

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 1546 of 2024

(Arising out of the Order dated 05.04.2024 passed by the National Company Law Tribunal, Indore Bench, Court No. 1 in CP(IB)/21(MP) 2021)

IN THE MATTER OF:

M/s VPR Mining Private Ltd.
8-2-293/82/A/1259, Laxmi Towers,
Road No. 36, Jubilee Hills,
Hyderabad – 500033
Telangana

...Appellant

Versus

M/s Gajraj Mining Private Limited
Behind Telephone Exchange,
Nehru Nagar, Singrauli,
Madhya Pradesh- 486889
Email : ajrajmpl@gmail.com

...Respondent

Present

For Appellants: Mr. Shashank Garg, Sr. Advocate, Dr. Swaroop George, Mr. Raghav Bhatia, Ms. Aradhya Chaturvedi & Mr. S. Roy, Advocates.

For Respondent: None.

J U D G E M E N T

(23.05.2025)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Company Appeal (AT) (Ins) No. 1546 of 2024 has been filed by the Appellant i.e. M/s VPR Mining Private Ltd., who is the Operational

Creditor, under Section 61 of the Insolvency and Bankruptcy Code, 2016 (**‘Code’**), challenging the Impugned Order dated 05.04.2024 passed by the National Company Law Tribunal, Indore Bench (**“Adjudicating Authority”**) in CP (IB) No. 21(MP)/2021

2. M/s Gajraj Mining Private Ltd, who is the Corporate Debtor, is the Respondent herein.

3. The Appellant submitted that M/s Northern Coalfield India Ltd. (**NCL**) awarded a contract to the Corporate Debtor, M/s Gajraj Mining Private Limited, on 25.01.2019 for excavation work at Dudhi Chua OCP, valued at Rs. 768,30,82,389.78/-. The Appellant stated that the Respondent subsequently engaged the Appellant via a Memorandum of Understanding (**MoU**) dated 10.04.2019 for part of the work, not exceeding Rs. 231,69,32,000/- subject to a price variation clause. Amendments to the MoU on 12.10.2019 and 07.07.2020 increased the scope of work to Rs. 363,70,66,646/- and Rs. 610,95,23,083/- respectively.

4. The Appellant submitted that it diligently commenced work, deploying significant machinery, but faced persistent delays in payment from the Respondent. Despite repeated communications and a Minutes of Meeting on 16.12.2020, where the Respondent acknowledged dues and committed to timely payments, including TDS liabilities, no payments were forthcoming.

5. The Appellant submitted that, due to non-payment of Rs. 3,98,02,115/- the Appellant issued a notice of termination on 10.04.2019 and amendments made

thereunder on 22.03.2021, invoking clauses 8.1 and 9.1 of the MOU. The Respondent's response on 08.04.2021 cited temporary financial difficulties but failed to address the dues. Consequently, on 24.04.2021, the Appellant demanded Rs. 16,24,83,76/- in unpaid bills and Rs. 3,26,73,990/- in TDS deposits, which remained unpaid.

6. The Appellant further contended that it issued a demand notice under Section 8 of the Code on 20.05.2021, to which the Respondent replied on 30.05.2021 (received on 16.06.2021), contesting the debt. Aggrieved, the Appellant filed a petition under Section 9 of the Code, which was heard on 08.09.2023, with judgment reserved. However, on 30.11.2023, the Adjudicating Authority took up the matter again and sought clarifications from both the parties as to whether the Appellants had stopped its work or had withdrawn its machinery pursuant to the termination. The Respondent unilaterally filed additional documents without permission and liberty granted by the Adjudicating Authority to either of the parties. On 22.12.2023, the Adjudicating Authority noted this irregularity, rejecting one application but inexplicably allowed another one which was an application for placing of new documents on record. This application was admitted by the Adjudicating Authority on 01.03.2024, without granting the Appellant an opportunity to respond, violating principles of natural justice.

7. The Appellant submitted that the Respondent's failure to pay admitted dues, coupled with procedural irregularities by the Adjudicating Authority,

warrants to set aside the Impugned Order and allow his petition under Section 9 of the Code.

8. The Appellant submitted that the Adjudicating Authority erred in its order dated 05.04.2024 by dismissing the Section 9 petition under the Code on the ground that the debt fell within the Section 10A exclusion period (25.03.2020 to 24.03.2021). The Appellant asserted that the invoices raised under the MoU dated 10.04.2019 with the Respondent were final in nature, payable fortnightly as per clause 5, which mandated 100% payment upon receipt from M/s Northern Coalfield India Ltd. (NCL). The MoU contained no provision for running account bills or interim payments, rendering each bill final upon issuance. The Respondent's admission of liability for dues exceeding Rs. 1 crore, including TDS deductions of Rs. 1,47,85,166/- for the financial year 2019-20, in the Minutes of Meeting dated 16.12.2020, established defaults prior to 25.03.2020, well outside the Section 10A period, as per the explanation to Section 10A.

9. The Appellant contended that the Adjudicating Authority's reliance on clause 10.2 of the MoU, which references potential recovery of losses or damages, is misplaced and does not alter the nature or due date of the debt. The Appellant explained that no claim for damages was raised by the Respondent prior to the issuance of the demand notice under Section 8 of the Code on 20.05.2021, and the belated dispute raised in its reply dated 30.05.2021 (received on 16.06.2021, beyond the 10-day statutory period) cannot be construed as a pre-existing dispute. The Appellant submitted that the Minutes of Meeting dated 16.12.2020

unequivocally record the Respondent's admission of liability and commitment to clear dues, including Rs. 3,23,73,595/- in pending bills and Rs. 1,47,85,166/- in TDS, reinforcing that the default occurred on the invoice due dates, unaffected by unclaimed or hypothetical damages.

10. The Appellant submitted that the Adjudicating Authority's finding that the outstanding amount of Rs. 9.25 crores relate solely to the last two invoices dated 05.03.2021 and 19.03.2021, thus falling within the Section 10A period, is factually and legally incorrect. The Appellant elaborated that the debt comprises invoices raised from 09.07.2019, with significant defaults, including unpaid TDS and bill amounts exceeding Rs. 1 crore, occurring prior to 25.03.2020 and the Respondent never asserted that pre-10A dues were cleared, and part payments acknowledged in the 16.12.2020 Minutes, coupled with invoice abstracts, confirm the continuity of unpaid dues from 2019. It is the case of the Appellant that the Adjudicating Authority's failure to examine the timeline of each component of the debt, particularly the TDS dues, which were statutorily payable by the 7th of the following month, led to an erroneous conclusion that the entire debt fell within the Section 10A period.

11. The Appellant contended that the TDS dues alone, amounting to over Rs. 1 crore for the period prior to 25.03.2020, constitute an undisputed operational debt sufficient to trigger insolvency proceedings under Section 9, as TDS is a statutory obligation deducted from payments made to the Appellant and mandatorily payable to the government by the 7th of the subsequent month, its

non-deposit by the Respondent constitutes a clear default. The Minutes of Meeting dated 16.12.2020 record the Respondent's agreement to clear Rs. 1,47,85,166 in TDS by 31.01.2021, yet no payments were made, establishing a default well before the Section 10A period.

12. The Appellant submitted that the Adjudicating Authority committed a grave procedural irregularity by allowing the Respondent to file additional documents on 01.03.2024, without leave, after the matter was reserved for judgment on 08.09.2023. the appellant stated that on 30.11.2023, the Authority sought clarifications on whether the Appellant had stopped work or withdrawn machinery post-termination, but no liberty was granted to file documents. The Appellants finally submitted that the Respondent's suo motu filing of documents, including a purported hindrance report, was noted as irregular on 22.12.2023, with one application (for balance sheet) rejected, yet another application was inexplicably allowed despite identical circumstances. The Appellant pleaded that the Respondent failed to demonstrate the relevance of these documents or justify the delay in filing, violating established principles for admitting additional evidence post-reservation. The Appellant alleged that he was denied an opportunity to respond, constituting a flagrant violation of natural justice and vitiating the impugned order.

13. The Appellant contended that the Respondent's defences, including Covid-19-related financial difficulties and alleged damages, are mala fide afterthoughts raised post-Section 8 notice to evade liability. The Corporate Debtor's letter dated

08.04.2021, responding to the termination notice of 22.03.2021, admitted financial constraints due to the demise of its promoter and operational issues with bankers but did not dispute the debt or raise Covid-19 as a defence. Similarly, no dispute was recorded in communications from January 2021 until the demand notice, and the 16.12.2020 Minutes confirm the debt's undisputed nature. The Appellant emphasized that the Respondent's reliance on a 21.03.2021 letter, allegedly issued on a Sunday and responded to by NCL on the same day, is dubious and irrelevant, as it pertains to operational stoppage for lack of explosives, not termination or debt disputes. The Appellant submitted that such belated defences fail to meet the Code's requirement of a pre-existing dispute under Section 8(2).

