IN THE NATIONAL COMPANY LAW TRIBUNAL, ALLAHABAD BENCH, ALLAHABAD

CP NO.(IB)18/ALD/2017
CA NO.37/2017

(UNDER SECTION 9 OF THE INSOVLENCY & BANKRUPTCY CODE, 2016 READ WITH RULE 6 OF THE INSOVLENCY & BANKRUPTCY [APPLICATION TO ADJUDICATING AUTHORITY] RULES, 2016)

IN THE MATTER OF

MR. HIMALAY DASSANI,
416 Hubtown Solaris, N.S. Phadake Road,
Andheri (E), Mumbai-400 069

..... OPERATIONAL CREDITOR/APPLICANT

VERSUS

M/S SOUTH EAST U.P. POWER TRANSMISSION COMPANY LTD.,
CIN:U40105UP2009PLC038216
A company registered under provisions of Companies Act, 1956,
Registered office at Shalimar Titanium, 601-602, 6th Floor,
Plot No.TC/G-1/1, Vibhuti Khand, Gomti Nagar, Lucknow-226 010

..... CORPORATE DEBTOR/RESPONDENT

NATIONAL COMPANY LAW TRIBUNAL ★ ALLAHABAD U.P. ★

JUDGMENT/ORDER DELIVERED ON 04.08.2017

CORAM : SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

For the Operational Creditor :	**Sh. Pratik J. Nagar, Advocate.** ***Alongwith,*** **Sh. Pawan Sharma, Advocate.**
For the Corporate Debtor :	**Sh. Anurag Khanna, Advocate.** ***Alongwith,*** **Sh. Anurag Asthana, Advocate.**

PER : SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

JUDGMENT/ORDER

1. The operational creditor files the present application U/s 9 of the Insolvency & Bankruptcy Code, 2016 and seeks to trigger Corporate

Insolvency Resolution Process in respect of the corporate debtor company by admitting the petition and to appoint an IRP in terms of Section 16 of the I & B Code and further declare moratorium under Section 14 of the Code and further to cause a publication under Section 15 of the Code for announcement Corporate Insolvency Resolution Process in respect of the corporate debtor company by filing the present petition under the Code. The applicant/operational creditors have made such averments stated as under: -

1. That the corporate debtor company commits default in making payment of the operational debt due to the applicant;

2. That the applicants sent a demand notice in Form 3 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor company demanding the payment of his operational debt as consultancy fee, but it remains still unpaid;

3. That no notice of existence of dispute has been received by the applicant (the operational creditor) from the corporate debtor company within stipulated period of ten days from the receipt of statutory demand notice;

4. Thus there has been no repayment to the applicant of his unpaid operational debt from the Corporate Debtor Company.

2. The applicant in the prescribed format of the present application made such averments that the total amount due towards operational debts is Rs.38 Crores (as per the column 1 part 4 of the application) and the corporate debtor company is liable to make payment to the

applicant for a sum of **Rs.59,20,49,559/- (Rupees Fifty-Nine Crores Twenty Lakhs Forty-Nine Thousand Five Hundred and Fifty-Nine only).** In the part 5 column 6 of the present application. The petitioner has stated such that the amount due as a final settlement payment alongwith other direct and indirect taxes as per the terms of clause 2 read with schedule A as per the Final Settlement & Consultancy Agreement dated 15th March, 2016, entered among the parties.

3. Thus, the applicant has now sought a prayer for triggering the insolvency process in respect of the corporate debtor company. He placed reliance on the above referred final settlement & consultancy agreement dated 15th March, 2016 being a tripartite agreement entered among the parties i.e. the operational creditor with M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. the original contractor and further with the present corporate debtor company. Thus, he made a claim for an amount in default for sum of Rs.59,20,49,559/- excluding the interest accrued thereon. In support of his contention, the applicant annexed a copy of the demand notice dated 21st December, 2016 (alongwith the present application) issued to the corporate debtor company and stated that he did not receive any such amount from the corporate debtor towards payments of his dues under the above referred final settlement & consultancy agreement. The operational creditor has further enclosed with the present applicant a copy of the statement of the Bank account as an evidence of non-receipt of any such payment from the corporate debtor company due under above stated final settlement agreement.

4. The applicant (operational creditor) in the petition has described about the consultancy services, he agreed to offer to the M/s Isolux Corsan India Engineering and Construction Ltd. (the original contractee) in respect of awarding a project for developing and execution of the transmission system of 765 KV S/C in Mainpuri-Bara Line with 765/400 KV AIS at Mainpuri and for associated works on a build, own, operate, and transfer (BOOT) basis (project). The present respondent/corporate debtor company is stated to be a subsidiary of the M/s Isolux Corsan India Engineering and Construction Ltd. (the original contractee).

5. As per such tripartite final settlement agreement (dated 15.03.2016) the present corporate debtor company is obliged to make payment of the aforementioned amount towards the consultancy fee and other charges to the applicant on being successful in getting awarded the project to the M/s Isolux Corsan India Engineering and Construction Ltd. the principal contractor. It is alleged that corporate debtor company commits default in making payment of the agreed amount fall due under the such final settlement agreement. Therefore, he constrained to file the present application seeking initiation of the Corporate Insolvency Process under the I & B Code in respect of the present corporate debtor company.

