

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Comp. App. (AT) (CH) (Ins.) No. 161 of 2022

(I.A. Nos.498, 940 & 544/2022)

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the 'Impugned Order' dated 08.03.2022 in
CP (IB) No.411/BB/2019, passed by the 'Adjudicating Authority',
National Company Law Tribunal, Bengaluru Bench, Bengaluru)**

In the matter of:

Sterling and Wilson Private Limited

Represented by Chief Financial Officer

(CIN: U31200MH1974PTC017538)

9th Floor, Universal Majestic,

P.L. Lokhande Marg, Chembur (W),

Mumbai-400 043

..... Appellant / Operational Creditor

V.

Embassy Energy Private Limited

(CIN: U40104KA2015PTC082514)

Regd. Off: 1st Floor, Embassy Point,

150, Infantry Road,

Bangalore-560 001

..... Respondent / Corporate Debtor

Present:

For Appellant : Mr. E. Om Prakash, Sr. Advocate,
Mr. Deveshwaar, Advocate.

For Respondent : Mr. Dhruva Mukherjee, Sr. Advocate,
Mr. A. Murali, Advocate
Mr. Atul Madhavan Kumar, Advocate,
Mr. Anurag Singh, Advocate
Mr. Pragya Gowtham, Advocate

J U D G E M E N T
(Through Virtual Mode)

[Per; Ms. Shreesha Merla, Member (Technical)]:

1. Challenge in this Appeal viz. *Comp. App. (AT) (CH) (Ins.) No.161/2022*, is against the 'Impugned Order' dated 08.03.2022 passed

by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench) in C.P. (IB) No.411/BB/2019, by which Order, the 'Adjudicating Authority' has dismissed the Application filed by the 'Appellant'/'Operational Creditor' under Section 9 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code').

2. While dismissing the Section 9 Application, the 'Adjudicating Authority' has observed as follows:

"13. With regard to the first issue, it is to be seen that the I&B Code, 2016 is a self-contained Code and all the actions of the parties are to be examined in terms of the Code and the Rules and Regulations made thereunder only. The Hon'ble Apex Court in a catena of cases has categorically stated the various aspects to be considered by the Adjudicating Authority while deciding the applications filed under sections 7 and 9 of the 18B Code, 2016.

14. The Hon'ble Supreme Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353, while dealing with an application filed u/s 9 of the 18B Code, 2016 has inter alia held as under:

"25. 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?

(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.”

15. Therefore, this Adjudicating Authority is only to see whether the ingredients required within the scope of IBC are present. Based on the principle of promissory estoppel, no debt either financial or operational can be established against a Corporate Debtor. None of the decisions relied on by the Petitioner support the submission of the Petitioner, in this regard. Accordingly, the first issue held against the Petitioner.

16. With regard to the second issue, it is an admitted case of the Petitioner that there was no formal contract or agreement between the Petitioner and the ‘Respondent’-Corporate Debtor. Similarly, it was also the case of the Petitioner that it has not raised any invoices against the ‘Respondent’-Corporate Debtor. The request of the ‘Respondent’-Corporate Debtor to the Petitioner to revoke the suspension of the work agreed to perform under the contract between the Petitioner and IEDCL and to complete all outstanding works and that they will directly pay to the Petitioner the amounts due from IEDCL as on 15.01.2019 on confirming the same by ISL, cannot be equated to a binding contract between the parties to the C.P. The various provisions of the Insolvency and Bankruptcy Code, 2016 defining the ‘operational debt’ does not include the debt claimed by the Petitioner on the basis of the letter dated 17.10.2018 or any other subsequent or consequential correspondence between the parties. None of the decisions on which the learned Counsel appearing for the Petitioner placed reliance support the contention of the Petitioner that the request of the ‘Respondent’-Corporate Debtor not to suspend the work and to complete the same on its assurance to pay certain amount due from IEDCL to the Petitioner, can be termed as an ‘operational debt’ within the scope of the

I&B Code, 2016. The Petitioner failed to establish the relationship of Operational Creditor and Corporate Debtor between the parties to the C.P. Therefore, this issue also held against the Petitioner.”