14. The Appellant submitted that the termination notice dated 22.03.2021, issued under clauses 8 and 9 of the MoU, was a direct consequence of the Respondent's persistent default in paying dues, including Rs. 3,98,02,115/- as demanded. The notice complied with the 30-day requirement, and upon the Respondent's failure to remedy the default, the MoU stood terminated on 21.04.2021. The Appellant withdrew its equipment and demanded Rs. 16,24,83,761/- in unpaid bills and Rs. 3,26,73,990/- in undeposited TDS, as recorded in the letter dated 24.04.2021. It was submitted that the Respondent's attempt to equate operational stoppage with termination is baseless, as clause 6.5 of the Second Amendment explicitly includes non-payment of TDS and bill amounts as part of the debt, further affirmed by the 16.12.2020 Minutes.

15. The Appellant contended that the debt of Rs. 22,44,15,010/- comprising a principal sum of Rs. 19,51,57,798 plus 24% simple interest as on 17.05.2021, is admitted and undisputed, as evidenced by the 16.12.2020 Minutes, invoice abstracts, and part payments made by the Respondent. The Appellant reiterated that the demand notice under Section 8, issued on 20.05.2021, was not responded to within the statutory 10-day period, and the Respondent's delayed reply on 30.05.2021 (received on 16.06.2021) lacks merit, in the absence of any pre-existing dispute, coupled with the Respondent's admission of liability, mandates the admission of the Section 9 petition. The Appellant further reiterated that the Respondent's claim that the petition is barred by Section 10A is untenable, as the first 18 invoices, valued over Rs. 1 crore, predate 25.03.2020, as admitted during hearings.

16. Concluding his arguments, the Appellant requested this Appellate Tribunal to set aside the Impugned Order and allow its appeal.

17. We note that initially the Respondent attended the hearings, and filed the Reply to the appeal. However, subsequently the Respondent failed to appear. We note that on 14.02.2025, the counsel for the Respondent brought to our notice that she has not received any instructions from the Respondent and as such this Appellate Tribunal issued fresh notice to the Respondent. The Respondent, however, failed to appear directly or through the counsel and therefore this Appellate Tribunal vide its order dated 21.04.2025, decided to proceed ex-parte. The order dated 21.04.2025 reads as under: -

ORDER
(Hybrid Mode)

21.04.2025: This appeal is directed against the order dated 05.04.2024 by which an application filed under Section 9 of IBC, 2016 by the appellant has been dismissed on two counts i.e. the amount claim comes within the purview of Section 10A and there was a pre-existing dispute raised by the respondent. Notice in this appeal was issued. The sole respondent was represented by the counsel who had appeared till 14.02.2025 and submitted that *"Ms. Arya, Advocate has appeared today through VC and submitted that she has no instruction from the Respondent to appear in this case. Therefore, let fresh notice be issued to Respondent for 07.03.2025."*

2. On 07.03.2025, the notice was issued to the respondent was in transit, therefore, fresh notice was issued for 21.04.2025 and Counsel for the appellant was directed to deposit the requisites as well as the process fee, within three days. The precise order of 07.03.2025 is as under:

"07.03.2025:- On 14.02.2025, the following order was passed:

"14.02.2025:- Ms. Arya, Advocate has appeared today through VC and submitted that she has no instruction from the Respondent to appear in this case. Therefore, let fresh notice be issued to Respondent for 07.03.2025."

As per our record, notice issued to the respondent is in transit.

Let fresh notice be issued to the respondent for 21.04.2025.

Counsel for the appellant is directed to deposit the requisites as well as the process fee, within three days.

Adjourned to 21.04.2025."

3. Thereafter, notice was issued by this court to the respondent for 21.04.2025 (for today) and as per our record the said notice has been delivered. Despite the notice issued and delivered to the respondent, no one has put in appearance on behalf of the respondent, therefore, the respondent is proceeded against ex-parte.

4. We have heard ex-parte arguments of the appellant. **Order Reserved.**

5. Counsel for the appellant is directed to submit the written submissions in not more than three pages along with relevant citations. Let it be done in Font- Times New Roman in 14 font size. Specific paras should be mentioned of the Judgments. Let the needful be done within a period of 10 days from today.

6. During the course of hearing, counsel for the appellant has argued that original MoU dated 10.04.2019 was amended on 07.07.2020 in which Clause 5.7 was added pertaining to the escrow account but the escrow account was never operationalized. In this regard the appellant is also directed to file an affidavit.

18. Hence, we have taken response of the Respondent from the reply filed vide Diary No. 54812, dated 14.10.2024, and note that per contra, the Respondent denied all averments made by the Appellant as misleading and baseless.

19. The Respondent submitted that the appeal filed by Appellant lacks merit and is barred by limitation, warranting dismissal at the threshold, as the Adjudicating Authority rightly rejected the Appellant's Section 9 application under the Code, due to a pre-existing dispute and applicability of Section 10A of the Code.

20. The Respondent submitted that the 2nd Amendment to the MoU dated 20.06.2019, was executed on 07.07.2020, which clearly indicates that up to 07.07.2020, there were no disputes between the parties, and the Appellant company had not raise any grievances regarding payments made or due. The Respondent replied that it is only after 07.07.2020, that any alleged dispute appears to have arisen, specifically during the period covered by Section 10A of the Code. The Respondent replied that the dispute was triggered following the unfortunate demise of the Respondent company's Managing Director due to Covid-19 on 07.08.2020, and the subsequent non-availability of explosives from

Northern Coalfields Limited (NCL), which adversely affected the mining operations. In its reply, the Respondent alleged that the Appellant decided to unilaterally abandon the contract and, in an attempt to extricate itself, raised a frivolous issue regarding non-payment of certain invoices that were issued during the Section 10A period.

21. The Respondent submitted in his reply that it is an undisputed fact that, as per the terms of the MoU, payments to the Appellant company were to be made by the Respondent company on a fortnightly basis, expressly subject to the Respondent's receipt of corresponding payments from NCL and it was agreed that 100% of the amount due to the Appellant would be paid immediately upon the Respondent receiving such payment from NCL, which clearly establishes that the Respondent's obligation to pay the Appellant was contingent upon and directly linked to the receipt of funds from NCL.

22. The Respondent in his reply submitted that it is undisputed by the Appellant company, by executing the 2nd Amendment to the contract on 07.07.2020, expressly enhanced its responsibilities and agreed to an escrow arrangement with a bank, whereby 100% of the amounts received from NCL would be credited directly into the escrow account, with no rights accruing to the Respondent, its bankers, lenders, or statutory authorities over such funds. Under this amendment, the Respondent was only entitled to a commission/management fee of Rs.4 per BCM, and the retention money was to be released directly to the Appellant against submission of a bank guarantee, with the Respondent having

no claim over it. The Respondent in his reply explained that except for the modifications introduced by the 2nd Amendment, all other terms and conditions of the original MoU dated 10.04.2019, remained in full force and effect.

23. The Respondent in his reply also submitted that both the original MoU dated 10.04.2019 and the 1st amendment dated 12.10.2019 were executed prior to the onset of the pandemic, while the 2nd amendment was executed during the pandemic on 07.07.2020 and unfortunately the Managing Director of the Respondent company, who was solely responsible for managing its day-to-day affairs, passed away due to Covid-19 on 07.08.2020, resulting in a temporary disruption of the company's operations.

24. The Respondent in his reply submitted that the Appellant company, with mala fide intentions to evade its expanded obligations under the MoU dated 10.04.2019 and its subsequent amendments, misused the Respondent's letterhead to send a letter to Northern Coalfields Limited (NCL), falsely informing NCL that the Respondent company was ceasing operations immediately. This letter was issued without the knowledge or consent of the Respondent company and was signed by Mr. Gopinath Rao, a representative of the Appellant, rather than by any authorized director of the Respondent and such unauthorized use of the Respondent's letterhead was deliberately done to cause financial harm to the Respondent by damaging its crucial relationship with NCL.

25. The Respondent in his reply further submitted that, upon receiving the letter dated 21.03.2021-improperly sent by the Appellant using the Respondent's

letterhead-Northern Coalfields Limited (NCL) immediately objected, stating that the letter was highly improper, unjustified, and undesirable. NCL clarified that the project was unable to provide the required amount of explosives due to the ongoing crisis caused by Covid-19, as supplies were being allocated based on government directives. NCL strongly advised reconsideration of the decision to halt operations and urged that work resume without delay. The Respondent in his reply stated that the Hindrance Report for March 2021, maintained by NCL, clearly records that the Appellant had already completely stopped work and withdrawn equipment as of 19.03.2021.

26. The Respondent submitted that it was duly recorded by Northern Coalfields Limited (NCL) that the Appellant company, on its own accord, ceased operations on the project and removed equipment on 21.03.2021, in gross violation of the terms of the Works Contract awarded by NCL. The Respondent assailed this unilateral action by the Appellant which was evidently intended to cause financial loss to the Respondent and led to a clear dispute between the parties on account of the Appellant's breach of both the contractual terms and NCL's conditions. The Respondent in his reply alleged that the Appellant addressed a letter dated 22.03.2021 to Smt. Nuzhat Zaidi and Shri Kabir Iram Zaidi, notifying them of its decision to terminate the MoU dated 10.04.2019 and its subsequent amendments, thereby attempting to evade its contractual responsibilities.