6. The respondent/corporate debtor company however has seriously opposed the present application by disputing the amount of debt/claim. It has filed a preliminary objection on maintainability of the present application by making such allegation that the applicant/operational creditor has suppressed and concealed with the

material fact intentionally and maliciously with this Tribunal those were well within his knowledge about the pendency of similar nature of company petition no.(IB)-11(PB)/2017 before the NCLT, Chandigarh which was based on same set of facts wherein he has made similar claim in respect of providing the same consultancy services to M/s Isolux Corsan India Engineering and Construction Ltd. Such petition was filed by no other than the petitioner himself initially before the Principal Bench of the NCLT which later on transfer to the NCLT, Chandigarh and reregistered as RT NO.CP(IB)12/CHD/HRY/2017. Thus, as per the corporate debtor company the applicant has made deliberate attempt to mislead this Bench for obtaining order in suppression and omission of material facts well within his personal knowledge. Hence, the present application is liable to be rejected with exemplary cost. The corporate debtor company in support of its contention has duly annexed a copy of company petition no.(IB)-11(PB)/2017 which has already been heard and now disposed of by the Hon'ble Chandigarh Bench of the NCLT by its order dated 08.05.2017.

7. It is also objected that the present application is liable to be dismissed for non-joinder of necessary party i.e. Isolux Corsan India Engineering and Construction Pvt. Ltd.

8. A bare perusal of the company petition filed before the Principal Bench/NCLT, Chandigarh Bench goes to show that the present applicant has earlier sought for initiation of an insolvency process against the M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. in a simultaneous proceedings and now is making same

claim through the present company petition. The claim made in the present application is based on same set of facts and agreements entered between the parties that is an original service (consultancy) agreement dated 8th July, 2010 and subsequent final settlement & consultancy agreement dated 15.03.2016. Thus, the applicant has initiated a dubious nature proceeding against the respondent company which is in palpable disregard to the settled cannons of law. Therefore, the present petition is misconceived on facts and with deliberate and intentional concealment, hence, is not maintainable and is liable to be rejected.

9. In its preliminary objection to the maintainability of the present application, the corporate debtor company further brought to our notice some glaring facts of the case that the applicant himself in his application filed before the Principal Bench, New Delhi (later on it was transferred to NCLT, Chandigarh) has made such pleading (in part 4 para D of his application) as stated below:

D. Final Settlement & Consultancy Agreement:

a. ***On March 15, 2016 the Corporate Debtor had fraudulently induced the Applicant to enter into a Final Settlement and Consultancy Agreement dated March 15, 2016 ("Final Settlement Agreement") with the Applicant in order to fully and finally settle their claims and dues without having any intention to honour its obligations. A copy of the Final Settlement and Consultancy Agreement dated March 15, 2016 is annexed herewith as Annexure II(D).***

b. ***Under the terms of the Final Settlement Agreement, one M/s South East Uttar Pradesh Power Transmission Company Limited ("SEUPPTCL"), which is a subsidiary of the Corporate Debtor, had undertaken to pay to the Applicant an amount of***

Rs.38,00,00,000/- (Rupees Thirty-Eight Crores only) alongwith all direct and indirect taxes, as a full and final settlement amount for the services rendered by the Applicant. However, neither the Corporate Debtor nor SEUPPTCL has made any payments to the Applicant under the said Final Settlement Agreement.

10. Thus, the applicant earlier made an attempt before another forum of law (e.g. NCLT Chandigarh/New Delhi) to retract from final settlement agreement dated 15th March, 2016 (which is a tripartite agreement) and already reverted back to its claim/amount due under the original service agreement dated 08.07.2010 for Rs.84 Crores alongwith taxes and interest etc. Thus, he made claim for Rs.96.60 Crores against the Isolux Corsan India Engineering and Construction Pvt. Ltd. but did not implead it as a party to the present proceedings before this Bench. As such the above stated application was filed by the applicant before the Principal Bench around on 15th January, 2017, which is evident from the supporting affidavit dated 15.01.2017 as sworn in by Sh. Himalaya Dassani but himself in contras to the same. He further filed this present application on 27.02.2017 before this Bench seeking enforcement of the same final settlement agreement dated 15th March, 2016 which according to himself was made fraudulently as he was compelled to get entered into the same due to inducement/undue influence he received from the present corporate debtor company as well as from the Isolux Corsan India Engineering and Construction Pvt. Ltd.

NATIONAL COMPANY LAW TRIBUNAL ★ ALLAHABAD.U.P. ★

11. Thus, such has been an evidence that the applicant made attempts by taking alternate plea to seek enforcement of both the agreements in parallel proceedings before both the Benches of the NCLT, which were entered between him and the Isolux Corsan India Engineering

and Construction Pvt. Ltd. and subsequent thereto a tripartite final settlement agreement entered among him, the Isolux Corsan India Engineering & Construction Pvt. Ltd. and M/s South East U.P. Power Transmission Company Limited the present respondent in respect of the same consultancy services.

12. The applicant/operational creditor further opposed the preliminary objection filed by the corporate debtor company and took such stand that the Isolux Company fraudulently induced him to enter into a Final Settlement and Consultancy Agreement (dated 15th March, 2016) alongwith the present corporate debtor company in order to get full & final settlement of his claims and dues but without having any intention to honour the obligation of the same. He took further such plea that liabilities arising out and claim made in both the applications are different legal entities. Therefore, the applicant/operational creditor is entitled to seek legal remedy against either or both the entities and thus he cannot be prevented for considering the factual matrix of transactions detailed in both the applications and either of application preferred by him cannot be treated as barred by the principle of resjudicata. The applicant further contends that a proceeding before this court and the remedy sought under the I & B Code is not a Trial Court or a recovery proceeding, moreover in case the present application is allowed, for admission then the remedy would be not in personam against but generally in favour of all the creditors of the corporate debtor company.

13. Thus, the applicant/operational creditor made an effort to substantiate its averments/pleadings made in both the applications and thus

prayed for rejection of the preliminary objection as raised by the corporate debtor company. He further pressed for an appropriate order to be passed for admission of the present application.