3. Learned Sr. Counsel Mr. E. Om Prakash appearing for the ‘Appellant’/‘Operational Creditor’ submitted that Embassy Energy Private Limited/‘Corporate Debtor’ sought to commission and operate a Solar Photovoltaic Electricity Generation Facility with a minimum capacity of 100MW AC, for which execution, the ‘Corporate Debtor’ entered into a contract with IL&FS Solar Limited (ISPL), who in turn entered into a contract with IL&FS Energy Development Company Limited (IEDCL), who in turn appointed M/s. Sterling & Wilson Private Limited/the ‘Operational Creditor’ herein as the sub-Contractor. In pursuance to this arrangement, it is averred that the ‘Operational Creditor’ and IEDCL entered into several Contracts for the purpose of the works in relation to the Project and several invoices were raised for the period 21.12.2017 till 24.11.2018. It is submitted that IEDCL consistently defaulted in the payments of various invoices totally amounting to Rs.99,75,88,940/- and despite several requests did not make any payments, on account of which, the ‘Operational Creditor’ issued a letter dated 04.10.2018 suspending the works in relation to the Project.

4. It is submitted that the ‘Respondent’/‘Corporate Debtor’ issued a letter dated 17.10.2018 stating that if the said invoices remained unpaid

even after 15.01.2019, the 'Corporate Debtor' would indemnify and clear them within 15 days from 15.01.2019. It is submitted that in relation to agreeing to pay the principal sum, the 'Corporate Debtor' has also promised the 'Operational Creditor' payment of interest to the tune of Rs.1,04,97,436/-. Learned Sr. Counsel drew our attention to the said letter dated 17.10.2018, which is reproduced as hereunder for better understanding of the case:

EMBASSY ENERGY



October 17, 2018

To,

Sterling and Wilson Private Limited ("SWPL")
9th Floor, Universal Majestic,
P.L. Lokhande Marg,
Chembur (W),
Mumbai-400 043

Attn. : Parameshwar Hegde

Sub: 100 MW AC Solar PV Plant in Karnataka ("Project") – Non-payment of contract dues by IEDCL.

Ref: Letter dated October 8, 2018 issued by SWPL to us ("Letter") enclosing therewith SWPL's suspension notice addressed to IEDCL dated October 4, 2018 on account of non-payment of contract dues ("Suspension Notice").

Dear Sirs,

We take note of the Suspension Notice pursuant to receipt of your Letter dated October 8, 2018.

We understand that as on date, the amounts payable by IEDCL to you are as follows:

Sl. No.	Particulars	Amounts (in INR. Cr.)
1.	Amounts overdue as on October 4, 2018 as set out in the annexure to the Suspension Notice	50.53
2.	Amounts that become due by October 8, 2018	5.95
3.	Delay interest accrued until October 4, 2018	1.05
	TOTAL	57.53

We further understand that invoices to the tune of INR 35 Crore have been certified by IEDCL and these amounts would become due and payable by IEDCL on the facility acceptance date and invoices to the tune of INR 9 Crore are under certification.

We note that due to non-payment of the above mentioned dues and anticipated delays in future payments, you have, as on October 4, 2018, suspended all work in relation to the Project.

Embassy-Energy Pvt. Ltd.

Embassy GolfLinks Business Park, Pebble Beach, Off Intermediate Ring Road, Bangalore - 560 071, India
Tel: 91 80 4059 9999 F: 91 80 4059 9998 www.embassyindustrialparks.com I CIN: U60231KA2009PTC050991

Registered Office: Embassy Point, 1st Floor, 150, Infantry Road, Bangalore - 560 001, India
T: +91 80 4179 9999 F: +91 80 2228 6012



We have no contractual obligation to make any payments to you in relation to the Projects. However, as suspension of work has an adverse impact on the Project, as owners of the Project, in the interest of the Project, we hereby request you to kindly revoke the suspension and continue to provide your services including in relation to completion of all outstanding works and operation and maintenance of the Project, subject to the following conditions:

- (i) we will directly pay you, upto the amounts set out in the Letter that remain due from IEDCL to you as on January 15, 2019, within 15 (fifteen) days from (a) us verifying the amounts remaining due to you, and (b) ISPL confirming to us that these monies remain due from IEDCL to you under your contracts. You shall provide all information and documents that we may require for the purposes of making our verification;
- (ii) you shall revoke the Suspension Notice immediately;
- (iii) no default interest shall accrue on any outstanding monies from the date of this letter;
- (iv) you shall fulfill all your obligations in relation to the completion, operation and maintenance of the Project from time to time and not discontinue your services in relation to the Project. Further, you shall not block access to the personnel or material at the site of the Project or hamper the smooth operation of the Project in any manner whatsoever;
- (v) you shall continue to exercise the rights and remedies available against IEDCL for monies owed to you under the contracts relating to the Project. If any amounts are received from IEDCL after we have made payment to you as per terms agreed above, you shall hold such monies in trust for us and immediately handover such monies to us.