27. The Respondent submitted that, through its letter dated 22.03.2021, the Appellant company once again acted in bad faith by attempting to justify its

unlawful stoppage and termination of the project, stating that, due to outstanding dues, it was providing a 30-day notice for automatic termination of the agreements. However, the factual position remains that the Appellant had already ceased operations and removed equipment from the site on or before 21.03.2021, as evident from the correspondence exchanged with NCL on that date.

28. The Respondent in his reply submitted that the Appellant's abrupt work stoppage, without adhering to the MoU's 30-day notice requirement for default remedy and termination, caused significant financial loss to the Respondent, including a penalty of Rs. 1,39,32,302.25 imposed by NCL and payments of Rs. 75,04,994 and Rs. 18,12,570 towards workers' wages and EPF, respectively, which were the Appellant's obligations. These actions led to the Respondent initiating arbitration on 07.09.2021, claiming Rs. 38,61,78,852.60 in losses, further evidencing the dispute.

29. The Respondent submitted that the alleged outstanding invoices of Rs. 13,71,02,646, primarily from 5th and 19th March 2021, fall within the Section 10A period (prohibiting insolvency proceedings for defaults during Covid-19), rendering the Appellant's claim untenable. The claimed TDS amount of Rs. 3,26,73,990 is payable to the Income Tax Department, not the Appellant, and thus does not constitute a default under the Code.

30. The Respondent submitted that the Appellant's reliance on the minutes of the 16.12.2020 meeting is misplaced, as it was a personal, not official, meeting with no admission of debt by Mr. Kabir Zaidi. The Statutory Notice of Demand

dated 20.05.2021 was addressed to individuals, not the Respondent, and was duly replied to on 30.05.2021 within the 10-day period, disputing the claim on merits.

31. The Respondent submitted that the Appellant suppressed critical documents, including the 21.03.2021 stoppage notice and NCL's objection letter, to mislead the Adjudicating Authority and this Appellate Tribunal. The Respondent's interlocutory applications (IA No. 1 and 36 of 2024) were filed with due opportunity for the Appellant to respond, and the Adjudicating Authority's order dated 01.03.2024, allowing IA No. 1, was procedurally fair.

32. The Respondent submitted that the Appellant's claim of Rs. 19,51,57,798 is a minor sum compared to the contract value of Rs. 610,95,23,083, typical in running projects, and was exacerbated by the Covid-19 force majeure and the Respondent's operational challenges post the Managing Director's death. The Appellant's mala fide intent to evade contractual obligations is evident from its premature equipment withdrawal and false non-payment claims.

33. Concluding in reply, the Respondent requested this Appellate Tribunal dismiss the appeal with cost.

Findings

34. We note that an application was filed by the Appellant Company, namely, M/s VPR Mining Infrastructure Pvt. Ltd. under Section 9 of the Code for initiating the CIRP against the Respondent Company i.e. M/s. Gajraj Mining Pvt. Ltd. for having allegedly defaulted to make a payment of their outstanding dues amounting to Rs. 22,44,15,010/- including simple interest @24%. However, the Adjudicating Authority has rejected the petition of the Appellant on the ground of the 10A period being applicable as well as pre-existing disputes.

35. Thus, we need to decide the following two issues: -

Issue No. (I) Whether, the application filed by the Appellant under Section 9 of the Code before the Adjudicating Authority was hit by Section 10A of the Code or not.

Issue No. (II) Whether, any pre-existing dispute existed between the Appellant and the Respondent.

36. Issue No. (I) Whether, the application filed by the Appellant under Section 9 of the Code before the Adjudicating Authority was hit by Section 10A of the Code or not.

- (i) At this stage, we will look into important provisions of the MoU dated 10.04.2019, followed by amendment of MoU vide dated 12.10.2019 and dated 07.07.2020.

Clause 5

5. PAYMENT TERMS:

- 5.1 The payments in respect of the work undertaken by the Second Party and the bills raised pursuant thereto shall be paid once in fortnight at the end of each fortnight subject to the condition that the same being received by First Party from the NCL/Owner. Hundred percent (100%) of the amount payable to Second Party will be paid immediately upon receipt of the same from NCL/Owner.
- 5.2 The bills raised by the Second Party shall be accurate and in accordance with the actual works executed vis-a-vis the amounts recorded in MB at the project site. Subject to the accuracy and correctness of the bills raised by the Second Party, First Party shall make payments against it in the manner as agreed in clause 5.1 and after compliance of the subsequent clauses as covered/mentioned under this MOU.
- 5.3 The Parties agree that the total cost / consideration for execution of the part work from the actual entire work covered under this MOU and as mutually agreed upon under this MOU (unless until mutually amended during the tenure of this MOU) to be paid by the First Party to the Second Party shall not exceed Rs. 231,69,32,000.00 (Rupees Two Hundred Thirty One Crores Sixty Nine Lakhs Thirty Two Thousands Only) excluding applicable taxes as per Statute for contract starting from 15th April, 2019 which shall be subject to change in statute as applicable and amended or made effective. This total cost/consideration is subjected to Price Variation clause mentioned in original agreement of NCL/Owner to Gajraj Mining Pvt Ltd. vide clause No.19 under Special Terms and Conditions for Hiring Contracts, Excavation and removal of over burden.
- 5.4 Price Variation: All additional amounts because of any price variation for the diesel and other components shall be passed on to the second party as prescribed in the agreement between NCL and Gajraj Mining Pvt Ltd.
- 5.5 The Second party hereby unconditionally undertakes that all expenses pertaining to maintenance, supervision, insurance, registration etc. in respect of the equipments shall be exclusively borne by the Second Party only.

- 5.6 It is admitted between parties that the entire Diesel required for the project shall be supplied through Gajraj Mining Pvt Ltd. and the consuming party/second party shall bear the diesel consumption expense and shall make sufficient funds available to maintain the uninterrupted supply of diesel for the project delivery in time. This diesel consumption shall be supported by 'Daily Consumption Report' of Second Party and the discount on concerned Invoice(s), if any, shall be passed to the fullest to the second party as received to the First Party. For the sake of convenience, for day to day transactions, First Party shall authorize the Second Party for signing the cheques by opening the separate bank account.

Clause 6

6. APPLICABLE TAXES & CESS

- 6.1 The consideration for the work done shall be exclusive of all the applicable taxes. Applicable GST amount shall be paid over and above the consideration. Income Tax TDS and GST TDS that will be deducted by NCL/Owner to First Party shall not be deducted to Second Party. The Income Tax will be deducted at the rates applicable in force and will be recovered from amounts payable to Second party and T.D.S. certificate will be issued to that effect by the First Party. The liability of Taxes and/or Cess, if any applicable, is joint and several and in this regard, the second party is liable to the extent of work executed by it. Any new taxes or duties or levies or penalties which were reimbursable or refundable will be paid to the Second party by the First party on receipt from NCL/Owner.
- 6.2 **RELEASE OF RETENTION MONEY** The retention money will be released to the second party on receipt of the same by the First Party against the submission of Bank Guarantee by the First Party on behalf of the Gajraj Mining Pvt Ltd. and the bank Guarantee commission/charges shall be borne by the Second Party on pro rata basis.

Clause 8

8. TERMINATION OF CONTRACT:

- 8.1 Either Party shall be entitled to terminate this Agreement by giving a notice period of 30 days, upon the occurrence of the following:
- (a) In the event of an occurrence of an Event of Default by either Party, as set out in Clause 9 below, and such default is not remedied within 30 days after notice thereof to the other Party.
 - (b) An event of Force Majeure occurring for continuous period of 30 days. For the purpose of this Agreement 'Force Majeure' shall mean to include but not limited to fire, flood, damage by the elements, perils of the sea or air accident, act of God, strike, lock out or other labour disorder not limited to the subject property, act of foreign or domestic de jure, or defacto government whether by law, order, legislation, decree, rule, regulations or otherwise, revolution, civil disturbance, breach of the peace, declared or undeclared war, act of interference or action by civil / military authorities or due to any other cause beyond the Parties' control
 - (c) The Contract is terminated by the NCL/Owner i.e. Northern Coalfields Limited.
- 8.2 In the event of termination of this Agreement, such termination shall be without prejudice to any other rights or remedies a Party may be entitled to hereunder or at law and shall not affect any accrued rights or liabilities of either Party nor the coming into force or continuation in force of any provision hereof which is expressly intended to come into force or continue in force on or after such termination.