14. It is a matter of record that an original service agreement of the Isolux Corsan India Engineering and Construction Pvt. Ltd. made with the present applicant was entered into on 8th July, 2010 for providing some consultancy service for which the applicant/operational creditor was appointed as a consultant and in consideration of such services to be provided as per the agreed terms his consultancy fee was fixed as 2% of the total cost of the project. Such project cost was to be determined by the UPPTCL. Thus, as per the applicant, the project cost for package 1 was costed around Rs.4,000/- crores and for package 2 it cost around Rs.3,600 Crore. Therefore, the amount of the consultancy fee was payable in two equal instalments either on 120th days of signing of the documents by the company pertaining to the project awarded to it or on the date of financial closure of the project.

15. As per the material available on the record, a subsequent tripartite agreement was entered among the signing parties by replacing the original agreement dated on 8th July, 2010 and substituting with the present final settlement & consultancy agreement dated 15th March, 2016. The para H & I (at page 2) of the above stated final settlement agreement, speaks as under:-

> **H.** ***"the parties have discussed the matter amicably and have reached the understanding for the full and final settlement of all claims and dues of Mr. Dassani towards the works executed under the service agreement such***

that, in consideration for rendering the services towards the project SEUPPTCL shall pay Mr. Dassani the settlement payment plus taxes as stipulated in clause 2 hereunder."

I. ***"the parties now wish to enter into this agreement to set forth binding and detailed terms and conditions as stipulated below."***

16. Thus, as per this subsequent final settlement agreement, the settlement amount towards consultancy fee stands revised and restricted to Rs.38 crores. In clause 2 of the terms of the above settlement the due date and mode of such payments are described. Further as per clause 2.3 of the agreement a sum of Rs.2 crores has already been paid to Mr. Himalay Dassani as an upfront payment before execution of the agreement. The payment thereof and receipt of such payment has further been admitted and acknowledged by him, thus as per the corporate debtor company the only balance amount remains as of Rs.36 crores which is payable only in equal monthly instalment after commencing the trigger date and in a manner set out in schedule A of such agreement. As per this schedule A of such agreement, the payment date for balance amount of Rs.36 crores is to be commenced from 30th day of the month after receipt of the payment from the SEUPPTCL from the Uttar Pradesh Power Transmission Company Limited or any of DISCOMM of Uttar Pradesh and/or any other power utility company. Hence, as per the corporate debtor, the trigger date for making such payment has not yet arrived. It is further contended that on execution of this agreement which is subject matter of the present petition, the SEUPPTCL/Corporate Debtor has already made payment of Rs.2 crores to Mr. Dassani who is stated to have duly admitted and

acknowledged the same by putting his signature on such final settlement & consultancy agreement. Hence, as per the corporate debtor company there is no debt fallen due by it for making payment of the initial amount and the further date of payment in instalment of such amount has not yet arrived at nor commences. Hence, the question for making such payments does not arise at all. Therefore, due to this reasons, the present petition is liable to be dismissed with an exemplary cost.

17. It is further seen that the corporate debtor company in its response to a demand notice dated 21.12.2016 as sent by Mr. Dassani strongly opposed to it and made formal reply to it on 03.01.2017 and thus seriously disputed the operational creditor's claim and contended such that the applicant has already made a claim of Rs.84 crores from the Isolux Company and further made a simultaneous claim of Rs.38 crores also from this corporate debtor, which is not only frivolous one and baseless but also ex-facie contradictory. It is further alleged that such allegation of the applicant/operational creditor for non-receipt of the amount of Rs.2 crores as upfront payment is contrary to clause 2.3 of the alleged settlement agreement, because the applicant/operational creditor himself acknowledged of such payment. It is further contended that the operational creditor himself in his demand notice issued to the Isolux Corsan India Engineering and Construction Pvt. Ltd. took such plea that the present final settlement & consultancy agreement is rendered void and nonest on the ground of alleged fraud and misrepresentation. Therefore, it is now not open to him to place further reliance on the same agreement

and to raise its claim. Thus, as per the corporate debtor, no debt or liability could be claimed under this agreement, because the applicant himself has treated it as a void and nonest agreement.

18. In addition to its above stated objections, the present corporate debtor company also went on to take some alternative plea in its reply to the demand notice by vehemently denying the allegations of committing any fraud or misrepresentation in such final settlement & consultancy greement dated 15th March, 2016 and also made some counter allegation against the present applicant alleging that, he himself is guilty for coercion and of undue influence to threaten to the corporate debtor company, thereby compelling it to make sign on the alleged settlement agreement even though the applicant did not render any services. The corporate debtor in its reply to such demand notice has also alleged that the petitioner is capable to harm its business interests by using its strong connections. According to the corporate debtor company, the applicant had threatened it of dire consequences and to harm its clients and business interests including but not limited to the present project, if the corporate debtor refused to sign such alleged final settlement agreement. Thus, the alleged final settlement agreement does not contain of true statement of facts, hence, is unconscionable in law nor the applicant is entitled to make any legal and valid claim on the strength such alleged final settlement and consultancy agreement.

19. The corporate debtor company without prejudice to its above stated contention took further alternative plea stating such the date of payment due under such final settlement agreement has not been yet

commenced because the applicant has already admitted and acknowledged the receipt of amount of upfront payment of Rs.2 crores and the balance claim of Rs.36 crores (as per the Schedule A of the alleged settlement agreement) is payable in such monthly instalments of Rs.3 crores each from the 30th day only when such payment is received by the corporate debtor company from the Uttar Pradesh Transmission Company Ltd. or any of DISCOM of Uttar Pradesh and/or any other power utility company. Thus, as per the corporate debtor, a trigger date as defined in the alleged agreement dated 15.03.2017 has not arrived yet. As no payment has been received from the Uttar Pradesh Transmission Company Ltd. or any of DISCOM of Uttar Pradesh, hence, no payment is due. Therefore, such claim of the applicant and consequently the demand notice issued to the corporate debtor company is pre-mature without any cause of action and bad in law.