Kindly take note of the above by acknowledging receipt of this communication and confirm your acceptance of the above terms by signing the duplicate copy where indicated below and return the same to the undersigned.

Yours sincerely,

For Embassy-Energy Private Limited

Authorised Signatory



5. Learned Sr. Counsel Mr. Om Prakash strenuously contended that the 'Respondent' herein had requested the 'Appellant' to kindly revoke the suspension and continue to provide the services and that they themselves would pay the amounts 'due and payable' as on 15.01.2019 and sought for revocation of the Suspension Notice immediately. Learned Counsel submitted that on account of this 'Promise', the 'Corporate

Debtor' had stepped into the shoes of IEDCL in terms of their 'promise to pay'. Learned Sr. Counsel also drew our attention to the letter dated 05.12.2018 written by the 'Corporate Debtor' to ISPL and the relevant paragraph is detailed as hereunder:

“This was followed by us receiving notice of the suspension notice dated October 4, 2018 from Sterling Wilson Private Limited ("SWPL") due to payment defaults by ISPL, and its sub-contractors. Yet again, to protect the interest of the Project, we had to engage with SWPL and request it to recommence its services in relation to the Project. As you are aware, SWPL has now revoked its suspension notice and has recommenced work in relation to the Project based solely on the assurance that EEL will pay amounts owed to SWPL by ISPL and its sub-contractors, if remaining unpaid beyond January 15, 2019. We had also subsequently written to you requesting that ISPL clear these dues on an immediate basis. It appears that no payments have been made to SWPL till date nor has there been any indication that these payments will be made in time. As a result, we believe it is likely that EEPL will be obliged to pay a significant amount to SWPL, which could be in the region of IN 100,00,00,000, so that the management of the Project is not affected and our interests are safeguarded.”

6. It is submitted that this letter evidences that the 'Corporate Debtor' had assured that the amounts owed to the 'Appellant' herein would be paid on an immediate basis. Learned Sr. Counsel drew our attention to the Agreement and Clause 6.1.1 which specifies that the Appellant herein is appointed as a sub-Contractor. It is submitted by the Learned Sr. Counsel

that Clause 6.1.6 details the terms and conditions with respect to indemnification and other terms:

“6.1.6. The Contractor shall ensure that each Sub-Contractor has knowledge of the terms of this Contract (other than the Contractor’s pricing information, other than IEDCL, with whom such information may be shared) which are relevant to the Sub-Contractor and the agreement entered into between the Contractor and each Sub-Contractor provides for terms that are in all respects not less stringent than the terms of this Contract (other than the financial terms). The sub-Contractors shall include the following terms:

(a) the Sub-Contractors shall be deemed to have knowledge of the terms of this Contract (excluding pricing and commercial terms, other than IEDCL which shall be deemed to have knowledge of such information), the Project Documents and the Scope of Works;

(b) each Sub-Contractor shall observe, perform and comply with the terms and conditions of this Contract (whether or not this Contract expressly requires the Contractor to obtain the Sub-Contractor’s compliance (herewith) insofar as they relate to the Works being performed by the Sub-Contractor or that part of the Works (including without limiting the generality of the foregoing, any erection, construction, testing, commissioning, insurance, quality assurance control, safety requirements or environmental regulations thereof or relating thereto) and shall not commit any action or fail to perform any action within the scope of its Sub-Contract which will result in a breach by the Contractor of its obligations under this Contract or which causes or shall cause a material adverse effect upon the design and performance of Works;

(c) each Sub-Contractor shall provide to the Owner, all rights lo Intellectual Property with respect lo the Project, relevant lo a Sub-Contract;

(d) no Sub-Contractor shall terminate a Sub-Contract relating to any major Works without notice to the Owner;

(e) the Owner or its nominee may (out shall not be obligated to) step into the sub-Contract in place of the Contractor and/or any other counterparty of the Sub-Contractor in such Sub-Contract, in case of the Contractor's default or failure under this Contract or any default under the Sub Contract, and assume al the rights and perform all the obligations of such counterparty(ies) under the Sub-Contract;

(f) each Sub-Contract shall contain an indemnity from the Sub-Contractor at least analogous lo the indemnification obligations in this Contract; and

(g) that upon termination or repudiation of this Agreement by the Contractor, il so directed by the Owner, each Sub-Contractor (other than IEDCL) shall undertake to provide the Owner, all applicable designs, documents, materials and other things Intended for incorporation in the Works.”

