National Company Law Appellate Tribunal, New Delhi

COMPANY APPEAL (AT) (Insolvency) No. 1415 of 2019

(Arising out of Order dated 02nd December, 2019 passed by National Company Law Tribunal, Mumbai Bench, in Company Petition (IB) No.- 2520/MB/2019)

IN THE MATTER OF:

Mr. Narayan Singh Pathania
Managing Director
Global Energy Private Limited
R/O Flat no. 4601,
Gyan Shakti CGHS Limited,
Plot no. 7,
Sector-6, Dwarka,
New Delhi-110076. **.....Appellant**

Versus

1. Valuelabs LLP
Plot No. 41, Survey No. 64
Phase-II, Software Units Layout,
Hi-Tech City,
Hyderabad-81 **...Respondent No.1.**

2. Global Energy Private Ltd.
Through its I.R.P.
Mr. L.V. Shyamsundar
207, 2nd Floor
Gera Imperium II
Patto Plaza
Patto Centre
Panji M, Goa - 403001 **...Respondent No. 2.**

Appellants: **Mr. Abhijeet Sinha, Mr. Malak Bhatt, Ms. Neha Nagpal, Ms. Neoma Vasdev Gupta, Mr. Abhinav Mukherji, Mr. Usman Ali Khan, Ms. Deepika, Mr. Udbav Nanda, Mr. Harry Dhaul and Mr. Rajat, Advocates.**

Respondent: **Mr. Ankur Goel, Advocate for R-1.**

J U D G E M E N T

(Pronounced on 09th February, 2021)

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal preferred by the Managing Director of M/s. Global Energy Private Limited (hereinafter referred to as 'GEPL') under

Section 61 of the Insolvency and Bankruptcy Code 2016 (in short the 'IBC') is to the Order dated 02.12.2019, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in CP (IB) No. 2520/MB/2019, by which Impugned Order, the Adjudicating Authority has admitted the Section 9 Application filed by M/s. Valuelabs LLP (hereinafter referred to as the 'Operational Creditor') observing as follows;

> *"17. Further, upon perusal of the agreed terms of the power purchase agreement, it is clear that the electricity generated by the Petitioner through its solar power plant could be injected into the electricity grid maintained by the DISCOM to be consumed by various consumers. Thereafter, the DISCOM acknowledges the receipt of particular of renewable energy and issues Generation Credit Note (GCN). Then on the basis of energy settlement/Report, the Petitioner raises the invoice as per the units consumed by the end consumer. The Corporate Debtor is liable to pay these invoices raised by the Petitioner whether they are banked units or other units as per to the agreed terms and conditions of the power purchase agreements and addendums executed between the parties. According to the Petitioner the mechanism of the banked units is that the total electricity generated by the generator during a period is more than the electricity actually consumed by the end consumer, the excess electricity is called banked units i.e. unconsumed electricity will go to the bank and are called banked units. He relied on the energy settlement/Report statement for the month of August 2017 which captures the column of bank units separately. Thus, the Energy Settlement/Report talks about two different units i.e. other units and bank units. Whereas the Corporate Debtor claims that the energy generated by the Petitioner is directed injected to the DISCOM and is banked and agreed and thus, there is no distinction between the normal units and the banked units.*
>
> *18. There is no provision or discussion regarding the normal units and the banked units in the entire solar power purchase agreement and addendums executed between the parties. Evidently, there has been an agreement of sale of electricity and purchase of*

electricity by and between the Petitioner and the Corporate Debtor. During the course of business, a new term called banked units were introduced and were agreed to be paid at certain rates/tariffs. The unpaid invoices raised by the Petitioner vide the invoice no. 10027, 10028, 10029 and 10043 dated 07.01.2016, 07.01.2016, 07.01.2016 and 18.01.2017 respectively amounting to Rs. 1,08,77,104/- is outstanding. And the unpaid invoices from 21.02.2017 to 20.04.2018 (annexures 122 – 131 of the Petition) amounts to Rs. 2,09,81,027 /- remain outstanding.

19. There is a clear liability of payment of unpaid invoices in terms of the solar power purchase agreement and addendums between the parties, wherein the Corporate Debtor has agreed to buy the energies generated and supplied to the DISCOMs under the definitive arrangements and with the obligation to pay the said amounts within the stipulated agreed time. The liability of the Corporate Debtor cannot be absolved under the premise that they are liable to pay only @ 3.70 per unit basing on the distinction drawn between the banked units and the other/normal units.

