing the contract on time. It is further stipulated that the payments to Appellant as per the Work Order will be paid on back-to-back basis i.e. in proportion to and in relation to receipt of payment from Railways. It further emerges from MOA that the Appellant was not eligible to participate directly in the tenders floated by Railways for the aforesaid project. Relationship between the parties had to be in the nature of 'strategic alliance' with liabilities of each party based on mutually agreed terms. MOA also provided for resolution of disputes arising out of it through mutual discussion and settlement failing which such disputes were to be referred to arbitration under the Arbitration and Conciliation Act, 1996. It is abundantly clear that there is no privity of contract between the Appellant and the Railways and the Railways owes no obligation to satisfy any claim raised by the Appellant directly against the Railways. Clause 4.1 of MOA clearly stipulated that for the works executed by the Appellant in terms of Work Order placed upon it by the Respondent, the payments to Appellant as per the Work Order will be paid on back-to-

back basis i.e. in proportion to and in relation to receipt of payment from Railways. The dispute relating to 12 contracts in respect whereof Appellant alleged default involved interpretation of 'back-to-back basis clause' as Respondent did not dispute the liability but pleaded that payment in relation thereto was not released by the Railways as a sequel to suspension of contract/calling off scheme by the Railway Board on 18th February, 2009 which also directed that the payments be made to the contracting agency for the work already executed by the contractors till the issue of notification calling off the scheme, on the basis of quantification of work done. As per Appellant, it had manufactured the material prior to suspension of scheme by Railway Authorities and this fact was certified by the Respondent. The Railway Board directed the Chief Mechanical Engineer of Railways for reconciliation and settlement of the pending bills. However, the Respondent appears to have failed to discharge its liability towards the Appellant who was constrained to file W.P. No.162 of 2012 before the Hon'ble High Court of Calcutta against the Respondent and the Ministry of Railways. Apart from raising the plea of not having received any money from Railways in regard to the 12 Letters of Acceptance (LOAs), Respondent pleaded that the Appellant did not fit the middle berths on to the Railway carriages thereby failing to execute the Work Orders in entirety. It is not in dispute that it was the Appellant itself which sought resolution of dispute qua the payment arising out of 12 Work Orders by filing Writ Petition No.162 of 2012 before Hon'ble High Court of Calcutta against the Respondent and the Ministry of Railways. From perusal of judgment it emerges that the Hon'ble High Court while

dealing with the merits of the Writ Petition observed that it was during the progress of the work allotted that the contract was cancelled on the basis of a policy adopted by the Railway Board. The Hon'ble High Court drew the conclusion that the present Appellant acted upon the assurance given by the present Respondent (which is an instrumentality of the State) investing its fund for manufacturing longitudinal middle class berths and the work was cancelled on the basis of decision of the Railway Board without any fault or laches on the part of parties to instant appeal. It also noticed that the Railway Board had allotted funds to the tune of Rs.6 Crore for remittance of dues payable towards fitment of additional longitudinal berths. After taking the admitted position as also the facts emerging from relevant communications and documents into consideration, the Hon'ble High Court was of the view that the doctrine of 'promissory estoppel' was squarely applicable with regard to the claim of present Appellant from the present Respondent. As a sequel to this finding, the Hon'ble High Court directed the competent authority of Southern Railway to release the fund allotted to it for payment towards the fitment of longitudinal middle berths in Sleeper Class Railway Coaches on the basis of the claim of present Respondent in its favour, so far as the claim under reference was concerned, within a period of two months and the present Respondent was directed to release the above amount in favour of the present Appellant within a month from the date of receipt of same from the South-Eastern Railway. However, Appellants claim has not been satisfied as the Railways has preferred an appeal against the judgment of Writ Court.