7. Learned Sr. Counsel Mr. Dhruva Mukherjee appearing on behalf of the 'Respondent's submitted that there is no 'privity of contract' between the 'Appellant' and 'Respondent'; that no invoices were raised by the 'Appellant' on the 'Respondent'; there is no 'debt' 'due and payable' nor is there any 'acknowledgement of debt' by the 'Respondent' towards the

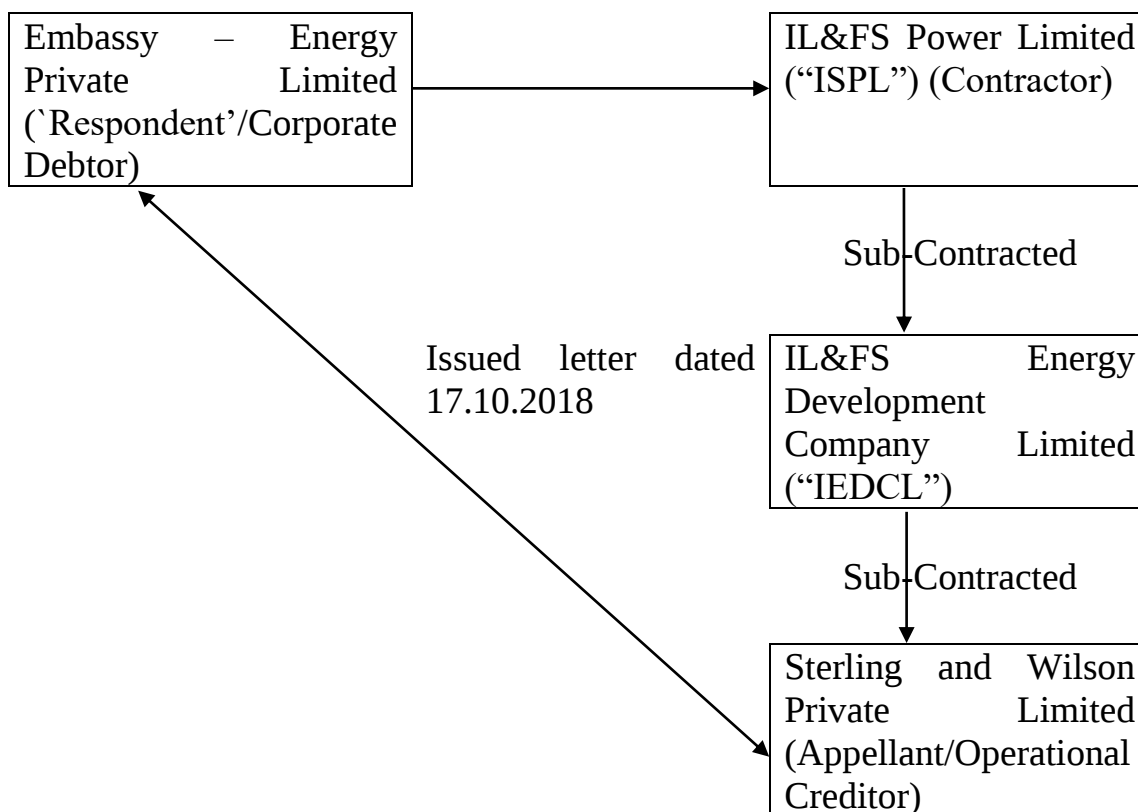
`Appellant' that the `Petition' under Section 9 of the Code is not maintainable as there were `Pre-Existing Disputes' and more so in the absence of any `Contractual Obligations', merely because the `letter of comfort' was issued on 17.10.2018, in order to stop the `revocation of contract', it cannot be said that the `Respondent' is liable to pay all the amounts which are to be paid by the Contractor to the sub-Contractor.