20. M.A. 3120/2019 IN C.P. 2520/2019 was filed by the Manager Administration of the Corporate Debtor seeking to intervene and implead as a party in the above matter cannot be entertained and is thus, dismissed on the ground that this is an application filed by the Petitioner in the capacity of Operational Creditor under Section 9 of the IBC, 2016 as he has not received the payment of the outstanding dues under unpaid invoices raised by the Operational Creditor under the terms and conditions of the Solar Power Purchase Agreement and addendums thereto. Therefore, neither an intervenor be impleaded as party nor can be allowed to be heard in an application under Section 9 of IBC, 2016. The legislature has envisaged the recourse of workmen/employees during the resolution process.

21. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in paying the outstanding unpaid invoices raised by the Petitioners in terms of the Power Purchase Agreement and addendums thereto and also placed the name of the

Insolvency Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under of Section 9 is taken as complete, accordingly this Bench hereby admits this Petition…"

2. Learned Counsel appearing for the Appellant contended that the Learned Adjudicating Authority has erred by overlooking the technical nature of the dispute between the parties; that the issue is with respect to interpretation of 'banked energy'; that the Operational Creditor had charged GEPL for normal units and banked units under different rates when the agreed rate was Rs. 3.70/kwh; that GEPL was the facilitator for Andhra Pradesh Southern Power Distribution Company Ltd. (APSDCL) and that the energy banked was consumed by the consumers of APSDCL which in turn adjusted the same against the electricity bills of the consumers; Generation Credit Notes (GCN) were issued by APSDCL to the Respondent for the units of energy injected by the Respondent into the grid of APSDCL and therefore the entire transaction was of banked energy and does not pertain to sale of energy or actual delivery of electricity generated by the Respondent to the end consumers directly. The Learned Counsel submitted that the entire transaction was based on power generated from a renewable source and as the energy cannot be directly dispatched, the entire mechanism is undertaken on the principles of banking of energy and therefore the tariffs charged by the Respondent could only be on the basis of banked energy/power.

3. Learned Appellant Counsel strenuously argued that the Learned Adjudicating Authority did not take into consideration that the demand

raised by the Respondent was contradictory to the invoices issued by them as the entire renewable energy was banked, the billing was to be done on uniform power basis; that a settlement report is generated by DISCOM specifying the unit details generated and consumed for that particular month; that these Energy Settlement Reports are issued months after the actual injection and consumption process takes place necessitating the units to remain banked with the DISCOM till such time it is actually consumed. The Counsel drew our attention to the Energy Settlement Reports for the period from 20.05.2015 to 31.12.2017 and submitted that the invoices post 13.12.2016 evidence that distinction for banked and non-banked units has been made only for three invoices and that the Settlement Report shows that a component of bank units is also considered as part of the total units consumed for such period and therefore contended that as the power supplied was essentially the banked power, the invoices raised by the Operational Creditor are invalid.

4. Learned Appellant Counsel further argued that the Operational Creditor continued to raise invoices upon GEPL at escalating rates despite the understanding that the agreed tariff would be Rs. 3.70/- per unit for banked units. Thereafter due to certain unavoidable circumstances, the data/account files of GEPL got corrupted and it was difficult for the Corporate Debtor to reconcile its accounts pertaining to a lot of transactions, including the transaction of the Operational Creditor. As the amounts due, if any, to the Operational Creditor could not be crystalized and ascertained the Corporate Debtor continued to make adhoc payments to the Operational Creditor. Even in their Reply dated 01.06.2018, to the Demand Notice issued

by the Operational Creditor, payment of dues was denied as the account reconciliation was still pending. It was only after the reconciliation of accounts that it came to the knowledge of the Corporate Debtor that the billing/invoicing has been done by the Operational Creditor on a wrong premise.

5. Learned Counsel placed reliance on Clauses 3, 4.5, 5 and 6 of the Solar Power Purchase Agreement (SPPA) dated 18.06.2013 and the addendums entered into between the Operational Creditor and Corporate Debtor for the supply of power on a real time, firm, non-banked basis in the capacity of a Solar Power Generator and Trader respectively enabling the Corporate Debtor to sell the power to consumers directly in real time as per the open access Regulation under the Electricity Act 2003.

6. The Counsel drew our attention to the addendum SPPA dated 09.10.2014 wherein Clause 4.2, refers to 'Energy Accounting', Clause 5 refers to 'Tariff' and Clause 6 refers to the 'Billing Procedure'. It is the further case of the Appellant that the invoices relied upon by the Respondent Counsel relate to a period subsequent to 13.12.2016 and that though the word 'Dispute' is not referred to except in the Arbitration process which began in January 2018, the intention of the Corporate Debtor 'wanting to resolve' construes that there is a dispute. The Learned Counsel strenuously argued that merely because 'rate' was not referred to the email communication it cannot be said that there was no dispute.