Clause 9

9. EVENT OF DEFAULT

9.1 First Party:

If the First Party fails to pay the bills or any other amount as required under this Agreement to the Second party;

9.2 Second Party:

- a) If the Second party fails to execute the work in accordance with the specific requirements of NCL/Owner as detailed in clause 2.2 of this MoU.
- b) If the Second Party fails to provide/ deploy sufficient Equipment to meet the requirement to handle the pre-defined monthly/annual quantities.
- c) If the Second Party fails to provide required manpower for maintaining and operating the Equipments as required by the First Party;
- d) Second Party failing to maintain the health and safety standards at site.
- e) Negligence of any kind by the Second Party.
- f) if the second party breaches the terms of this agreement.

Clause 10

10. REMEDIES
10.1 In case of the First party's Event of Default under this Agreement, the Second party shall have the right to exercise any one or more of the following remedies: <ul style="list-style-type: none">a) To receive the amount of consideration, due and payable in satisfactory proportion to the quantum of Work executed by the Second party, after giving a notice of 30 days to the First party.b) To withdraw the equipment after expiry of the notice period of 30 days, from the work place.c) To sue for recovery of losses/damages (directly and indirectly)
10.2 In case of the Second Party's Event of Default under this Agreement, the First Party shall have the right to exercise any one or more of the following remedies: <ul style="list-style-type: none">a) To recover the losses, costs, expenses and damages (direct or indirect) from the running bill of the Second Party and/ or recover the said amount from the Second Party directly;b) To sue for recovery of the damages;

(ii) From above, it is noted that the MoU was signed between the M/s Gajraj Mining Private Ltd (Respondent herein) who signed MoU as First Party and M/s VPR Mining Private Ltd. (the Appellant herein) who has signed MoU as Second Party on 10.04.2019.

(iii) During hearing, we put a specific question to the Appellant that whether there has any separate contract had been signed, to which the Appellant has replied that the MoU is only agreement between them and based on which the Appellant as Second Party or as sub contractor to the Respondent carried out the work.

(iv) From Clause 5.1, it is seen that the payment in respect of work completed by the Second Party i.e., the Appellant herein was to be made by the Respondent once in a fortnight at the end of each fortnight subject to condition that same

having being received by the Respondent from the Northern Coalfields Limited / owner.

(v) Similarly, from Clause 5.2 it can be inferred that bill raised by the Appellant were to be in accordance with the actual work done vis-à-vis the amount recorded in the MB (although not defined in MoU, however it is presumed that MB stands for Measurement Book).

(vi) Typically speaking, MB is used in engineering and construction projects to record the measurements i.e., quantities of work done or material used. Thus, MB is record of measurements taken on site and is basis for preparing the bills and making payment to the contractor/ sub-contractor. MB is normally used for “running bills” in the sense that it record the progress of work and the corresponding quantities / work that need to be paid periodically (running account bills) which is in contrast to the concept of “fixed bills”. Thus, the MB is used for measuring work progress and generating running bills based on measured quantities.

(vii) We have already noted in Clause 5.1, wherein it has been stated that the Appellant’s bills are to paid once in a fortnight based on work undertaken by the Appellant and the bill raised. When we further look into Clause 5.3 of the above MoU, it is noted that the total cost/ consideration for execution of the work, covered under the MoU has been fixed and pre-determined which was originally Rs. 231,69,32,000/- excluding applicable taxes and subject to price variation.

(viii) From these clauses of MoU, it can be inferred that the contract of the work was at a pre-determined price and the bill raised every month based on the work executed by the Appellant were in nature of the running bills.

(ix) We also note that the Clause 8 defines termination of contract which is subject to Clause 9 i.e., event of default. The event of default on part of the Respondent was on the failure to pay the bills or in other amount as required under the MoU to the Appellant whereas the event of default w.r.t. the Appellant was failure to execute the work in accordance with the specific requirements of Northern Coalfields Limited / owner, as determined in Clause 2.2 of the MoU. Sub-Clause (b) of Clause 9.2 indicate that insufficient deployment of equipment would also tantamount to breach on the part of the Appellant. Similarly, sub-Clause (c) of Clause 9.2 further stipulates that in case the Appellant fails to provide required manpower but maintenance as per the requirement of the Respondent the same will also be treated as breach on the part of the Appellant. Sub-Clause (f) of Clause 9.2 finally indicate that if the Appellant breaches the terms of the agreement, the same is to be treated as an event of default.

(x) The remedies have been provided in Clause 10 of the MoU. It has been significant to note that in Clause 10.2 the words “running bills” have been specifically mentioned, which clearly indicate that the MoU envisaged the concept of “running bills”.

(xi) Now, we will come back to issue of 10A which is fulcrum in the present appeal. It is the case of the Appellant that he raised 42 invoices starting with

invoices dated 05.07.2015 to last invoice dated 19.03.2021. The list of 42 invoices reads as under :-

VPR MINING INFRASTRUCTURE PRIVATE LIMITED GADRAJ MINING PVT LTD - OUTSTANDING DUES STATEMENT											Quantity Eligible for Commission	Commission @Rs.4/per BCM	Cumulative Receivable net of commission	No of days	Interest @ 24%
Sl No	Invoice Date	Quantity	Gross Bill Incl GST	TDS 2% GADRAJ TO VPR	S.D	Electricity/ Bank Charges /Others	Total Deduction	Net Receivable	Received	Received date					
1	05-07-15	1,670.432	168,207,900	2,766,736	8,160,395	106,089	11,092,720	152,175,180	146,642,709	10-07-2015 & 12-07-2015			5,532,471	11	40,016
2	26-07-15	342.916	33,979,118	565,748	1,668,356	-106,089	2,328,615	31,250,503	30,119,008	20-08-15			6,663,966	18	76,872
3	07-08-15	403.784	39,402,489	667,839	1,970,124		2,637,963	36,764,576	31,428,840	07-Aug-15			7,595,644	12	63,130
4	19-08-15	411.777	40,232,289	681,903	2,011,614		2,693,518	37,536,777	36,174,965	19-Aug-15			9,289,490	17	104,655
5	05-09-15	406.268	39,696,999	672,780	1,964,700	68,120	2,735,000	36,968,199	31,672,839	05-Sep-15			10,706,010	14	90,582
6	19-09-15	417.581	44,707,455	757,773	2,235,373		2,993,126	41,774,329	40,190,873	19-Sep-15			12,274,517	21	168,798
7	10-10-15	481.654	48,036,594	814,180	2,401,830		3,216,009	44,820,585	43,192,234	10-Oct-15			13,852,877	11	106,196
8	21-10-15	415.692	44,522,854	754,616	2,226,140	129,192	3,108,966	41,412,388	39,903,736	21-Oct-15			15,362,129	17	171,719
9	07-11-15	962.085	90,811,006	1,589,180	4,669,880		6,239,060	84,572,548	79,000,000	08-Nov-15			20,934,675	13	178,948
10	20-11-15	792.028	75,791,257	1,284,580	3,869,213	80,183	5,233,994	79,557,264	68,067,717	20-Nov-15			23,474,272	17	261,836
11	07-12-15	886.945	85,085,117	1,441,782	4,332,806		5,774,687	79,290,429	76,486,514	07-Dec-15			26,228,137	11	189,705
12	18-12-15	737.562	76,337,011	1,293,763	3,895,251		5,190,013	71,141,960	68,590,472	18-Dec-15			28,869,663	19	360,871
13	06-01-20	906.942	75,550,907	1,280,924	3,857,195		5,137,719	70,413,187	67,946,825	07-Jan-20			31,330,025	12	247,254
14	18-01-20	838.811	79,390,645	1,345,757	4,049,633	156,530	5,551,920	73,847,745	71,151,988	18-Jan-20			34,081,782	17	380,410
15	04-02-20	921.714	88,466,835	1,493,438	4,502,756		6,002,104	82,464,641	79,461,784	05-Feb-20			37,095,139	13	316,574
16	17-02-20	925.895	70,930,849	1,201,760	3,631,892		4,833,683	66,097,167	63,647,463	18-Feb-20			39,457,873	20	674,738
17	14-03-20	854.600	70,163,840	1,189,218	3,584,892		4,774,110	65,289,730	60,000,000	18-Mar-20			41,857,603	5	246,107
18	19-03-20	809.677	67,280,179	1,140,342	3,641,889	158,471	4,740,702	62,539,477	60,281,192	19-Mar-20			43,885,888	20	1,014,327
19	08-04-20	930.649	79,926,925	1,354,694	4,074,226		5,428,920	74,498,005	71,787,903	08-Apr-20			46,328,590	12	629,860
20	20-04-20	815.088	66,537,445	1,127,793	3,391,772		4,519,526	62,017,919	59,538,411	21-Apr-20			48,385,488	14	603,899
21	05-05-20	884.604	75,691,366	1,282,905	3,849,468	17,645	5,148,018	70,546,348	67,980,537	05-May-20			50,504,111	12	669,670
22	18-05-20	827.817	66,195,654	841,479	3,374,683	151,029	4,367,194	61,828,659	60,119,294	19-May-20			52,461,309	12	669,670
23	08-06-20	934.244	81,941,410	1,143,831	4,961,970		5,707,802	84,273,608	81,604,667	09-Jun-20			54,504,674	18	1,024,736
24	18-06-20	726.285	65,650,981	885,521	3,547,949		4,433,470	65,217,511	64,161,294	20-Jun-20			56,540,615	13	742,901
25	10-07-20	536.273	51,038,053	649,551	2,619,863		3,269,354	67,828,697	46,319,078	10-Jul-20			58,581,833	22	1,330,982
26	18-07-20	718.822	73,651,445	936,547	3,682,572	150,917	4,749,627	68,901,818	66,697,742	20-Jul-20			60,603,576	8	488,319
27	07-08-20	740.525	72,852,758	919,732	3,417,613		4,337,345	67,414,913	65,698,773	07-Aug-20			62,642,017	20	1,234,402
28	19-08-20	990.991	96,823,809	1,730,811	4,841,190	751,240	6,330,242	89,999,567	87,121,674	19-Aug-20			64,667,951	12	743,813
29	08-09-20	1,008.633	80,847,476	1,037,727	4,943,374		5,970,094	75,777,380	73,379,361	09-Sep-20			66,666,756	20	1,250,219
30	20-09-20	942.336	86,176,009	1,035,381	4,908,500	157,373	5,561,253	80,608,754	78,052,864	21-Sep-20			68,666,990	19	1,180,495
31	09-10-20	831.392	72,874,699	926,373	3,840,733		4,576,106	68,304,354	66,143,018	08-Oct-20			70,667,234	9	540,730
32	18-10-20	718.805	70,290,110	892,756	3,541,506		4,434,261	65,855,849	63,742,732	19-Oct-20			72,668,468	19	1,176,911
33	06-11-20	632.768	59,869,879	761,098	2,961,494		3,723,592	56,135,328	54,178,130	07-Nov-20			74,669,640	11	677,653
34	17-11-20	780.454	81,732,528	1,038,973	3,944,641	191,194	5,174,809	76,557,720	71,413,984	19-Nov-20			76,669,640	17	1,049,883
35	04-12-20	950.275	92,845,692	1,180,247	4,642,285		5,822,526	87,023,166	84,289,768	05-Dec-20			78,669,640	15	937,922
36	19-12-20	971.353	94,905,662	1,206,420	4,745,259		5,951,673	86,953,389	86,121,027	19-12-2020 & 21-12-2020			80,669,640	18	1,122,448
37	06-01-21	951.907	93,005,114	1,187,268	4,650,256		5,837,524	87,172,190	84,413,963	07-Jan-21			82,669,640	12	748,671
38	18-01-21	885.748	86,541,130	1,100,093	4,327,057	201,765	5,628,915	80,912,205	78,343,208	19-Jan-21			84,669,640	19	1,178,084
39	09-02-21	918.661	89,854,337	1,143,219	4,492,727	48	5,634,994	84,219,344	81,554,367	06-Feb-21			86,669,640	13	805,297
40	19-02-21	871.790	85,137,127	1,082,763	4,258,866	-454	5,342,083	79,835,244	77,308,797	20-Feb-21			88,669,640	14	860,352
41	05-03-21	768.750	74,461,175	946,540	3,723,059	50	4,669,649	69,791,316	67,582,932	5-3-21 & 10-3-21			90,669,640		