8. It is also submitted by the Learned Sr. Counsel that except for the letter dated 17.10.2018 there is `no relationship' between the `Appellant' and the `Respondent' herein and that no Proceedings under IBC can be sustained on the basis of a promissory estoppel.

9. Learned Sr. Counsel Mr. Mukherjee also brought to the `Notice' of this Bench that the `Appellant'/'Operational Creditor' filed a `Claim' against ISPL, which is undergoing Corporate Insolvency Resolution Process (`CIRP') and that the Resolution Professional (`RP') therein has admitted the `Claim'.

Assessment:

10. The brief point that falls for consideration in this Appeal is whether the `Adjudicating Authority' was justified in dismissing the `Application' filed under Section 9 of the Code on the ground that there was no `Contractual Relationship' between the `Appellant' and the `Respondent' herein. For better understanding of the case, the relationship between the `Appellant' and the `Respondent' is explained in the following diagram:



11. It is clear from the aforementioned diagram that IEDCL had sub-Contracted the work to the 'Appellant'/'Operational Creditor' herein. IEDCL is one of the subsidiaries of IL&FS Solar Power Limited (ISPL)/ the main Contractor which had entered into a contract with 'Embassy Energy Private Limited'/the 'Respondent' herein for operation of the Solar Power Project. It can be seen from the 'Agreement for Civil Works and Construction' entered into between Embassy Energy Private Limited/'Respondent', the owner and ISPL that except for Clause 6.1.1 which deals with the name of the sub-Contractor, any 'Contractual Obligation' with the 'Appellant' herein is not established by way of any Written Agreement. Clause 6.1.4 of this Agreement reads as hereunder:

“6.1.4 Notwithstanding anything to the contrary contained in this Agreement or any other Project Document, a Sub-Contractor shall not have any contractual relationship with the Owner, and shall not be entitled to prefer any claims against the Owner.”

12. From the aforementioned Clause it is clear that *‘a sub-Contractor shall not have any Contractual Relationship with the owner and shall not be entitled to prefer any ‘Claims’ against the owner’*. The material on record establishes that there is no *‘Operational Relationship’* between the *‘Appellant’* and the *‘Respondent’* herein and it is pertinent to mention that the *‘Respondent’* is not even a party to the Agreements entered into between ISPL and IEDCL and ISPL and the *‘Appellant’/‘Operational Creditor’*.

13. Now we address to the letter dated 17.10.2018 on which the Learned Sr. Counsel Mr. Om Prakash appearing for the *‘Appellant’* placed reliance in support of his submission that there was *‘admission of debt’* on behalf of the *‘Respondent’* herein. At this juncture, we find it relevant to reproduce the definitions of *‘Operational Creditor’* and *‘Operational Debt’* as defined under Section 5(20) & Section 5(21) of the Code:

“5. Definitions. –

In this Part, unless the context otherwise requires,

—

(20) “operational creditor” means a person to whom an operational debt is owed and includes

any person to whom such debt has been legally assigned or transferred;

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

14. It is clear from the record that there are no ‘goods and services’ supplied directly by the ‘Operational Creditor’ to the ‘Respondent’ herein and therefore it cannot be said that there is any ‘Operational Debt’ between the ‘Operational Creditor’ and the ‘Respondent’ herein. Merely because the ‘owner’ had given a bona fide assurance that if IEDCL fails to pay the amount they would pay the same on their behalf, the amount will not fall within the definition of ‘Operational Debt’ as defined under Section 5(21) of the Code. Learned Sr. Counsel for the Respondent submitted that all payments ‘due and payable’ by the ‘Respondent’ towards ISPL were made and discharged. The Hon’ble Supreme Court in the matter of ***‘Essar Oil Limited’ Vs. ‘Hindustan Shipyard Ltd. & Ors.’*¹**, has held that when a ‘principal employer’ grants a contract to a Construction Company the sub-Contractors cannot sue the ‘principal employer’ for any issues, if payable, as there is no ‘privity of contract’ between the sub-Contractors and the ‘principal employer’. The Hon’ble Supreme Court in paras 24 to 28 has observed as follows:

¹ (2015) 10 SCC 642

“24. It is true that ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between ONGC and the ‘Respondent’ for making direct payment to the appellant, possibly because the ‘Respondent’ was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of ONGC was likely to be adversely affected. ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between ONGC and the ‘Respondent’, it is clear that so as to facilitate the ‘Respondent’, ONGC had made payments on behalf of the ‘Respondent’ to the appellant directly.