7. Per contra, Learned Counsel appearing for the Respondent strenuously contended that the alleged dispute being raised by the Appellant hereunder is neither a dispute in fact nor in law and is nothing but a feeble

argument which is illusory. The Respondent Counsel argued that the so called dispute cannot be construed as a 'Pre-Existing Dispute' as it was raised subsequent to the filing of the Petition under Section 9 of IBC; that the Demand Notice under Section 8 of IBC is dated 08.05.2018; the belated Reply was issued only on 01.06.2018 beyond the period envisaged under the IBC and that the Corporate Debtor merely stated that reconciliation of accounts has not been carried out and baldly denied the outstanding dues. Learned Counsel drew our attention to Clause 4.3 of SPPA in terms of which the calculation of electricity to be supplied by the Operational Creditor to the Corporate Debtor was to be done on the basis of the end consumer's bills by the DISCOM; the billing procedure under SPPA stipulates that the Operational Creditor raises invoice on the Corporate Debtor only to the extent of the electricity units adjusted in the end consumer's electricity bill and further that the Agreement clearly specified that only the unconsumed electricity is to be banked. The Counsel asserted that, the whole of the electricity generated by the Operational Creditor falls under banked units. The Agreement provides only for a single unit rate of electricity ranging from Rs. 5.3/- to Rs. 5/- per unit from time to time. He placed reliance on the email dated 13.12.2016 wherein a separate price for Rs. 3.70/- per unit was agreed to be paid for the 'banked' units. Invoice for these banked units was to be raised only after consumption by the end consumer.

8. The Respondent Counsel further submitted that under the SPPA Agreement, the calculation of electricity consumed by the end consumption was done by the DISCOM and Certificate of Settlement Statement of Energy was issued by the Transmission Corporation to both the Operation Creditor

and Corporate Debtor. These certificates provide complete details of the period for which it is issued, the name of the generator, total electricity generated, name of the end consumer, electricity consumed by the end consumer, unconsumed electricity to be banked and submitted that as per the agreed billing procedure, the Operational Creditor could raise an invoice only for the months of December 2016, February 2017, March 2017 and May 2017. The Counsel argued that all the invoices covered under the Demand Notice were issued only for actual electricity consumed by the end consumer only; when such banked units are actually consumed, an invoice was raised by the Operational Creditor; that electricity was being supplied from the year 2013 under the SPPA; that the previous invoices have been paid by the Corporate Debtor at the rate of Rs. 5/- to Rs. 5.3/- per unit and that the outstanding amount of the first four invoices pertaining to the period prior to 13.12.2016 is itself excess of rupees one crore.

9. The Learned Counsel for the Respondent further submitted that the Corporate Debtor repeatedly stated that there was a software breakdown and simply asked for time to reconcile the accounts though the pending amounts were separately being demanded to be paid on 03.08.2017, 17.11.2017, 09.01.2018, 17.03.2018, 06.04.2018, 07.04.2018 and finally when the Demand Notice was issued on 08.05.2018. The purported dispute regarding rate of electricity was raised for the first time in the email dated 01.11.2018 after the Petition filed by the Operational Creditor was taken up for hearing by the Adjudicating Authority on 01.11.2018 and therefore, the dispute cannot be said to be 'Pre-Existing' but was raised for the first time

with respect to the 'rate' subsequent to the issuance of the Demand Notice and the filing of the Petition.

10. The main point for consideration here is whether there is any 'Existence of a Dispute', and whether the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence and whether the Dispute is 'Pre-Existing'.

11. Admittedly, an SPPA was entered into by both the parties for a period of one year on 18.06.2013 whereby GEPL was required to supply electricity generated through its Solar Power Plant to the Respondent at the agreed tariff rate. The parties extended the SPPA on 09.10.2014, whereby it was agreed that the tariff rate would be Rs. 5.30/kwh and an addendum was executed on the same date to extend the terms to 31.10.2016 with an agreed tariff rate of Rs. 5.10/kwh. Subsequently, further addendums were executed on 10.07.2015 and on 13.12.2016, on which date the amended applicable tariff rate of Rs. 3.70/kwh was agreed upon.