It may be seen that the corporate debtor company raised serious dispute on the final settlement agreement dated 15.03.2017 on its legality, validity and enforceability by alleging that it was not agreed to nor entered among the parties with free will and meeting of their free minds. The corporate debtor company took further plea that the trigger date of the payment cannot commence since being a contingent condition as the company is required to make payment in monthly instalment only after it receive payment from Uttar Pradesh Transmission Company Ltd. or any of DISCOM of Uttar Pradesh and/or any other power utility company which is not yet received. It further refutes the applicant's such allegation that he did not receive

upfront payment of Rs.2 crores as being contrary to the relevant Clause 2.3(i) of the alleged final settlement agreement dated 15.03.2016 wherein he himself has already admitted and duly acknowledged the receipt of such payment and put his signature.

21. In this context, it would be appropriate to refer also to the stand taken by the original contractee M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. which has equally opposed the notices issued to it by the petitioner U/s 433 and 434 of the Companies Act. The M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. in its reply to such demand notice issued by Mr. Himalay Dassani has contended and made such allegation on Mr. Dassani that he himself exercised his coercion and/or undue influence over the company and made inducement to sign on such final settlement agreement dated 15.03.2016. It is also alleged that the applicant being in dominant position over the later (M/s Isolux Corsan India Engineering and Construction Pvt. Ltd.) and due to having some strong connection is capable to harm its business interest, he exercised undue influence over and threaten to the company to cause harm to its business interests, if later refuse to sign on such final settlement agreement. Therefore, as per the corporate debtor company such settlement agreement is unconscionable nor contain true statement of facts and no legal or valid claim on the basis of such agreement can be made.

22. It is matter of record that Mr. Himalay Dassani as an Operational Creditor had earlier moved an application (under Section 9 of the I & B Code) against the M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. during the month of January, 2017 before the

Principal Bench, New Delhi [bearing no.(IB)-11(PB)/2017], later on, it was transferred to the Chandigarh Bench of the NCLT. ***In the part 4 column 1 (d) of such application he pleaded such that on 15th March, 2016 the corporate debtor (herein Isolux Corsan India Engineering and Construction Pvt. Ltd.) fraudulently induce the applicant to entered into a final settlement and the consultancy agreement dated 15th March, 2016. In order to fully and finally settled their claims and dues without having any intention on its application.***

23. It may be seen that during the course of hearing of his application filed before the Hon'ble Chandigarh Bench of NCLT, the applicant through his counsel took such stand which has been referred to by the Hon'ble NCLT, Chandigarh in (para 12) of its decision, that the petitioner agreed to the aforesaid terms, as per the agreement, a sum of Rs.2 crores was acknowledged by him but in fact no such payments were made to him nor the respondent placed any record relating to transfer of such payment in favour of the petitioner. **As the terms of such agreement have not been complied with, therefore, the petitioner has a right to fall back upon the original service agreement entered with the respondent (herein Isolux Corsan India Engineering and Construction Pvt. Ltd.) being the original contractee.**

24. By going through the above stated averments/alternative pleas, it is evident that the applicant himself disowned the final settlement agreement dated 15th March, 2016 and opted to revert back to his original service agreement dated 08.07.2010 entered between him

and M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. Therefore, in common prudence and normal course. It is not legally open to him to initiate parallel proceeding by taking inconsistent plea and to seek for enforcement of both the agreement on the pretext of being separate entities. It can be understood even assuming so that in case if both the courts come to allow the petition under separate agreement, then the amount of debts claims would exceed the actual amount of fee due and payable towards consultancy service. Thus, this may amount unjust enrichment. Because both the Benches of NCLT were not properly informed by him about filing or proposed filing of two parallel applications against two different respondents based on same set of facts and same cause of action in respect of the same consultancy fee. It is pertinent to note that there is no such mention or any kind of whisper in I & B petition either filed before the NCLT, Delhi/Chandigarh about filing of petition or to be filed before the Allahabad nor in the I & B petition filed before this Bench of NCLT about filing and pendency of petition before the NCLT, Chandigarh.

25. Further, it is a case of disputed facts as the original contractee has made reply to the legal notice dated 2nd March, 2016 issued to it under the provision of Section 433 & 434 of the Companies Act and taken a plea alleging such the applicant Himalay Dassani did not even provide requisite services in terms of agreement dated 08.07.2010 and the service provided as consultancy service by him was not even worth for Rs.1,12,36,000/- (One crore twelve lakhs and thirty six thousand) against which he himself raised some debits notes.

Therefore, as per the original contractee M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. there can be no other amount due & payable except to the extent of Rs.1,12,36,000/- (One crore twelve lakhs and thirty-six thousand) to be claimed by the applicant. It has been further alleged that the applicant has made an attempt to extort money from the company with such threat to winding up of the company which is clearly dishonest, vexatious and frivolous. Hence, the original contractee M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. (the corporate debtor before the NCLT, Chandigarh) also went to allege that even the original agreement (dated 08.07.2010) itself is vague, ambiguous and uncertain and is neither enforceable nor can be acted upon. As there reflect no subsequent understanding among the parties, hence, no claim based on such agreement dated 08.07.2010 could be made by him as he did not fulfil his obligation expected under the agreement. Therefore, no payment can be said to be due or payable to him by the original contractee.

26. In addition to the above, the Isolux Corsan India Engineering and Construction Pvt. Ltd. made further allegation that it has to suffer seriously on account of non-performance on the part of Mr. Dassani for which he is liable to compensate the company as the project was awarded to it on its own strength and hard work for which there is no contribution nor any assistance from the applicant as agreed in the terms of the contract.

