

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 262 of 2023 &
I.A. No. 1122, 1124 & 1167 of 2023

(Arising out of Order dated 27.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh, C.P.(IB)No.248/Chd/Chd/2019)

IN THE MATTER OF:

Tejinder Pal Setia

... Appellant

Vs

Kone Elevator India Pvt. Ltd. and Ors.

... Respondents

Present:

For Appellant: Mr. Mohit Chaudhary, Mr. Prakhar Mithal, Advocates

For Respondents: Mr. Sandeep Thukral for R-1.

Mr. Abhijeet Sinha, Mr. Aditya Soni, Mr. Saikat Sarkar, Ms. Heena Kochar, Advocates for R-3.

Mr. Iswar Mohapatra, Advocate for IRP.

Mr. Surjeet Bhadu, Mr. Abhishek Anand, Advocates for Intervenor.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Suspended Director of the Corporate Debtor challenging the order dated 27.02.2023 passed by the National Company Law Tribunal, Chandigarh Bench, Chandigarh admitting Section 9 Application filed by Operational Creditor – Kone Elevator India Pvt. Ltd.

2. Brief facts of the case are:

- (i) The Operational Creditor is engaged in the business of manufacturing, commissioning/ installation and providing after sales service for lift manufactured by the Operational Creditor. Future Colonizer and Construction Pvt. Ltd. ("**FCCPT**") had approached the Operational Creditor for supply and installation of Kone elevators for its project site at Fashion Technology Park, Sector-90, Mohali, Punjab. An Agreement dated 05.02.2013 was entered with the Operational Creditor and FCCPT.
- (ii) Corporate Debtor Company wrote a letter dated 12.07.2013 acknowledging the dues of the Operational Creditor and assured that they shall pay a sum of Rs.71,10,000/- to the Operational Creditor.
- (iii) The Project was re-christened and a fresh contract was entered on 14.03.2015 between the Corporate Debtor and the Operational Creditor. The Corporate Debtor did not pay the dues of Operational Creditor. Three cheques issued to the Operational Creditor dated 23.06.2015 for Rs.10,30,000/-; cheque dated 15.08.2015 for Rs.36,05,000/-; and cheque dated 15.09.2015 for Rs.36,05,000/- were presented and the same were dishonoured. A letter dated 25.11.2015 was written by the Corporate Debtor, acknowledging sum of Rs.92,70,000/-.

- (iv) The Operational Creditor issued a Demand Notice dated 15.10.2018 to Registered Office as well as Delhi Office of the Corporate Debtor Company. After sending the Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”), the Operational Creditor filed Section 9 Application dated 03.04.2019 before the Adjudicating Authority. Notices were issued by the Adjudicating Authority. Short reply dated 08.01.2020 was filed by the Corporate Debtor.
- (v) During the pendency of the Company Petition, a settlement was entered between the Operational Creditor and Corporate Debtor on 27.09.2021. As per settlement, the Corporate Debtor offered total Rs.60 lakhs as a full and final settlement of dues and an amount of Rs.25 lakhs was paid. Second installment of Rs.20 lakhs was to be paid on or before 15.12.2021 and third installment of Rs.15 lakhs on or before 15.03.2022. An Application was also filed by the Operational Creditor to take settlement on record.
- (vi) The Adjudicating Authority heard the parties and by judgment and order dated 27.02.2023 admitted Section 9 Application. The Adjudicating Authority found operational debt due and held that the Demand Notice was served on the Corporate Debtor. The Adjudicating Authority also found that the

Corporate Debtor did not honour the settlement entered into between the parties.

(vii) Aggrieved by the order dated 27.02.2023, this Appeal has been filed.

3. An IA No.1122 of 2023 has been filed by one Sanjeev Chadha, seeking impleadment in the Appeal. In the IA, the Applicant stated that debt owned by M/s Kone Elevators India Pvt. Ltd., Operational Creditor is assigned to the Applicant vide Agreement dated 03.02.2023, i.e., before passing of the impugned order, hence, the Applicant be impleaded as one of the Respondent. This Tribunal vide order dated 20.03.2023 allowed the IA No.1122 of 2023 impleading the Applicant as Respondent No.3.

4. When the Appeal was heard on 02.03.2023, the Appellant offered to deposit an amount of Rs.35 lakhs. The Appellant was permitted to deposit the amount by an order dated 02.03.2023 and on which date an interim order was also passed directing that in pursuance of the impugned order dated 27.02.2023, no further steps shall be taken. By order dated 02.03.2023, Homebuyers who sought liberty to file Application, were permitted to file Application and IA No.1167 of 2023 has been filed by 55 Allottees, seeking impleadment as Intervenor in the Appeal. Reply on behalf of Respondent No.3 has been filed in the Appeal.