12. The relevant clauses of SPPA relied upon by the Learned Counsel for the Appellant is being reproduced as hereunder;

> ***"3. Delivery Point:***
>
> ***3.1*** *The Company shall deliver the energy at the interconnection point/ex-generation at 33KV bus bar of the Solar Power Project located at Nallacheruvu Substation, Nallacheruvu Manadal, Kadiri Taluk, Anantapur District in the State of Andhra Pradesh…."*
>
> ***"4.5.*** *The Company agrees to provide schedules on month ahead basis for the entire duration of the contract, based on the weather and yield reports…"*

"5. Tariff:

5.1*. For the solar power supplied, the Facilitator shall pay to the Company a tariff for energy generated and supplied at the rates provided in* ***Schedule A****.*

5.2. *The tariff provided in Clause 5.1 above is inclusive of all taxes, duties, Open Access Charges and / or Open Access Losses, charge, surcharge, wheeling and transmission charges and losses up to the Delivery Point, and it is agreed that all the charges up to the Delivery Point shall be to the account of the Company. It is agreed that in event of any increase in the existing rates of taxes, duties, Open Access Charges and / or Open Access Losses, or Imposition of new taxes, duties, Cross subsidy surcharge, additional surcharge, Open Access Charges, Open Access Losses, charges, post the signing of this Agreement, the Parties shall re-negotiate the tariff in good faith, if the affected party gives a notice to the other for such re-negotiation. All open access charges including cross subsidy surcharge and/or any other charges for onward supply of electricity after the Delivery Point shall be borne by the Facilitator. However, any increase in levy or additional charges etc. the same will result in renegotiation of the terms of the contract if either of the parties feel that the increase renders the transaction unviable.*

5.3. *The Solar Project is being set-up under Renewable Energy Certificate (REC) Mechanism and all the RECs will accrue to the account of Company only.*

5.4. *The Facilitator hereby agrees to pay all taxes duties, Open Access Charges and/or Open Access Losses, charge, Cross Subsidy surcharge, wheeling and transmission charges etc. at full rates so as to enable the Company to be eligible for RECs as presently applicable."*

"6. Billing Procedure:

Company will raise the invoice on the Facilitator after adjustment of units in consumer's electricity bill of DISCOM facilitator and only to the extent of the units adjusted in the consumer bills. Accordingly, the Facilitator will make the payments to Company within

10 days from the receipt of Company's invoice, to the extent of the units so adjusted only."

13. It is the case of the Appellant that the Operational Creditor was injecting the energy into the grid/system of the DISCOM for which Generation Credit Notes was issued in name of the Operational Creditor by the DISCOM in lieu of the units of energy banked and therefore, the present transaction was based on the banking of energy concept rather than real time supply of energy. It is also their case that as per Clause 4.5 of SPPA, Operational Creditor was obligated to provide the forecast/schedule to the Corporate Debtor a month ahead to enable the Corporate Debtor to plan for scheduling of the energy to the consumers. The Operational Creditor never provided the forecast/schedule a month ahead though contemplated in the SPPA and therefore it should be construed that the present transaction is wholly based on 'banked' units of energy.

14. The main terms of the amended Agreement executed on 09.10.2014 and extended up to 31.10.2016 shows that the tariff stands revised to 5.10/kwh for the period from the day of scheduling of power as per the approval of LTOA to 31.10.2016. The Billing Procedure which is also amended states as follows;

"Billing Procedure:

- *ValueLabs will raise the invoice to GEPL to the extent of the units adjusted in the consumer's electricity bill of DISCOM. GEPL will make the payments to ValueLabs within 10 days from the receipt of ValueLabs' invoice to the extent of the units so adjusted only.*

- *The transaction is being carried out under the provision of Wheeling and Banking in the State of Andhra Pradesh. As per the provisions of the*

same, monthly unconsumed energy shall be banked with the DISCOM for ValueLabs and ValueLabs may accordingly sell the energy to any Buyer of its choice.

- *It is hereby agreed between the Parties that GEPL or the consumers shall not be liable to pay any tariff or penalty to the Generator for:*

    1) *Failure to make arrangement with one or more Buyers to offtake the energy made available by ValueLabs.*
    2) *Failure of one or more Buyers to consume energy generated by the Generator.*
    3) *Failure to ensure the credit and / or adjustment of energy to a Buyer.*

15. It is the case of the Operational Creditor that the reduced price of Rs. 3.70/kwh was agreed for banked units only. This term 'Banked Units' is used extensively in Renewable Energy Industry and carries a specific meaning and that the price agreed for 'banked units' cannot be applied to other units which do not fall within the category of 'banked units'. Giving an example, it is submitted that if 1000 units are produced and only 900 units are consumed, the billing is done for 900 units only and the balance 100 units, the Operational Creditor can sell to any third party or even to the Corporate Debtor failing which the balance 100 units would be banked with DISCOM.