25. Simply because some payments had been made by ONGC to the appellant, it would not be established that there was a privity of contract between ONGC and the appellant and only for that reason ONGC cannot be saddled with a liability to pay the amount payable to the appellant by the ‘Respondent’.

26. It is also pertinent to note that the arbitration agreement was only between the appellant and the ‘Respondent’. ONGC was not a party to the arbitration agreement. When a dispute had arisen between the appellant and the ‘Respondent’ in relation to payment of money, the appellant had initiated the arbitration proceedings. As ONGC was not a party to the arbitration agreement, it could not have been represented before the Arbitral Tribunal. If ONGC was not a party before the Arbitral Tribunal, the Tribunal could not have made any award making ONGC liable to make payment to the appellant. In the aforesaid factual and legal position, the Arbitral Tribunal could not have made ONGC liable in any respect and

rightly, the majority view of the Arbitral Tribunal was to the effect that ONGC, not being a party to any contract or arbitration agreement with the appellant, could not have been made liable to make any payment to the appellant.

27. We are in agreement with the view expressed by the majority of the Arbitral Tribunal. In our opinion, the High Court had committed an error by not considering the above facts and by observing that the appellant will have to take legal action against ONGC for recovery of the amount payable to it. If one looks at the relationship between the appellant and the 'Respondent', it is very clear that the 'Respondent' had given a sub-contract to the appellant and in the said agreement of sub-contract, ONGC was not a party and there was no liability on the part of ONGC to make any payment to the appellant. Moreover, we could not find any correspondence establishing contractual relationship between ONGC and the appellant. In the circumstances, ONGC cannot be made legally liable to make any payment to the appellant. As stated hereinabove, only for the sake of convenience and to get the work of ONGC done without any hassle, ONGC had made payment to the appellant on behalf of the 'Respondent' without incurring any liability to make complete payment on behalf of the 'Respondent'.

28. The learned counsel appearing for the appellant failed to show any document in the nature of a contract entered into between the appellant and ONGC whereby ONGC had made itself liable to make payment to the appellant. Even when the payment had been made by ONGC, it was very clear that the payments were made on behalf of the 'Respondent' as ONGC was debiting the account of the 'Respondent' by the amount paid to the appellant. It is important that the payment was made to the appellant only upon certification of work done by the 'Respondent'. ONGC had given a contract to the 'Respondent'.

ONGC had never entered into any contract with the appellant and therefore, it did not rely upon any certification or any statement made by the appellant in relation to quantum of work done by the appellant. This fact also shows that ONGC was concerned with the work which had been approved by the 'Respondent' and instead of making payment to the 'Respondent', ONGC had made payment to the appellant on behalf of the 'Respondent', though there was no legal obligation on the part of ONGC to make such a payment to the appellant."

(Emphasis Supplied)

15. This Tribunal is of the considered view that any promise made in the letter dated 17.10.2018, specifically having regard to Clause 6.1.4 of the 'Agreement for Civil Works and Construction' entered into between Embassy Energy Private Limited and ISPL, whereby and whereunder, it was clearly specified that the sub-Contractor, would not have any contractual relationship with the owner and would not be entitled to prefer any 'Claims' against the owner, these amounts claimed cannot fall within the definition of 'acknowledgement of debt' in the absence of any contractual relationship between the 'Operational Creditor' and the 'Respondent' herein.

16. It is significant to mention that the 'Appellant' herein had filed a 'Claim' in the CIRP Proceedings of IL&FS and the RP has admitted their 'Claim' to the extent of Rs.99Cr./- approximately. We are also conscious of the fact that the 'Respondent' is a commercially solvent Company and the scope and objective of the Code is not to send a commercially

`Solvent Company' to `Insolvency' specifically having regard to the facts of the attendant case on hand.

17. For all the foregoing reasons, *Company Appeal (AT) (CH) (Ins.) No.161/2022* is `dismissed' as devoid of `merits'. No Costs. The connected pending `Interlocutory Applications', if any, are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

16/06/2023
HA / TM