27. A perusal of the rival contention, submission made by the corporate debtor company is before the Hon'ble Chandigarh Bench in (CP

NO.(IB)12/CHD/HRY/2017) as well as before this Court goes to show that it has not only opposed vehemently the present petition but seriously disputed about the validity and enforceability of both the agreements for initiation of CIRP in respect of respondent companies.

28. It is now a matter of record that Hon'ble NCLT, Chandigarh Bench by its order dated 08.05.2017 has pleased to disposed of the application filed by Sh. Himalay Dassani filed against the original contractee M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. and rejected the same by imposing a cost of Rs.50,000/-, with such observation that the petition was filed without merit. The Hon'ble NCLT, Chandigarh, also pleased to observe such observation that the parties vicious to entered into an agreement by renegotiating the original sum payable to the petitioner as per Clause 3 of the original agreement have reached at an understanding to close the service agreement to be replaced fully with the agreement dated 15.03.2016, **then it was not open to the petitioner to file the Insolvency Resolution Process against the respondent (M/s Isolux Corsan India Engineering and Construction Pvt. Ltd.)**.

29. Therefore, by following the above stated observation of the Hon'ble NCLT, Chandigarh, the question arises for consideration of this Bench as to whether it is still open to the same applicant to enforce such final settlement & consultancy agreement dated 15.03.2016 through this Bench for initiating the CIRP against another company i.e. the present respondent/corporate debtor by this petition. As per the record, the applicant himself has pleaded such before a competent court of law that he signed the agreement dated 15.03.2016 only

because of undue influence and it was obtained fraudulently and such compelled him to approach the NCLT, Delhi/Chandigarh Bench for seeking remedies against the original contractee, wherein he could not be successful.

30. Moreover, by leaving aside the question of legality and validity of the subsequent agreement dated 15th March, 2016 before this Bench he took such alternate plea that it is still open to him as being a defrauded party to make such contract voidable or otherwise as per U/s 17 & 19 of the Contract Act. Hence, he is entitled to initiate such parallel proceeding before this Bench to enforce the subsequent agreement and seeking for initiation of CIRP proceedings in respect of respondent/present corporate debtor company.

31. We have already observed in preceding paras that in the present matter not only the applicant but equally the respondent/corporate debtor company in the present petition as well as in the petition before the Hon'ble Chandigarh Bench have made allegation, counter allegation against each other raising dispute on legality, enforceability and validity of such settlement agreement dated 15th March, 2016 alongwith an original service agreement dated 8th July, 2010. Therefore, by taking in consideration these allegations which appears to be disputed question of fact. We feel it is not proper for this court within scope of I & B Code to explore the truth behind such agreements as in our humble view such disputed facts need to be ascertained by issue involved therein can be dealt with only by a competent civil court. (In our view it is neither the aim nor object of the present I & B Code that an adjudicating authority to go into

enquiry of these disputed facts. Hence, we leave the issue open for a competent forum of law/civil court to deal with and decide in accordance with law). In this context we find support from a decision of the Hon'ble Punjab & Haryana High Court in the matter of **Dalbir Singh @ Vir Singh *versus* Dalbir Singh** (reported in AIR 2001 P&H 216) wherein his Lordship came to examine the relevant provision of **Section 16 of the Contract Act, 1872** and dealt with the issue of undue influence on specific performance of an agreement of sale in the said judgment their Lordship held as such **the onus to prove such facts would be greater on the party who is claiming that such agreement is result of freewill and volition and no unfair advantage had been taken. It is required that such contract was not inducted by undue influence and the position to obtain unfair advantage over the other.** Hence, as per the above stated ruling, it requires such degree of proof that the accused party was in such position, to dominant the will of other and such transaction appears to be on the face of it and on the evidence adduced is found to be unconscionable. Thus, the burden of proving such contract would lie upon the person who is in position to dominate the will of other in order to show that he did not misused his such position.

32. Moreover, the Hon'ble Supreme Court also came to examine the maxim of **Approbate & Reprobate and doctrine of election in a case of R.N. Gosain versus Yashpal Dhir (1992) 4 SCC 683** and pleased to observe such and held (in para 10 of the judgment) as such stated below:-

"Law does not permit a person to both approbate & reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd., Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside".

33. The Hon'ble Supreme Court in its another decision in the matter of **S.P. Chengal Varaya Naidu v/s Jagannath (1994) 1 SCC 1** further came to examine the purport and the meaning of "Fraud" and such the that "Fraud" amount to non-disclosure of relevant and material document with a view to obtain advantage and a decree obtained by fraud to be treated as nullity and can be questioned in collateral proceedings. The observation of the Hon'ble Apex Court made in para 5 of the judgment which is equally relevant and applicable to the present case may be reproduced herein below:-

"We do not agree with the High Court that, "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitating to say that a

person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation".

34. The Hon'ble Supreme Court in its another case in **Chairman and MD, NTPC Ltd. v/s Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663** had occasion to examine well and dealt with the issue of undue influence, novation of a contract and requisite proof required for deciding the issue and on the doctrine of **Approbate & Reprobate** and also on the conduct of a party and has pleased rule as such that these are triable issue which are required to be determined by the Arbitrator. Such dispute would fall for the consideration of the Arbitrator (which is deemed to be a forum for trial of such disputed facts/issue). The relevant portion of the Hon'ble Supreme Court's judgment e.g. para 26 to 30, 36, 37 & 39(iv, v & ix) may be reproduced herein below:-

26. The appellant herein did not raise a question that there has been a novation of contract. The conduct of the parties as evidenced in their letters, as noticed hereinbefore, clearly goes to show that not only the final bill submitted by the respondent was rejected but another final bill was prepared with a printed format that a "No-Demand Certificate" has been executed as otherwise the final bill would not be paid. The respondent herein, as noticed hereinbefore, categorically stated in its letter dated 20.12.1990 as to under what circumstances they were compelled to sign the said printed letter. It appears from the appendix appended to the judgment of the learned trial Judge that the said letter was filed even before the trial court. It is therefore, not a case whether the respondent's assertion of "under influence or coercion" can be said to have been taken by way of an afterthought.