16. A perusal of the Settlement Agreements filed further substantiates the case of the Respondent that the energy units which are not consumed are banked. For better understanding of the case the DISCOMs Generator Settlement Abstract dated 08.06.2017 is reproduced as hereunder;

Report: Discome Generator Settlement Abstract
Report Type: KWH (ENERGY)

S. No.	Discom	Settlement period		Generator	Generator Type	Prior Schedule At Entry Point	Schedule From Bank	Generator Actual Generation	Generator Actual Generation Limited to Contracted Capacity	Revised Generator Generation Allocated to Consumer at Entry	Consumer	Energy Consumed Accountable to Generator	Total Energy Accountable to Generator from all Consumers	Inadvertent Power to Discome Due to Less Drawn by Consumer	Bank
		From date	To date												
1	APEPDCL	01.03.2017	31.03.2017	Arkhu01-Arkha Solar Power Pvt. Ltd ,Dakkanu(V),Tangutmpeta (M),East Godavari(Dist.)	Solar	155862	0	155862	155862	155862	VSP784-Sea Valley Resorts Pvt. Ltd, Maharanipeta,Visakhapatnam	154591	154591	0	1271
2	APSPDCL	01.03.2017	30.03.2017	BLYTH01-BLYTH Wind Park Pvt Ltd,Bovanpalli,Kalyandurg(M), Anantapur(Dist.)	Wind	0	0	2031578	2031578	0	ATP029-Precot Meridian Ltd,Kodigenahalli,Hindupur,Anantpur (Dist.)	0	1671023	0	152374
		01.03.2017	30.03.2017			650105	0			650105	ATP351-A One Steels Pvt Ltd,Kolnur,Hindupur,Anantapur(Dist.),	509675			
		01.03.2017	30.03.2017			467263	0			467263	NDR538-Krishnapatnam Port Company Ltd,Muthukur,Nellore(Dist.)	467263			
		01.03.2017	30.03.2017			406316	0			406316	VSP537-Vijayeri Organics Ltd,J.N.Pharmacity,Parawada,Visakhapatnam(Dist.)	396959			
		01.03.2017	30.03.2017			507894	0			507894	VSP784-Sea Valley Resorts Pvt. Ltd ,Maharanipeta Visakhapatnam	447307			
3	APSPDCL	01.03.2017	31.03.2017	Value02-Value Labs LLP,Kadiripallkunta(V),Moddimadugu,N .Lellacheruvu(M),Anantapuram	Solar	754607	0	754607	754607	754607	ATP351-A One Steels Pvt Ltd,Kolnur,Hindupur,Anantapur(Dist.)	632390	632390	0	122218
4	APSPDCL	01.03.2017	31.03.2017	BIOP01-BIOP Steels & Power Pvt Ltd,Obulapuram(V),D.Hiroldi(M),Anantapuram(Dist.)	Coal	2118825	0	1581795	1581795	1553158	ATP351-A One Steels Pvt Ltd,Kolnur,Hindupur,Anantapur(Dist.)	1530800	1530800	28299	0

Note:
(1) APERC has accorded approval for APTRANSCO transmission losses calculation methodology.

(2) As per Transmission Tariff Order of FY 2014-15 to FY2018-19, as per para(30), actual transmission losses need to be considered for making the year accounts.Due to non availability of current month losses, the latest available transmission loss 2.79 % of Jan 2017 month is applied for the period from 01.03.17 to 25.03.17 & 3.07 % of Feb 2017 month is applied for the period from 26.03.17 to 31.03.17 as per Board approval. Wheeling loss of 3.96% (33KV APSPDCL),7.47% (11KV APEPDCL) is also applied as per Wheeling Tariff Schedule for the FY 2014-15 to 2018-19.

(3) The banked energy shown above is exclusive of 2% banking charges.The same may be deducted while wanting the banked energy by Discom.

Entry Point Discom Representative
CGM (Revenue&IA), APSPDCL

Exit Point Discom Representative
CGM (Revenue&IA), APSPDCL

Entry Point Discom Representative
CGM (Expenditure), APEPDCL

Exit Point Discom Representative
CGM (Expenditure), APEPDCL

SLDC Representative
CE (SLDC) APTRANSCO

STU Representative
ED (SRD & Planning), APTRANSCO

Special Invitee
CE (Commercial) , APPCC

Authorised OA Generator Representative
M/s. BLYTH Wind Park Pvt Ltd.