VPR MINING INFRASTRUCTURE PRIVATE LIMITED GARRAI MINING PVT LTD - OUTSTANDING DUES STATEMENT														
Bill No	Invoice Date	Quantity	Gross Bill Incl GST	TDS 2% GARRAI TO VPR	S.O	Electricity/ Bank Charges /Others	Total Deduction	Net Receivable	Received	Received date	Balance Receivable	Quantity Eligible for Commission	Commission @Rs.4/per BCM	Cumulative Receivable net of commission
42	19-03-21	651,227	88,518,817	1,061,616	4,175,691	161,381	5,398,688	78,115,129	75,638,025	20-Mar-21	2,477,104	651,227	2,604,908	92,551,048
		33,337,250	3,125,896,123	45,914,374	157,538,345	2,377,687	201,830,405	2,921,065,718	2,783,983,072		137,102,646	11,137,900	44,551,598	29,378,927

RECEIVED ON 10 FEB 2020	58,800,000
RECEIVED ON 10 NOV 2020	25,145,590
BALANCE IN HAND	73,592,785

Qty eligible for Commission	11,137,900	44,551,598
Qty eligible for Commission against the work already completed-mentioned in agreement	1,669,277	6,677,108
Qty eligible for Commission against the work completed now	9,468,623	37,874,490

For VPR Mining Infrastructure Pvt. Ltd.

Director

(xii) From above, we note that the first 18 invoices were prior to 10A period i.e., before 25.03.2020 and invoice from Serial No. 19 to Serial No. 42 are within the restricted period of 10 A of the Code i.e., from 25.03.2020 to 25.03.2021.

(xiii) It is the case of the Appellant that 18 invoices pertain prior to 10A period and since these were invoices wise payment i.e., fixed bill payments and not running bills, the total outstanding at the end of the day was Rs. 9,25,51,048/-In view of the Appellant, the Impugned Order has been incorrectly passed against the Appellant holding that Section 7 application is hit by 10A period. On the other hand, we note that the Adjudicating Authority has held that these bills were “running bills”, therefore, the outstanding amounts pertained to period falling in restricted period covered under Section 10A of the Code.

(xiv) Therefore, a crucial aspect here involves correctly identifying the nature of the debt owed, particularly whether it arises from running bills or fixed invoice-based bills, as this classification can influence the determination of default for initiating CIRP. Section 3(12) of the Code defines 'default' as the "non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid". This definition is pivotal when considering scenarios involving partial payments against the bills raised, paid and remaining outstanding amount. We need to differentiate between running bills and fixed invoice-based bills in the context of initiating CIRP for outstanding payments, while considering the temporal limitations imposed by Section 10A of the Code.

(xv) We have already noted that running bills are a common invoicing method employed in long-term projects, particularly within the construction and engineering sectors, where work is executed over an extended period. These invoices are typically submitted periodically, often monthly, and claim payment for the work completed up to a specific point in time. The amount claimed in a running bill is usually based on the percentage of physical work completed or the achievement of pre-defined milestones within a specific billing cycle, which helps to ensure a regular influx of funds for the contractor, facilitating the ongoing execution of the project, and allows the Corporate Debtor or the owner of the project to track progress and manage payments accordingly. The MB is typically jointly verified and signed by representatives of both the Corporate Debtor/ owner and the contractor, adding to its authenticity and reliability. Following the

recording of measurements in the MB, the contractor submits a Running Account Bill (RA Bill), which is a regular invoice detailing the work performed up to a specific date, directly referencing the measurements documented in the MB. RA Bills typically provide a comprehensive breakdown of the completed work, including measurements of various items, their corresponding unit rates and prices, the percentage of work completed during the billing period, any variations in the initially estimated quantities, and details of retentions and deductions. Part payment against a running bill would generally reduce the outstanding amount pertaining to the specific work certified and recorded in the MB and claimed in the RA Bill up to that particular billing cycle.

(xvi) In contrast to running bills, fixed invoice-based bills involve a pre-determined price agreed upon between the contractor and the Corporate Debtor/owner for a specific project or a defined set of deliverables, often established before the work commences and includes examples like lump sum contracts where a single, fixed price covers the entire project , milestone-based payments where invoices are raised and payments are made upon the successful completion of pre-defined stages or milestones in the project , and recurring billing where a fixed amount is invoiced at regular intervals, such as monthly or quarterly, irrespective of the actual amount of work performed during that period. These types of bills typically outline defined deliverables and a clear scope of work, ensuring both parties have a mutual understanding of the obligations and the

expected outcomes. Invoicing under a fixed price arrangement is usually tied to the achievement of agreed-upon milestones or the final completion of the project.

(xvii) Debts arising from both running bills and fixed invoice-based bills will fall under the definition of operational debt as per Section 5(21) of the Code, which defines operational debt as "a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority". Section 3(11) of the Code provides a broader definition of 'debt' as "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt". This encompasses the financial obligations arising from the provision of goods or services, regardless of whether they are documented through running bills or fixed invoices. The concept of 'default' under the Code, as defined in Section 3(12), is crucial when considering part payments as the definition explicitly includes the non-payment of any part of a due debt, implying that even after a partial payment, a default exists for the remaining outstanding amount. Therefore, a part payment does not necessarily negate the occurrence of a default; it merely reduces the quantum of the debt that remains unpaid. Thus, even if a part payment has been made, CIRP can still be initiated if the remaining unpaid amount meets or exceeds the threshold of Rs. 1 Crore.