27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the

disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in the stronger position.

29. We may, however, hasten to add that such a case has to be made out and proved before the arbitrator for obtaining an award.

30. At this stage, the Court, however, will only be concerned with the question whether triable issues have been raised which are required to be determined by the arbitrators.

36. The appellant has in its letter dated 20.12.1990 used the term "without prejudice". It has explained the situation under which the amount under the "No-Demand Certificate" had to be signed. The question may have to be considered from that angle. Furthermore, the question as to whether the respondent has waived its contractual right to receive the amount or is otherwise estopped from pleadings otherwise, will itself be a fact which has to be determined by the Arbitral Tribunal.

37. In Halsbury's Laws of England, 4th Edn., Vol. 16 (Reisuue), para 957, at p.844 it is stated:

"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate expresses two propositions:

(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

39(iv) Interpretation and/or application of clause 52 of the agreement would constitute a dispute which would fall for consideration of the arbitrator.

(v) The effect of the correspondences between the parties would have to be determined by the arbitrator, particularly as regards the claim of the respondent that the final bill was accepted by it without prejudice.

(ix) The finding of the High Court that a prima facie case, in the sense that there are triable issues before the arbitrator so as to invoke the provisions of Section 20 of the Arbitration Act, 1940 cannot be said to be perverse or unreasonable so as to warrant interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India.

35. Thus, by placing reliance on the above cited judicial precedents, we are having firm view that nature of allegation made as such in the present petition definitely falls under disputed facts which needs to be agitated before a competent civil court to be dealt with in accordance with law. This Tribunal being Adjudicating Authority under the Code is not expected to go into the merits of such allegation and to rule on enforceability of such agreements which are based on such disputed facts. Thus, the prima facie, we feel that the agreement dated 15th March, 2016 cannot be enforced nor can be acted upon through filing of the present petition under the I & B Code before this Tribunal to initiate Corporate Insolvency Resolution Process against

the respondent company because of the applicant himself in a parallel proceeding before a co-ordinate Bench of this Tribunal has very much disputed the contents of such agreement, free will and meeting of free minds before executing such deed and has already opted to revert back to his original contract i.e. service agreement dated 08.07.2010. Hence, in our view it is no longer open to him to fall back again seeking enforcement of the disputed agreement dated 15th March, 2016 for the purpose of initiation of the CIRP against the present corporate debtor as both of the parties to the present petition have made allegations, counter allegation against each other for making undue influence, coercion etc. Therefore, in our view, such issue needs to be agitated before a competent court of law and not before us under the I & B Code. Further, we are constraint to observe such the approach of the applicant in this petition, if is not improper, so, even then it cannot be said as fair to make parallel approach in both courts by keeping in dark with each other. Such action on the part of applicant is deprecated. Thus, the present application is liable to be rejected on the ground alone, even otherwise it is found maintainable before this Bench.

36. In addition to the above, the Hon'ble Chandigarh Bench in the judgment, of the same petitioner has referred to a Principal Bench's decision in the matter of **One Coat Plaster v/s Ambience Pvt. Ltd. (CA No.(IB)07/PB/2017 decided on 01.03.2017)**, which relates to the issue of raising dispute about the quality of work in reply to the notices issued U/s 8 of the Code and the same was considered as a notice of dispute disentitling the applicant for an order of admission

and thus such application came to be rejected. Here in the present petition also the corporate debtor has raised dispute about the amount of debt due in reply to its statutory demand notice. Since the Hon'ble NCLT, Chandigarh Bench by distinguishing the decision of Hon'ble NCLT, Mumbai Bench in the matter of **Deutsche Forfait AC and Anr. v/s M/s Uttam Galva Steel Ltd. (in CP No.45/I & BP/NCLT/MAH/2017)** has pleased to follow the preposition as laid down in the Hon'ble Principal Bench's decision in **One Coat Plaster v/s Ambience Pvt. Ltd. (CA No.(IB)07/PB/2017 decided on 01.03.2017)**. Hence, our views are forfeited with views already taken by the Division Bench of the NCLT, Chandigarh is in the case of the same applicant and held as such that a dispute has been raised in the reply to the statutory demand notice in respect of the alleged debts in the present petition. Hence, the present petition is not found complete and maintainable before this Bench under the I & B Code.

37. As per the record and during the course of making scrutiny of the present case, this court raised some objections through the registry, pointing out about some procedural defect and raised such issue that debt is being disputed by the corporate debtor company by replying to it the applicant/operational creditor made an effort to remove procedural defects and clarified its stand in respect of debt being disputed. He placed reliance on a decision of the Hon'ble NCLT, Bombay in the matter of **Deutsche Forfait AC and Anr. v/s M/s Uttam Galva Steel Ltd. (in CP No.45/I & BP/NCLT/MAH/2017)**, wherein such view was taken that dispute includes ongoing proceeding alone which qualify to signify to existence of dispute and

without merely inviting such a dispute without substance or pendency of any suit arbitration without service the demand of notice cannot vitiate the proceeding initiated U/s 9 of the I & B Code.