Authorised OA Consumer Representative

Authorised OA Generator Representative
M/s. Arkha Solar Power Pvt. Ltd.

Authorised OA Consumer Representative

Authorised OA Generator Representative
M/s. Value Labs LLP

Authorised OA Consumer Representative

Authorised OA Generator Representative
M/s. BIOP Steels &Power Pvt Ltd.

Authorised OA Consumer Representative

For Value Labs LLP
C.A.
AAB-2321
Hyderabad

17. The corresponding invoice is also reproduced as hereunder;

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ValueLabs LLP

Plot No.41, Sy. No.81, HI-Tech City, Madhapur, Hyderabad - 500081
TEL: 040-66239000 , FAX : 040-66239841
Email: finance@valuelabs.net, taxation@valuelabs.com

ValueLabs®

INVOICE

Invoice for the period: 01-03-17 to 31-03-17

Invoice No.: SP/10053
Date: 14-Jun-17

To:

Global Energy Private Limited
#103-104, 10th Floor, Makers Chambers
VI Nariman Point, Mumbai - 400021

S. No	Particulars	Qty in Units	Rate per Unit	Amount in Rs.
1	Sale of Solar Generated Power for the Period 01-03-17 to 31-03-17	632,390	5.00	3,161,950
			Grand Total	3,161,950

In words: Rupees Thirty One Lakh(s) Sixty One Thousand Nine Hundred Fifty Only

E & OE

For ValueLabs LLP

Note:
1. Cheques / DD in favour of "ValueLabs LLP" and payable at Hyderabad.
2. Any disputes are subject to Hyderabad Jurisdiction only.
3. Payment to be made within 15 days from the settlement by DISCOM to consumer.
4. Interest will be charged @ 24% per annum on delayed payments.

Authorised Signatory

VAT Registration No. TIN: 36230186168
Service Tax Registration No.: AAKFV2276KSD001
PAN No.: AAKFV2276K

ValueLabs LLP AAB-2321 Hyderabad

18. The aforenoted Settlement Abstract and the corresponding invoice shows that the quantity of units billed are the ones which are actually consumed. Another invoice dated 14.06.2017 for the Solar Generated Power for the period 01.02.2017 to 28.02.2017 billed for 3,71,209 units also corresponds to the Settlement Abstract dated 02.05.2017. The invoices and the Settlement Abstract filed with the Application under Section 9 correspond to the particulars of 'Operational Debt' in para 4 of the Application. As regards the contention of the Learned Counsel for the Corporate Debtor that Operational Creditor has violated the 'Billing Procedure', having perused the material on record, the SPPA Agreement, the Settlement Abstracts, the invoices, this Tribunal is of the earnest view that the Operational Creditor has not breached any of the terms of the 'Billing Procedure', as the invoices were raised for electricity actually consumed. At this juncture, it is observed that IBC is not a debt enforcement procedure and is a summary proceeding and furthermore it is not a Suit proceeding.

19. Learned Counsel appearing for the Appellant placed reliance on the following Judgements of the Hon'ble Supreme Court and drew our attention to the specific paragraphs which are detailed as hereunder.

> *"Para 56 of* ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*** *(2018) 1 SCC 353:*
> *Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in*

characterizing the defense as vague, got-up and motivated to evade liability."

"Para 29 of ***M/s. Innoventive Industries v. ICICI Bank*** *(2018) 1 SCC 407:*
The scheme of Section 7 stands in contrast with the scheme Under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the Corporate Debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the Operational Creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing i.e. before such notice or invoice was received by the Corporate Debtor. The moment there is existence of such a dispute, the Operational Creditor gets out of the clutches of the Code."

"Para 19 of ***Anshul Vashishtha v. M/s. Jayhind Steel Traders & Anr.*** *Company Appeal (AT) (Insolvency) No. 656 of 2020, 2020 SCC Online NCLAT 673:*
In a case of running account where accounts are yet to be reconciled and settled, an email like 05.02.208 sent before Section 8 demand notice dated 13.06.2018 asking Operational Creditor to take back the rejected material reflect pre-existing dispute in such case Adjudicating Authority cannot sit down to settle the account and calculate the Debt dues."