(xviii) Section 10A of the Code introduced a suspension on the initiation of CIRP under Sections 7, 9, and 10 for any default arising on or after March 25, 2020,

and before March 25, 2021. This bar on initiating CIRP for defaults within this specified period is absolute. For both running bills and fixed invoices, if the date of default for the non-payment of the whole or any part of the bill (after accounting for any part payment) falls within the Section 10A period, then CIRP cannot be initiated for that particular instance of default. However, if the date of default for a running bill or a fixed invoice occurred before March 25, 2020, and the default continued into or after the Section 10A period, the bar under Section 10A does not apply. Therefore, when considering initiating CIRP for part payment defaults related to running bills or fixed invoices, it is crucial to accurately determine the date of default for the unpaid amount. If this date falls within the Section 10A moratorium, CIRP is barred for that specific default. However, defaults originating before this period and continuing thereafter are not protected by Section 10A.

(xix) We observe that in ***Ramesh Kymal v. Siemens Gamesa Renewable Power Pvt. Ltd.***, [(2021) 3 SCC 224] the Hon'ble Supreme Court of India unequivocally clarified that Section 10A imposes an absolute bar on initiating CIRP for defaults occurring during the period from March 25, 2020, to March 24, 2021.

(xx) In this connection, we would like to look into the reasoning on the aspect of Section 10A of the Code used by the Adjudicating Authority as contained in the Impugned Order. The relevant portion of the Impugned Order reads as under:-

“9.1 It is noted that the net outstanding amount as on any day ranged from Rs 55.32 lakhs to Rs 9.50 crores only whereas during the period the total amount payable as per the various bills/invoices amounted to Rs. 292.21 crores and as against that the Respondent Company had paid an amount to the extent of Rs. 278.39 crores. Thus, the outstanding, if any, as on a particular day during the entire period of 09.07.2019 to 19.03.2021, which ranged between Rs 55.32 lakhs to Rs 9.5 crores only, was not as high when compared to the total amount of Rs 278.39 crores paid by the Respondent Company. Furthermore, keeping in view the nature of contract, the invoices are to be considered as running tails only and as such the payments made by the Respondent Company is to be adjusted against the outstanding dues as per the running account. However, it has been stated on behalf of the Applicant Company that these were not running bills and rather as per the terms of the MoU each bills were to be settled by the Respondent Company at 100 % separately.

9.2 But, in the context, on perusal of Clause 10.2 of the MoU dated 10.04.2019, we find that the invoices raised were running bills only (refer para 5.1 above.) For ready reference the content of clause 10.2 of the MoU is reiterated herein as under:

"10.2 In case of Second Party's Event of Default under this Agreement, the First Party, shall have the right to exercise any one or more of the following remedies".

(a) To recover the losses, costs, expenses & damages (Direct or Indirect) from the running bills of the Second Party and/or recover the said amount from the Second Party directly.

(b) To sue for recovery of the damages.”

Here the Respondent Company is referred to as First Party and the Applicant Company is referred to as Second Party. In this clause there is a reference for recovery of losses/damages incurred to the First Party from the running bills of the Second Party. Thus, the plea taken by the Applicant Company that its invoices cannot be considered as running bills is quite misplaced. The above-mentioned clause of the MoU also supports the view that the bills under reference have to be treated as running bills, and thus the outstanding amount as on any day has to be first adjusted as against the regular payments made immediately after that day. That way the total payment of Rs 278.39 crores was to be adjusted against the various bills and if that is done then the outstanding, amount of Rs 9.25 crores will have to be co-related to the last two invoices dated 05.03.2021 & 19.03.2021.

Only this inference can be derived in another way also. From Annexure 2 of the demand notice (refer to para 3 above), it can be noted that the last two invoices are dated 05.03.2021 & 19.03.2021. The payable amount as per these invoices amounted to Rs 6.98 crores & Rs 7.81 crores respectively totalling to Rs 14.79 cores as against these invoices the payments made by the Respondent Company

amounted to Rs 6.75 crores & 7.56 crores totalling to Rs 14.31 cores. As already mentioned the balance outstanding as at the end of the period amounted to Rs 9.25 crores only which is less than the total invoices value as per the last two bills dated 05.03.2021 & 19.03.2021, thus it has to be inferred that this balance outstanding is to be correlated to the last two bills only and that way the default date falls within 10A period. In view thereof, the application is not maintainable at all and on that ground, itself deserved to be rejected.

It is to be noted that the liability for depositing the TDS in the Government account is of the Respondent Company only, but in terms of the said MoU and amendments made thereto, if the Respondent Company is made liable to pay that amount also to the Applicant Company (on failing to pay within due dates as per the Income Tax Act), then that amount would also fall within the period of 10A and as such on that account also the application filed by the Applicant Company does not succeed.

Even otherwise, if we consider the admitted amount as per the minutes dated 16.12.2020 (for clearing pending bill amounting to Rs 3.23 crores and depositing the TDS of Rs 1.47 crores) and also the outstanding dues as on 22.03.2021 for an amount of Rs 16.24 crores, and the TDS to the tune of Rs 3.98 crores, as stated by the Applicant Company, in default then also such default would lie within the 10A period and as such the application would not be

maintainable and on that ground itself the application deserves to be rejected.”

(Emphasis Supplied)

(xxi) From above, it is noted that the Adjudicating Authority was of the view that all these invoices were in nature of “running bills”. Based on this conviction of “running bills”, the Impugned Order has recorded that total amount payable at the bills/ invoices was amounting to Rs. 292.21 Crores against which the Respondent has paid amount of Rs. 278.39 Crores. Thus, there was a balance outstanding of Rs. 9.25 Crores payable to the Appellant. The Adjudicating Authority had further relied upon the amount of Rs. 9.25 Crores pertains to the last two bills which was falling in restricted under Section 10A period of the Code.

(xxii) We do not find any fault in the reasoning of the Adjudicating Authority. We have already noted that in the MoU, which is the only document between the Appellant and the Respondent, the Clause regarding ‘MB’ and “running bills” have been clearly used, indicating that the intention of the parties was to make payment against running bills and once the concept of “running bills” is accepted then one has to take into consideration total amount payable, which is Rs. 292.21 Crores and the amount paid which is Rs. 278.39 Crores. Thus, the net outstanding payment was Rs. 9.25 Crores (approx.) which is covered by the last two invoices itself as correctly pointed out by the Adjudicating Authority. On this account, we find that the default amount claimed by the Appellant falls within 10A period.

(xxiii) Further, we note that in Part IV of the Section 7 application the Appellant has claimed Rs. 19,51,57,798/-. The break of the same is Rs. 16,24,83,809/- towards work done payment plus Rs. 3,26,73,990/- towards TDS deducted from work bills and not deposited. It has been indicated in Part IV that detailed calculation is as per the enclosure to demand notice. We find demand notice which reads as under :-

VPR
VPR MINING INFRASTRUCTURE PVT. LTD.
 ISO 9001:2015, ISO 14001:2015 & ISO 45001:2018 Certified Company
 CIN : U14205AP2008PTC057363
 Corp. Off.: D.No 8-2-293/82/A/1259, 3rd Floor, Plot No. 1259, Lakshmi Towers, Road No. 36, Jubilee Hills, Hyderabad - 500033.
 Tel.: (0) +91 40 23551862/63, Fax : +91 40 23551861
 Reg. Off. : Door No. 16-1-1782, Ramamurthi Nagar, Nellore - 524001, www.vprmininginfra.com

(WITHOUT PREJUDICE NOTICE)

FORM 3
 (See clause (a) of sub-rule (1) of rule 5)
FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE
INSOLVENCY AND BANKRUPTCY CODE, 2016
 (Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

Hyderabad
 Date: 20.05.2021

To,
 Sri. Nuzhat Zaidi,
 Sri. Kabir Iram Zaidi,
 The Managing Director
 Gajraj Mining Private Limited
 Behind Telephone Exchange,
 Nehru Nagar, Singrauli,
 Madhya Pradesh - 486889.

From,
 M/s. VPR MINING INFRASTRUCTURE LTD
 Corporate office at 8-2-293/82/A/1259,
 Luxmi Towers, Road No.36, Jubilee Hills
 Hyderabad-500033. Telengana

Sub : Demand notice/ invoice demanding payment in respect of unpaid operational Debt due from M/s. Gajraj Mining Private Limited

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from M/s. Gajraj Mining Private Limited.
2. Please find particulars of the unpaid operational debt below:

~ 1 ~

For VPR Mining Infrastructure Pvt. Ltd.
 Director

Company App. (AT) (Ins.) No. 1546 of 2024

PARTICULARS OF OPERATIONAL DEBT		
1	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	Rs. 19,51,57,798/- (Rs 16,24,83,809 towards work done payments (+) Rs. 3,26,73,990- towards TDS amount deducted from work bills and not deposited) a) Memorandum of Understanding dated 10 th April, 2019 b) First Amendment dated 12 th October, 2019 c) Second Amendment dated 7 th July, 2020. d) Minutes of Meeting dated 16-12-2020 Payment due dates: Respective Invoice dates
2	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)	Rs. 19,51,57,798/- + 24% Simple interest per Annum as on 17-05-2020 i.e., Rs. 2,92,57,212/- Total - Rs.22,44,15,010/- Enclosed Annexure 1 & 2
3	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)	None
4	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	Not Applicable
5	RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)	None

~ 2 ~

For VPR Mining Infrastructure Pvt. Ltd.