38. Notwithstanding the above stated ruling has been distinguished by the Hon'ble Chandigarh Bench of the NCLT in the similar case of Mr. Himalay Dassani by taking a different view, the relevant portion of the Hon'ble NCLT, Chandigarh's decision is reproduced herein below:-

> *"The matter of by following the Hon'ble Principal Bench of NCLT decision in* ***"CA No.(IB)07/PB/2017 and CA No.(IB)08/PB/2017 titled M/s One Coast Plaster vs. M/s Ambience Private Limited and M/s Shivam Construction Company vs. M/s Ambience Private Limited"*** *and observed and held as such:*
>
> *View of the facts of that case, raising of the issue about quality of the work in the reply to the notice under section 8 of the Code was considered a notice of dispute dis-entitling the applicant for an order of admission and therefore, the application was rejected.*
>
> *Before discussing the above contention, it would be appropriate to refer to the definition of term "dispute" as defined in Section 5(6) of the Code, which reads as under:*
>
> *"**dispute**" includes a dispute or arbitration proceedings relating to-*
>
> ***(a)*** *The existence of the amount of debt;*
>
> ***(b)*** *The quality of goods or service; or*
>
> ***(c)*** *The breach of a representation or warranty;*
>
> *The above definition is clearly inclusive and not exhaustive. The requirement of admitting the application under Section 9 of the Code is provided in sub-section 5 thereof, which is reproduced as under:*
>
> *"**(5)** The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order-*

(i) *Admit the application and communicate such decision to the operational creditor and the corporate debtor if.-*

(a) *The application made under sub-section (2) is complete;*

(b) *There is no repayment of the unpaid operational debt;*

(c) *The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*

(d) *No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*

(e) *There is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*

(ii) *Reject the application and communicate such decision to the operational creditor and the corporate debtor, if-*

(a) *The application made under sub-section (2) is incomplete;*

(b) *There has been repayment of the unpaid operational debt;*

(c) *The creditor has not delivered the invoice or notice for payment to the corporate debtor;*

(d) *Notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*

(e) *Any disciplinary proceeding pending against any proposed resolution professional:*

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority."

The petitioner has attached copy of reply dated 17.01.2017 sent by the respondent to the demand notice dated 03.01.2017. This is at page 26 of Annexure 1(B). It is stated in the reply that the notice is contradictory to the previous notice dated 29.11.2016, wherein claim

of Rs.38 crores was made by the respondent, whereas now the claim is raised for Rs.84 crores. It is stated that on the basis of Final Settlement Agreement, the respondent has obligation to pay. It is further alleged that the ***Final Settlement Agreement is void and nonest on the ground of alleged fraud and misrepresentation. The respondent even stated in the reply that it signed the alleged Final Settlement Agreement as the petitioner exercised coercion, undue influence by threatening them to cause harm to the business of the respondent****.*

There was exchange of communication between the parties relating to the dispute even before the Final Settlement Agreement was entered. The respondent has sent reply dated 02.03.2016 (at page 45 of the paper book) in response to the notice dated 02.02.2016 sent by the petitioner. It would be relevant to refer to para nos.5 and 6 of the said reply, which reads as under:

> **"5.** *Without prejudice to the above, it is stated that pursuant to the execution of said agreement, your Client did not provide the services as agreed to our Client and failed to discharge his obligations under the agreement. It is reiterated that it was our Client management and representatives, who took upon themselves and did the entire work relating to the Project including preparation and finalization of all documents and information to be submitted to UPPTCL in connection with the bidding for the Project following up with UPPTCL on the bidding process, ironing out the issues with UPPTCL, discussion, finalization and execution of the Project Documents and achieving the financial closure and other milestone under the Project. Even when our Client sought services from your Client, when it was required, your Client failed to provide the same and at times your Client did not even respond to our Client's request. On account of your Client's defaults, lapses and non-performance, the finalization of the project got delayed causing huge financial loss to our Client. Your Client, instead of admitting his lapses are defaults, is adding salt to our Client's injury by making preposterous claims against our Client. Our Client reserves its right to claim damages from your Client.*
>
> **6.** *In as much as your Client failed to fulfil the obligations undertaken by him under the agreement, no payment can be said to be due or payable by our Client. On the contrary, our Client is suffering hugely on account of your Client's non-performance, for which your Client is liable to compensate our Client. Our Client was awarded the Project on its own strength and hard work and your Client made no contribution and provided no aid or assistance as agreed to*

between your Client and our Client. Now when our Client is proceeding ahead with the implementation of the Project your Client has sought to jump in the fray by making baseless and dishonest claims against our Client. Your Client's contention that our Client has not raised any complaint/grievance in relation to deficiency in alleged service performed by your Client is specious in nature and stated to be rejected. The question of making grievance would arise only if your Client had provided the services as agreed. Your Client virtually abandoned the agreement. However, our Client still reserves its right to claim damages from your Client in due course."

The learned counsel for the petitioner, however, submitted that the execution of the Service Agreement of 2010 is admitted and thereunder the payment having admittedly not been made, the petitioner has the remedy under the Code for an order of admission, as it was the intention of the legislature to rule out the frivolous defence. It was further contended that if the plea of fraud and coercion is raised, that is a triable issue, which need not be discussed in the summary procedure prescribed under the Code.