"Para 10 of ***Ramco Systems Ltd. v. Spicejet Ltd.*** *Company Appeal (AT) (Insolvency) No. 31 of 2018, 2019 SCC Online NCLAT 354:*
There is nothing on the record to suggest that the invoices dated 23rd July, 2014 were forwarded or received by the Respondent 'Spicejet Limited'. Therefore, the Demand Notice issued on 24th April, 2017 as relates to invoice dated 23rd July, 2014, though it cannot be held to be barred by limitation, but in absence of specific evidence relating to invoices actually forwarded by the Appellant and there being a doubt, we hold that the Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default."

20. In ***"Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353",*** the Hon'ble Supreme Court held that the 'existence of the dispute' and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be and observed:

> *"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)).* ***Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ……."***

21. In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an Application under Section 9, which is as follows:

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the*

pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

22. From the aforesaid decision, it is clear that the existence of 'Dispute' must be 'pre-existing' i.e. it must exist ***before*** the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding rupees one lakh and the Application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a 'Dispute' between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt', the Application under Section 9 cannot be rejected and is required to be admitted.

23. The facts in ***Anshul Vashishtha V/s. M/s. Jayhind Steel Traders & Anr. Company Appeal (AT) (Insolvency) No. 656 of 2020, 2020 SCC Online NCLAT 673*** relied upon by Learned Counsel appearing for the Appellant are different from the facts of the instant case as it can be seen from ***Anshul Vashishtha (Supra)*** that though the running account was to be reconciled and settled, there was an *email sent prior to issuance of the Demand Notice under Section 8 asking the Operational Creditor to take back the rejected material,* clearly reflecting a 'Pre-Existing Dispute' whereas in the instant case there is no communication put forth by the Appellant herein to evidence any kind of dissatisfaction with respect to the 'rate'. Hence, the

ratio of ***Anshul Vashishtha (Supra)*** does not apply to the facts of the instant case. The ratio of ***Ramco Systems Ltd. v. Spicejet Ltd. Company Appeal (AT) (Insolvency) No. 31 of 2018, 2019 SCC Online NCLAT 354*** also does not apply to the facts of the instant case as there is specific evidence herein that invoices were actually forwarded by the Operational Creditor and received by the Corporate Debtor.

24. The contention of the Learned Counsel appearing for the Appellant that as per the principal laid down in para 56 of ***Mobilox Innovations (Supra)*** *'that the Tribunal has to ascertain whether a dispute does truly exist in fact between the parties which may or may not ultimately succeed'* is being addressed to.

25. At this juncture, it is relevant to peruse the email communication between the parties to ascertain whether there is a material dispute, and if the dispute is a 'Pre-Existing' one. Emails dated 03.08.2017 (Annexure R-1/1 [page 15 of Reply]) and 17.03.2018 (Annexure R-1/3 [page 17 of Reply]) addressed by the Corporate Debtor to the Operational Creditor establish that there was a request by the Operational Creditor for payment of balance amounts, but the Corporate Debtor stated that they are unable to 'confirm any balance amount payable as of now' as accounts need to be reconciled.

26. Emails dated 06.04.2018 (page 18 of Reply) and 07.04.2018 (page 19 of Reply) addressed to by the Operational Creditor to the Corporate Debtor evidence that repeated requests have been made by the Operational Creditor seeking for payment of balance amounts. It is significant to mention that in the email dated 06.04.2018, it is categorically stated by the Operational

Creditor that all information sought for by the Corporate Debtor was submitted by them. There is no denial of the same. It is not the case of the Corporate Debtor that on account of non-furnishing of details by Operational Creditor, reconciliation of accounts could not be done. In the 07.04.2018 email communication, Operational Creditor specifically mentioned that the time frame taken by the Corporate Debtor to reconcile their accounts is inordinate and sought for immediate payment. The email dated 17.11.2017 (Annexure R-1/6 [page 63 of Reply]) is of relevance as the price of the banked units was increased from Rs. 3.70/- per unit/kwh to Rs. 4/-.

27. It can be seen from the aforenoted email communication beginning 03.08.2017 onwards even till the Reply to the Demand Notice dated 01.06.2018 (Annexure A-9, [page 77 of Volume I]), that is for almost ten months, the Corporate Debtor has simply stated that there is a software breakdown and loss of financial data because of which he could not reconcile his accounts. There is a bald and bare denial of any amounts due and payable only on the ground of 'pending reconciliation'. It is pertinent to note that there is no whisper of any dispute regarding 'rate'.