8. A plethora of judicial precedents have been cited at the Bar as regards the interpretation of clause governing payment on 'back-to-back basis'. We are not inclined to deal with the same as the Writ Court has in principle recognized it and having regard to the same passed directions for release of funds against Southern Railway directing it to release funds allotted to it for payment towards the fitment of longitudinal berths in railway coaches on the basis of claim of present Respondent within two months with further direction to present Respondent to release the same in favour of present Appellant within a month from the date of receipt of same from South-eastern Railway. Having regard to the stand taken by parties before this Appellate Tribunal, we have no hesitation in holding that the Appellant having provided goods and services to the Respondent by executing the Work Order placed upon it by the Respondent for manufacturing and retrofitment of longitudinal middle berths in sleeper class coaches in terms of MOA governing contractual relations between the parties, the Respondent owes an obligation to pay for goods and services supplied by Appellant through execution of the Work Order placed upon it thereby bringing the obligation within the fold of 'Operational Debt' and that the Appellant holds the status of an 'Operational Creditor' qua the Respondent. Having held so we are constrained to record our agreement with the finding arrived at by the Adjudicating Authority as regards existence of a pre-existing dispute inter-se the parties qua the 'Operational Debt'. It is not in dispute that it was much prior to issuance of Demand Notice under Section 8(1) by the Appellant upon the Respondent culminating in filing of application under

Section 9 of the I&B Code against the Respondent (Corporate Debtor) that the Appellant approached the Hon'ble High Court of Calcutta with a Writ Petition seeking reliefs in regard to the same subject matter as against the Respondent and the Ministry of Railways as the Respondent expressed its inability to satisfy the claim and discharge the Operational Debt owed to Appellant on the ground that the Railways had put the project on hold due to change in policy and not released the funds for the works executed. It is manifestly clear that the dispute was raised by the Respondent on the basis of back-to-back clause in MOA despite release of funds by the Railway Board in favour of the concerned Railway Authorities for releasing the same for payment of fitment of longitudinal middle berths. It is noticed in the judgment of the Hon'ble High Court that the Railway Board allotted funds to the tune of Rs.6 crores in the final grant of 2010-11 for remittance of dues payable towards fitment of additional longitudinal berths in AC – 3 Tier and Sleeper Coaches. Keeping this in view and upholding the doctrine of 'promissory estoppel' invoked by the Appellant, the Writ Court directed the competent authority of the Southern Railways to release the funds in favour of present Respondent to the extent of its claim within a given time frame who was, upon receipt of the same, directed to satisfy the claim of present Appellant. It is manifestly clear that the obligation to pay on the part of Respondent – Corporate Debtor was contingent upon the release of funds by the Railways and the Railways not having released funds in favour of respondent inspite of allotment of funds by the Railway Board and directions in the Writ Petition and having embarked upon the path of further

litigation by preferring appeal against the judgment of Writ Court, default in discharging the obligation of Operational Debt did not occur. Unless the debt is payable default will not occur. A debt, payment whereof is contingent upon a happening or an event as in the case of back-to-back payment clause in the contract governing relations between the parties, cannot be said to have been defaulted unless such happening or event occurs. It is in this context that the debt from which the obligation to pay arises cannot be said to be undisputed.

9. In so far as pre-existence of a dispute warranting rejection of application of triggering of Corporate Insolvency Resolution Process under Section 9 of the I&B Code is concerned, be it noticed that the existence of an undisputed debt is the basic edifice upon which the triggering of Corporate Insolvency Resolution Process rests. The Adjudicating Authority acts within its jurisdiction when it insists upon the Operational Creditor to satisfy it that the Operational Debt in respect whereof default is alleged, is payable in law. Admittedly, in terms of the judgment of Writ Court the debt in question is payable to Appellant only after the funds are released by the Railway Authorities in favour of the Respondent as regards its claim and it is only upon such payment being made that the Appellant is entitled to claim the debt. This is also not disputed that the Writ Court judgment has been assailed in appeal. Thus apart from the payments claimed by Appellant being based on back-to-back principle incorporated in MOA, Appellant itself

having raised the dispute through the medium of Writ Petition with regard to the part of claim much prior to the issuance of demand notice and the matter being still under judicial scrutiny, no fault could be found with the finding recorded by Adjudicating Authority that there was a pre-existing dispute between the parties qua the Operational Debt or part thereof. The finding is perfectly justified in the facts and circumstances of the case and no exception can be taken to the same.

10. Having conspectus of the entire gamut of controversy surrounding this case, we are of the considered view that the impugned order does not suffer from any legal infirmity or factual frailty. There being no merit in this appeal, the same is dismissed. Parties are left to bear their own costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

NEW DELHI

9th August, 2019

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