Director



6	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE	a) Memorandum of Understanding dated 10 th April, 2019 b) First Amendment dated 12 th October, 2019 c) Second Amendment dated 7 th July, 2020. d) Minutes of Meeting dated 16-12-2020
7	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	a) Memorandum of Understanding dated 10 th April, 2019 b) First Amendment dated 12 th October, 2019 c) Second Amendment dated 7 th July, 2020. d) Minutes of Meeting dated 16-12-2020

3. If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.
4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:
 - a. An attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - b. An attested copy of any record that M/s. VPR MINING INFRASTRUCTURE LTD has received the payment.
5. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of M/s. Gajraj Mining Private Limited



Yours Sincerely

Mr G V Satyanarayan
Director,

Corporate office at 8-2-293/82/A/1259
Laxmi Towers, Road No.36, Jubilee Hills
Hyderabad-500033, Telangana

~ 3 ~

For VPR Mining Infrastructure Pvt. Ltd.

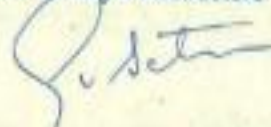
Director

VPR MINING INFRASTRUCTURE PRIVATE LIMITED
GAJRAJ MINING PVT LTD - OUTSTANDING DUES STATEMENT

Particulars	Amount (Rs.)	Remarks
Bill amounts pending	13,71,02,646	Refer Annexure-I
Security Deposit pending to date	7,35,92,765	Refer Annexure-I
Diesel 1 tanker supplied	13,39,996	
	21,20,35,407	
Less:		
Adjustment	50,00,000	
Commission @Rs.4/BCM on quantities eligible	4,45,51,598	Invoice not yet raised by GAJRAJ Mining on VPR Mining
	4,95,51,598	
Balance receivable from Gajraj Mining	16,24,83,809	
TDS deducted not yet paid by Gajraj-		Amounts not reflecting in 26AS of VPR Mining
FY 2019-20	76,57,041	
FY 2020-21	2,50,16,949	
Net Receivable from GAJRAJ Mining	19,51,57,798	
Interest @ 24% p.a. on Bill amounts due	2,93,18,068	Refer Annexure-I
Net Receivable alongwith Interest from GAJRAJ Mining	22,44,75,866	

For VPR Mining Infrastructure Pvt. Ltd.



Director

Company App. (AT) (Ins.) No. 1546 of 2024

VPR MINING INFRASTRUCTURE PRIVATE LIMITED

GAIRAJ MINING PVT LTD - OUTSTANDING DUES STATEMENT

Sl No	Invoice Date	Quantity	Gross Bill Incl GST	TDS 2% GAIRAJ TO VPR	S.D	Electricity/ Bank Charges /Others	Total Deduction	Net Receivable	Received	Received date	Balance Receivable	Quantity Eligible for Commission	Commission @Rs.4/per BCM	Cumulative Receivable Net of commission	No of days	Interest @ 24%
1	09-07-19	1,670,432	163,207,900	2,766,236	8,160,295	106,089	11,092,720	152,175,180	146,042,709	10-07-2019 & 12-07-2019	5,532,471			5,532,471	11	40,016
2	20-07-19	342,916	33,979,118	565,748	1,668,956	-106,089	2,528,615	31,250,503	30,119,008	20-Jul-19	1,131,495			6,663,966	18	78,872
3	07-08-19	403,284	39,402,489	667,829	1,970,124		2,637,953	30,794,576	31,423,840	07-Aug-19	1,939,678			7,599,644	12	63,120
4	19-08-19	411,777	40,272,289	681,903	2,011,614		2,693,518	37,530,777	36,174,966	19-Aug-19	1,363,806			8,963,450	17	104,605
5	05-09-19	406,266	39,693,929	672,780	1,964,700	68,120	2,735,800	36,968,199	31,627,839	05-Sep-19	1,343,560			10,306,010	14	96,582
6	19-09-19	457,581	44,707,455	757,753	2,235,373		2,993,126	41,734,329	40,190,873	19-Sep-19	1,515,506			12,274,517	21	186,799
7	10-10-19	401,654	48,076,594	814,180	2,401,830		3,216,009	44,820,085	43,192,274	10-Oct-19	1,628,361			13,852,877	11	100,196
8	21-10-19	455,692	44,552,994	754,676	2,226,148	128,152	3,108,966	41,412,088	39,903,736	21-Oct-19	1,509,252			15,362,129	17	171,719
9	07-11-19	962,095	90,811,006	1,579,180	4,669,880		6,238,060	84,573,546	79,000,000	08-Nov-19	5,572,546			20,934,675	13	176,948
10	20-11-19	792,078	75,791,257	1,204,588	3,869,213	80,183	5,233,994	79,557,264	68,067,717	20-Nov-19	2,489,547			23,424,222	17	261,836
11	07-12-19	886,945	85,085,117	1,441,782	4,332,806		5,774,687	79,202,429	76,486,514	07-Dec-19	2,703,915			26,228,137	11	189,705
12	18-12-19	737,562	76,337,011	1,293,763	3,895,251		5,190,013	71,141,360	68,590,472	18-Dec-19	2,641,526			28,869,663	19	360,871
13	06-01-20	906,942	75,530,907	1,280,924	3,857,195		5,137,719	70,413,187	67,946,825	07-Jan-20	2,466,362			31,336,025	12	247,254
14	18-01-20	828,911	79,399,685	1,345,757	4,049,633	156,530	5,551,920	73,847,740	71,151,988	18-Jan-20	2,695,757			34,031,782	17	380,410
15	04-02-20	921,734	88,466,835	1,499,438	4,502,756		6,002,194	82,464,641	79,461,284	05-Feb-20	3,023,357			37,055,139	13	316,574
16	17-02-20	925,895	70,905,849	1,201,760	3,621,892		4,823,683	66,080,197	63,647,463	18-Feb-20	2,432,734			39,487,873	20	674,738
17	14-03-20	894,600	70,163,840	1,189,218	3,584,892		4,774,110	65,389,730	60,000,000	18-Mar-20	35,389,730			74,857,603	5	246,107
18	19-03-20	809,827	67,286,179	1,140,342	3,441,889	158,471	4,740,702	62,330,477	60,281,192	19-Mar-20	2,258,285			77,115,888	20	1,014,327
19	08-04-20	930,649	79,936,925	1,354,894	4,074,226		5,428,930	74,488,065	71,787,903	09-Apr-20	2,710,102			79,828,990	12	629,800
20	20-04-20	815,088	66,537,445	1,127,793	3,391,772		4,519,526	67,017,919	59,538,411	21-Apr-20	2,479,508			82,305,498	18	863,899
21	05-05-20	884,604	75,891,366	1,282,905	3,849,468	12,645	5,145,018	70,546,340	67,980,537	05-May-20	2,565,811			84,871,309	12	669,670
22	18-05-20	827,817	66,195,854	841,673	3,334,683	151,028	4,367,194	61,828,659	60,119,294	19-May-20	1,709,365			86,580,674	18	1,024,736
23	05-06-20	934,244	80,881,410	1,143,831	4,563,970		5,707,802	84,273,408	81,604,067	05-Jun-20	2,668,941			89,249,615	13	762,901
24	18-06-20	726,265	65,690,981	885,521	3,547,949		4,433,470	65,227,511	68,141,294	20-Jun-20	2,066,717			91,315,833	22	1,320,952
25	10-07-20	596,273	51,078,053	649,551	2,619,803		3,269,354	67,828,697	46,313,078	10-Jul-20	5,515,619			92,831,452	8	488,319
26	18-07-20	753,822	73,651,445	936,347	3,687,572	150,907	4,748,827	68,881,818	66,697,742	20-Jul-20	2,184,576	287,503	1,150,011	93,886,017	20	1,234,402
27	07-08-20	740,525	72,852,758	919,732	3,417,613		4,337,345	67,814,913	65,688,773	07-Aug-20	2,146,140	436,052	1,744,707	94,267,951	12	743,813
28	19-08-20	990,991	96,823,809	1,730,811	4,841,190	750,240	6,330,342	89,999,567	87,121,674	19-Aug-20	2,871,893	517,772	2,071,087	95,068,756	20	1,250,219
29	08-09-20	1,008,633	80,847,476	1,037,727	4,542,374		5,079,096	75,777,380	73,379,361	09-Sep-20	2,388,019	721,887	2,887,527	94,579,248	12	746,369
30	20-09-20	942,336	86,170,009	1,095,381	4,108,500	157,373	5,361,255	80,600,754	78,052,864	21-Sep-20	2,535,890	660,934	2,643,734	94,491,401	19	1,180,495
31	09-10-20	831,302	72,874,659	926,373	3,840,733		4,576,106	68,304,554	66,143,018	08-Oct-20	2,161,536	475,008	1,900,094	94,752,905	9	540,710
32	18-10-20	718,805	70,290,110	892,795	3,511,566		4,404,281	65,825,848	63,742,752	19-Oct-20	2,083,097	657,872	2,631,488	94,204,514	19	1,176,911
33	06-11-20	612,768	59,889,879	761,098	2,993,494		3,754,592	56,131,578	54,178,110	07-Nov-20	1,937,198	612,768	2,451,072	93,690,640	11	677,653
34	17-11-20	780,454	81,732,528	1,038,973	3,944,641	191,194	5,174,808	76,557,720	71,413,584	19-Nov-20	5,143,780	780,454	3,121,814	95,712,562	17	1,049,883
35	04-12-20	950,275	92,845,692	1,180,247	4,642,285		5,822,526	87,023,166	84,289,268	05-Dec-20	2,733,898	842,806	3,371,619	93,094,836	15	937,922
36	19-12-20	971,353	94,905,062	1,306,420	4,745,259		5,951,677	88,953,289	86,121,022	19-12-2020 & 21-12-2020	2,832,367	772,675	3,080,700	94,836,504	18	1,122,448
37	04-01-21	951,907	93,005,114	1,182,168	4,660,256		5,832,524	87,172,190	84,413,583	07-Jan-21	2,758,627	677,881	2,711,525	94,683,608	12	748,671
38	18-01-21	885,748	85,541,110	1,100,693	4,327,057	201,769	5,428,825	86,912,206	78,347,108	19-Jan-21	1,586,898	770,913	3,080,051	94,370,452	19	1,178,984
39	08-02-21	919,661	89,854,537	1,142,219	4,462,727	48	5,634,934	84,219,344	81,554,367	08-Feb-21	2,605,177	706,563	3,826,250	94,209,279	13	805,297
40	19-02-21	871,790	85,127,327	1,087,763	4,258,866	454	5,342,083	79,835,244	77,308,787	20-Feb-21	2,526,447	818,734	3,734,987	93,400,889	14	860,352
41	05-03-21	768,750	74,401,175	946,540	3,723,059	50	4,669,649	68,731,216	67,582,932	5-3-21 & 10-3-21	2,208,594	747,018	2,990,631	92,670,852		