28. The email on record evidences that the dispute with respect to rate of electricity was raised for the first time in the email dated 31.10.2018 under notice of invocation of Arbitration. It is significant to mention that the Application under Section 9 of IBC was filed on 06.06.2018 by the Respondent/Operational Creditor before the Adjudicating Authority. Though the Demand Notice under Section 8 of IBC is dated 08.05.2018, the Reply was given only on 01.06.2018 beyond the stipulated period envisaged under

the Code. Be that as it may, the documentary evidence on record substantiates that the Corporate Debtor never raised the aspect of 'rate' or any dispute prior to 01.06.2018 and has not settled the dues of the Operational Creditor though there were repeated requests being made from 03.08.2017 onwards as can be seen from the aforenoted emails. It is pertinent to note that in all their replies, the Appellant herein only mentioned non-reconciliation of accounts as the reason but is silent with respect to any other issue regarding payment of amounts and therefore this Tribunal holds that the Appellant has failed the test of proving of any 'Pre-Existing Dispute'.

29. To reiterate, this Tribunal without going into the merits of the 'Dispute' holds that the documentary evidence furnished with the Application read with the email communication shows that the debt is 'due and payable' and has not been paid and there is no plausible contention which requires further investigation and that the 'Dispute' raised is only a patently feeble argument unsupported by evidence. Hence, this Tribunal is of the considered view that the ratio of the Hon'ble Supreme Court in ***M/s. Mobilox Innovations Pvt. Ltd., reported in 2008 (1) SCC 353*** squarely applies to the facts of this case as the Hon'ble Apex Court has laid down that the 'Dispute', if any, should be 'Pre-Existing' and also that it cannot be a feeble argument. Merely contending that accounts were not reconciled for almost a year in our considered opinion, can be construed as a 'feeble and spurious argument'.

30. A perusal of the contents of the reply to the Demand Notice, this Tribunal is unable to find any 'Dispute'. It is seen from the record that at the

earliest point of time, the Corporate Debtor did not raise any dispute that existed between the parties. For all the reasons assigned in this instant Appeal, we do not find any illegality or infirmity in the Order passed by the Learned Adjudicating Authority warranting our interference. In fine, this Appeal is dismissed and the Impugned Order dated 02.12.2019 in Company Petition (IB) No. 2520/MB/2019 passed by the Learned Adjudicating Authority is affirmed. No order as to costs.

31. I.A. 46 of 2021 is filed by the intervenor Mr. Pradip Krishan under Rule 31 read with Rule 11 of the NCLAT Rules, 2016 seeking the interim reliefs detailed as hereunder;

> *"(a) Allow the present application and permit the Applicant to intervene as a party for the purposes of the reliefs prayed for in the present application; and*
> *(b) In the interim, direct the Respondent No. 2 through the interim resolution professional to make payments of the lease rent w.e.f. June 2018 till the use and occupation of the premises; and*
> *(c) In the alternative, direct the Respondent No. 2 to vacate the premises in view of expiry of the lease deed;*
> *(d) for costs of the present Application; and*
> *(e) for such further and other reliefs as the circumstances of the case may require.*

32. The Applicant submits that he is the owner of the premises given on lease to the Corporate Debtor in terms of a lease deed, registered on 05.02.2009, between the intervenor and the Corporate Debtor with respect to the said premises. Though the lease has been terminated by the Applicant, the Corporate Debtor, the lessee of the premises, has neither handed over the premises to the Applicant nor was paying rentals and was deliberately procrastinating these proceedings to take benefit of the interim

directions passed by this Tribunal and therefore, seeks intervention to protect his interests.

33. Learned Counsel appearing for the Appellant opposed this intervention on the ground that the IA is not maintainable since the present Appeal was filed with the limited scope of challenging the order of Admission of CIRP against the Corporate Debtor; that the intervenor did not avail his remedy of filing an Application before the Learned Adjudicating Authority under Section 60(5) of the IBC; that the prayer sought for in this IA is clearly hit by the moratorium under Section 14(1)(d) of the Code.

34. Admittedly, the intervenor is not a party in the Original proceedings i.e. Company Petition (IB) No. 2520/MB/2019 and only before this Appellate Tribunal, is now making an endeavor to get himself impleaded as an intervenor. After hearing the parties, at this juncture, this Tribunal is of the view that in the instant case, even in the absence of the Proposed Intervenor, the main Appeal can be determined based on the available material(s) on record. As such, he is not a Necessary or a Proper Party for adjudication of the controversies centering around this Appeal. Viewed in that perspective, this Tribunal is not inclined to entertain I.A. 46 of 2021 and the same is hereby rejected.

[Justice Venugopal M.]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

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Pronounced in terms of Rule 92 (1) of NCLAT Rules, 2016.