We are, however, of the view that in view of the case set up by the petition, the petition is liable to be rejected. The petitioner himself has stated against column No.I of the IV of Form 5 at serial number (d) that the Corporate Debtor had fraudulently induced the applicant to enter into a Final Settlement and Consultancy Agreement dated 15.03.2016, without having intention to honour the obligation. ***If the petitioner himself has raised the issue of fraud and inducement and there is also a counter defence by the respondent with regard to the fraud and coercion, it would be the fittest case to categorically hold that there is a 'dispute' between the parties, which would disentitle the petitioner for an order of admission. It is pertinent to mention that the Final Settlement Agreement does not provide that in case SEUPPTCL fails to make the payment of Rs.38 crores, the petitioner would be entitled to fall back upon the original agreement of the year 2010. That cannot be permissible, especially when the petitioner has already taken recourse to the proceedings under the Code against SEUPPTCL in Allahabad Bench of NCLT.***

39. Thus our views are forfeited with the above view as taken by the co-ordinate Bench of NCLT, Chandigarh and further followed by the above referred decision of Hon'ble Supreme Court, Punjab & Haryana High Court and the Principal Bench of the NCLT, New Delhi, and the ratio laid down therein. Therefore, we have not

hesitation to h old that the present petition is not maintainable before this Bench on the doctrine of "Approbate & Reprobate" as rightly raised by the corporate debtor company in its preliminary objection-cum-maintainability application alongwith CA No.37A/2017 and further raised in another CA No.18/ALD/2017 filed U/s 65 & 76 of the I & B Code in the present petition, by relying on a Hon'ble Supreme Court's decision in the matter of **R.N. Gosain versus Yashpal Dhir (1992) 4 Supreme Court Cases 683, on the doctrine of "Approbate & Reprobate" and further, in the matter of S.P. Chengal Varaya Naidu v/s Jagannath (1994) SCC.**

40. As we have already held the present petition is not found complete and maintainable on the basis of such ***doctrine of approbate and reprobate*** laid down by the Hon'ble Supreme Court in the above referred decision. Hence, we do not feel necessary to go further into the merits of the allegations, counter allegations made in the present application, preliminary objection and reply thereof further in company application filed U/s 76 & 65 in the I & B Code which in our view is a dispute and is question of disputed facts. Hence, thie present petition is liable to be rejected on the question of maintainability under the I & B Code before this Bench of the Tribunal.

41. Therefore, the CA No.37/2017 filed in the present petition succeeds and is allowed, consequently the present company petition must fails and is hereby rejected with a cost of Rs.25,000/- payable to the respondent/corporate debtor company.

42. In view of the above, our findings given/observation made in respect of the present order may be summarised as under:

1) The main company petition filed U/s 9 of the I & B Code moved by the operational creditor Mr. Himalaya Dassani must fails is hereby rejected in view of a Division Bench's decision of NCLT, Chandigarh Bench, (passed in CP No.(IB)11/PB/2017 dated 08.05.2017), and by further, placing reliance on the decision of Hon'ble Supreme Court in the matter of ***R.N. Gosain versus Yashpal Dhir (1992) 4 Supreme Court Cases 683, on the doctrine of "Approbate & Reprobate" and further, in the matter of S.P. Chengal Varya Naidu v/s Jagannath (1994) SCC and in the matter of Chairman and MD, NTPC Ltd. v/s Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663 and Hon'ble Punjab & Haryana High Court in the matter of Dalbir Singh @ Vir Singh versus Dalbir Singh (reported in AIR 2001 P&H 216), further by following decision of the Principal Bench, NCLT in the matter of One Coat Plaster v/s Ambience Pvt. Ltd. (CA No.(IB)07/PB/2017 decided on 01.03.2017).***

2) A perusal of records of this case goes to show that the petitioner has sought to trigger CIRP proceeding against the corporate debtor company on the strength of a final settlements & consultancy agreement dated 15th March, 2017 entered between him and the corporate debtor company, while in contra to this, he has pleaded in his another IB petition before the Hon'ble NCLT, Chandigarh by taking inconsistence and contradictory

plea with the present application, that the corporate debtor fraudulently induce him to sign and enter into a final settlement & consultancy agreement dated 15th March, 2017 which is not acceptable to him and he reverted back to his original claim with the original contractee M/s Isolux Corsan India Engineering and Construction Pvt. Ltd.

3) Thus, it is evident that the petitioner himself earlier claimed to be an unwilling party of the present final settlement agreement which is now subject matter of the present petition in its pleadings made before the Hon'ble NCLT, Chandigarh and did not agree to and recognize this final settlement agreement dated 15th March, 2017.

4) That apart the operational creditor through his notice of demand dated 03.01.2017 and legal notice dated 29.11.2016 issued to M/s Isolux Corsan India Engineering & Construction Pvt. Ltd. (another corporate debtor company), has taken such plea that above stated agreement is null & void. If, this being so the factual position, then it is not open to him to take alternate plea before this Co-ordinate Bench and seek remedy on the strength of such disputed agreement/documents seeking implementation, thereof. Thus, it may be seen, that the petitioner did not fairly disclose about filing/pendency of an I & B petition based on same sets of facts and on similar cause of action it took against a corporate debtor company M/s Isolux Corsan India Engineering & Construction Pvt. Ltd. of which the present corporate debtor is a subsidiary company. Such I & B petition,

which was initially filed before the Principal Bench, NCLT, New Delhi later on it transferred to the NCLT, Chandigarh.

5) Therefore, in the light of above mentioned decisions of the Hon'ble Supreme Court of India and on the doctrine of the **"Approbate and Reprobate"**. The present petition is hereby rejected with a cost of Rs.25,000/- (Rupees Twenty Five Thousand), payable to the respondent company.

6) Consequently, miscellaneous company application No.37/2017 and application No.37A/2017 filed U/s 65 & 76 of the I & B Code are also stands disposed of in the light of this order and the interim order passed, if any, therein stands merged with this final order.

7) Notwithstanding the above, it is further made clear that observation of this Tribunal are made only for disposing of the present petition hence not to be treated as conclusive findings on validity and enforceability of above referred agreements, which is in our humble view, falls within domain of a competent Civil Court/Forum of Law to be dealt with and decided in accordance with law. The parties are at liberty to approach the same for seeking legal relief.

—Sd—

Dated:04.08.2017 **Shri H.P. Chaturvedi, Member (Judicial)**

Typed by:
Kavya Prakash Srivastava
(Stenographer)