For VPR Mining Infrastructure Pvt. Ltd.

R. S.

Director

Company App. (AT) (Ins.) No. 1546 of 2024

VPR MINING INFRASTRUCTURE PRIVATE LIMITED GARRAJ MINING PVT LTD - OUTSTANDING DUES STATEMENT														
Bill No	Invoice Date	Quantity	Gross Bill Incl GST	TDS 2% GARAJ TO VPR	S.D	Electricity/ Bank Charges /Others	Total Deduction	Net Receivable	Received	Received date	Balance Receivable	Quantity Eligible for Commission	Commission @Rs.4/ per BCM	Cumulative Receivable net of commission
42	19-03-21	651,227	88,518,817	1,061,616	4,175,691	161,381	5,398,688	78,115,129	75,638,025	20-Mar-21	2,477,104	651,227	2,604,908	92,551,048
		33,337,250	3,125,896,123	45,914,374	157,538,345	2,377,687	205,830,405	2,821,065,718	2,783,963,072		137,182,646	11,137,900	44,551,888	28,378,923

RECEIVED ON 10 FEB 2020	58,800,000
RECEIVED ON 10 NOV 2020	75,145,590
BALANCE IN HAND	73,592,783

Qty eligible for Commission	11,137,900	44,551,888
Qty eligible for Commission against the work already completed-mentioned in agreement	1,668,277	6,677,108
Qty eligible for Commission against the work completed now	9,468,623	37,874,490

For VPR Mining Infrastructure Pvt. Ltd.

Director

(xxiv) Thus, although some calculation sheet has been made which includes bill amount pending security deposit, diesel tanker supplied, etc., however exact details of calculation of entire amount claimed thereof, seems not to have been attached or even furnished at this appeal stage and as such, we cannot go into details of these figures. The only sheet, which is clear and concise is the list of 42 invoices which we already discussed and the Impugned Order also recorded the same.

(xxv) On 21.04.2025, during the course of hearing, counsel for the appellant has argued that original MoU dated 10.04.2019 was amended on 07.07.2020 in which Clause 5.7 was added pertaining to the escrow account but the escrow account was never operationalized. In this regard the appellant was also directed to file an affidavit vide our order dated 21.04.2025.

(xxvi) However, we note that no such affidavit has been filed by the Appellant. We also observe that the Written Submissions was filed by the Appellant on 30.04.2025 but without filing the affidavit. As such, we are not in a position to accept the submission made by the Appellant on this account.

(xxvii) Now, we will examine the aspect of alleged non-payment of TDS by the Respondent amounting to operational debts, which were not paid by Corporate Debtor to the government resulting into default for Section 7 application. It is the case of the Appellant that non payment of TDS will tantamount to default by the Corporate Debtor i.e., Respondent herein towards the Operational Creditor i.e., the Appellant herein. We appreciate that when corporate debtor makes specific payments, it is obligated to deduct a certain percentage of the gross amount as tax and remit this deducted amount to the government. This deducted amount is essentially held by the corporate debtor on behalf of the government and represents a prepayment of the income tax liability of the recipient of the payment. Failure on the part of the corporate debtor to either deduct the TDS or to deposit the deducted amount with the government attracts penalties and interest charges as per the provisions of the Income Tax Act. The amount of TDS deducted by the corporate debtor is reflected in the Form 26AS of the recipient of the income, allowing them to claim credit for this amount against their total income tax liability when filing their tax returns.

The primary obligation for the non-payment of TDS rests with the corporate debtor in relation to the Income Tax Department, rather than directly towards the

operational creditor. The operational creditor's fundamental concern is typically the receipt of the full payment due for the goods or services they have provided,.

(xxviii) Thus, we also need to examine whether the non-payment of TDS by the Corporate Debtor/ Respondent can constitute a valid ground for the Appellant as an operational creditor to initiate the CIRP under the Code. Understanding the interplay between the Code provisions regarding operational debt and the obligations imposed by the Income Tax Act, 1961 concerning TDS is crucial in determining the viability of such an action. The provisions under the Code indicate that a tax-related default by the Corporate Debtor towards the government, even if originating from a transaction involving an operational creditor, might not automatically fall under the purview of operational debt in a manner that allows the latter to trigger CIRP. We note that Section 5(21) of the Code defines "operational debt" as "a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority". An "operational creditor," as defined under Section 5(20) of the Code, is any person to whom an operational debt is owed, which also includes individuals to whom such a debt has been legally assigned or transferred. Generally, statutory dues such as income tax, sales tax, and Value Added Tax are considered operational debts owed to the respective government authorities. The fundamental characteristic of an operational debt is

that it arises from a transaction related to the operations of the corporate debtor, typically involving the supply of goods or services.

(xxix) Thus, we need to clearly understand that while TDS is a statutory due, the operational creditor's primary claim against the corporate debtor usually pertains to the payment for goods or services they have provided. The non-remittance of TDS by the corporate debtor, while a legal obligation, is principally a matter between the corporate debtor and the tax authorities. The Code framework for operational debt recovery is primarily designed to address defaults in payments for operational transactions. The failure of a corporate debtor to pay the TDS amount does not constitute a sufficient reason for admitting an application under Section 9 of the Code, which pertains to the initiation of CIRP by an operational creditor.

(xxx) Thus, we hold that the Appellant, as an operational creditor, cannot initiate the CIRP against a Corporate Debtor only on the ground of non-payment of TDS by the Respondent as Corporate Debtor. The Income Tax Act, 1961, provides specific legal avenues and remedies to address instances of non-deduction or non-remittance of TDS, and these are the mechanisms that the relevant tax authorities are expected to pursue. While statutory dues in general can be classified as operational debt under the Code, the failure of a corporate debtor to remit TDS, which is essentially tax collected on behalf of the government from payments made to others, is not considered a debt owed to the Appellant as an operational creditor in a manner that would entitle him to initiate CIRP under the Code. The

Code is primarily focused on resolving insolvency related to defaults in payments arising from operational or financial relationships between the corporate debtor and its creditors. Therefore, matters concerning non-compliance with tax laws, such as the non-payment of TDS, fall under the purview of the Income Tax Act and its enforcement mechanisms.

37. In view of above detailed examination of facts and law, we do not find any merit in the contention of the Appellant on the applicability of 10 A period in Section 9 application. We hold that the outstanding bills of Rs. 9.25 Crores (approx.) fell in 10A restricted period and thus the Appellant could not have initiated Section 9 application against the Respondent. We concur with the finding of the Adjudicating Authority on this issue and do not find any fault in the Impugned Order on this ground.

38. Issue No. (II) Whether, any pre-existing dispute existed between the Appellant and the Respondent.

Since, the application is directly hit by the 10 A restricted period as provided in the Code, as such, it is not maintainable. In view of this, we do not intent to go into the issue of pre-existing dispute which has been elaborated in the Impugned Order.

39. In fine, we do not find any error in the Impugned Order. The Appeal devoid of any merit stand rejected. No cost. I.A., if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sim