5. We have heard Shri Mohit Chaudhary, learned Counsel for the Appellant; Shri Sandeep Thukral, learned Counsel appearing for Respondent No.1; Shri Shri Abhijeet Sinha, learned Counsel appearing for

Respondent No.3; Shri Iswar Mohapatra, learned Counsel for IRP and Shri Surjeet Bhadu, learned Counsel appearing for Intervenors.

6. The learned Counsel for the Appellant, challenging the impugned order submits that Demand Notice issued by the Operational Creditor dated 15.10.2018 was not served on the Corporate Debtor. It is further submitted that Demand Notice issued by the Corporate Debtor was defective, it being not accompanied by any invoices. When demand is made on the basis of invoices, it was mandatory to annex the invoices and Demand Notice ought to have been issued in Form-4. The learned Counsel for the Appellant submits that assignment claim by Respondent No.3 is illegal. Assignment was made without any knowledge or notice to the Corporate Debtor. The Corporate Debtor was ready to make the balance payment due as per Settlement Agreement and approached the Operational Creditor, who refused to accept the same, informing that it has assigned the debt. The Appellant has also offered to make payment of Rs.20 lakhs by Bank Draft dated 13.02.2023, which was not accepted by the Operational Creditor. The Operational Creditor having not performed its installation of the lift was not entitled for any operational debt. Section 9 Application was filed on the basis of Agreement dated 05.02.2013, which was not an Agreement entered into with the Corporate Debtor, Section 9 Application against the Corporate Debtor was not maintainable.

7. Shri Abhijeet Sinha, learned Counsel for Respondent No.3 submits that Corporate Debtor having committed default in payment of operational

debt, the Application under Section 9 filed by Operational Creditor was rightly been admitted. It is submitted the Settlement Agreement dated 27.09.2021, which was entered between Corporate Debtor and the Operational Creditor clearly acknowledges the debt of the Corporate Debtor and the payment as per the Settlement Agreement having not been made by the Corporate Debtor, the entire claimed amount of Rs.92,70,000/- became due. The Operational Creditor on account of breach of Settlement Agreement was entitled to continue the proceedings under Section 9 as per Settlement Agreement. The Demand Notice was duly issued to the Corporate Debtor, which fact is also acknowledged in the Settlement Agreement. The Corporate Debtor having acknowledged the operational debt, the argument that no operational debt is due is meaningless. Respondent No.3 has been impleaded by order of this Tribunal dated 20.03.2023, which order has been unsuccessfully challenged by the Appellant before the Hon'ble Supreme Court by filing Civil Appeal No.3181 of 2023, which was dismissed on 08.05.2023. The assignment of debt was assigned by the Operational Creditor in favour of Respondent No.3 and on the strength of which assignment, Respondent No.3 is fully entitled to support the impugned order. Learned Counsel for Respondent No.1 adopted the submission made on behalf of Respondent No.3.

8. The learned Counsel for the IRP submits that in pursuance of the publication issued by IRP, claims of more than Rs.200 crores have been received.

9. The learned Counsel for the Intervenor appearing for the Allottees submits that Allottees who were Financial Creditors of the Corporate Debtor have filed their claims. The Allottees also submitted that they had already filed an Application under Section 7 being CP(IB) No.210 of 2020 against the Corporate Debtor where claim of Rs.121.47 crores was made. It is submitted by learned Counsel for the Intervenor that Corporate Debtor is not a solvent company and in pursuance of publication issued by the IRP, claims have been filed by the Allottees.

10. We have considered the submissions of the learned Counsel for the parties and have perused the records.

11. We need to first consider the submissions of learned Counsel for the Appellant that Demand Notice dated 15.10.2018 was not served on the Corporate Debtor. In the Application under Section 9, the Operational Creditor has pleaded that Demand Notice dated 15.10.2018 was sent through speed post to Registered Office as well as Delhi Office of the Corporate Debtor Company. It was pleaded that Notice was delivered to the Corporate Debtor on his Registered Office, however, notice dispatched to Delhi Office was returned with remarks "Left Without Address". In paragraph 11 of the Application, following averments have been made:

"11. That, the Operational Creditor/ Applicant issued demand notice dated 15.10.2018 under the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor Company which. was sent through Speed Post on 18.10.2018 to the registered office as well as Delhi office

of the Corporate Debtor Company. The said legal notice has been duly delivered to the Corporate Debtor on its registered office as the same was not returned undelivered till date. However, the notice dispatched to the Delhi Office was returned. undelivered with the remark " LEFT WITHOUT ADDRESS". Copy of demand notice dated 15.10.2018 is filed as ANNEXURE-XII, original Postal Receipts for dispatch of notice are filed as ANNEXURE-XIII and Service Report downloaded from the website of Postal Department in respect of registered office is filed as ANNEXURE-XIV and returned envelope in respect of Delhi Office of the Corporate Debtor is filed as ANNEXURE-XV."

12. The Corporate Debtor in its reply to Section 9 Application has denied service of Demand Notice. The Adjudicating Authority in the impugned order has considered submissions of the parties in paragraph 11 of the impugned order, the Adjudicating Authority returned a finding that the post was delivered at the Registered Office and the tracking report and postal receipts were attached. In paragraph 11, following findings have been reported:

"11. Now, delving upon main petition, the first issue for consideration is whether the demand notice in Form 3 dated 15.10.2018 was properly served. The same has been delivered to the corporate debtor vide registered post on 18.10.2018 to the registered office as well as Delhi office. The post was delivered at the registered address, the tracking report and postal receipts are attached at Annexure XIII and XIV of the petition.

However, the post at the Delhi office, notice was returned undelivered with the remark 'Left Without Address' (Annexure-XV). Therefore, the demand notice was properly served but corporate debtor has not replied to the same.”

13. When in the Section 9 Application, the Operational Creditor has filed the original postal receipt for dispatch of Notice and service of Notice from the website of Postal Department and there being no challenge to the service report downloaded from the website of the Postal Department, there is no infirmity in the finding of the Adjudicating Authority that Demand Notice was served. It is further relevant to notice that in the Settlement Agreement, which was entered between the Operational Creditor and the Corporate Debtor on 27.09.2021, the Settlement Agreement also referred to Demand Notice dated 15.10.2018 sent on 18.10.2018. The Settlement Agreement being signed by both Operational Creditor and Corporate Debtor, there is clear acknowledgement in the Agreement regarding sending of Demand Notice. We, thus, do not find any merit in submission of the learned Counsel for the Appellant that Demand Notice was not served on the Corporate Debtor.

14. The learned Counsel for the Appellant has attacked the Demand Notice on the ground that Demand Notice is defective. He submits that in Section 9 Application, the Agreement which was relied, was an Agreement dated 05.02.2013, which was an Agreement not entered with the Corporate Debtor, rather with another entity. It is further submitted that the Demand Notice in Form-3 was also defective, since no invoices were attached along

with the Notice, whereas operational debt was claimed on the basis of invoices, hence, it was obligatory to annex invoices along with the Demand Notice. The learned Counsel for the Appellant placed reliance on judgment of this Tribunal in ***Neeraj Jain vs. Cloudwalker Streaming Technologies Pvt. Ltd. – Company Appeal (AT) (Insolvency) No.1354 of 2019*** decided on 24.02.2020.

15. We may first notice the submission with respect of Agreement dated 05.02.2013. The Operational Creditor in its Application under Section 9 has given the details of the Agreement dated 05.02.2013 entered into Future Colonizer and Construction Pvt. Ltd. The Applicant itself has stated that Future Colonizer and Construction Pvt. Ltd. having abandoned the site, the Corporate Debtor being owner of the site acknowledged the dues of the Applicant and fresh Agreement dated 14.03.2015 was entered with Operational Creditor and the Corporate Debtor. The Corporate Debtor has also issued three cheques in the year 2015 after the Agreement. The aforesaid facts have been pleaded in paragraphs 4, 5, 6 and 7 of the Section 9 Application, which is to the following effect:

“4. That Future Colonizer and Construction Private Limited (hereinafter referred to as FCCPT) had approached the Applicant Company for the supply and installation of KONE elevators for its project site at Fashion Technology Park, Sector-90, Mohali, Punjab. Accordingly FCCPT had agreed to place purchase order for supply and installation of 04 KONE elevators. Consequently, a Supply Installation, Testing and Commissioning (SITC) Agreement dated 05.02.2013

bearing reference number KEIPL/038/201212/0002584719 was executed by and between the Applicant Company and FCCPT for the purpose of supply, installation, testing and commissioning of the elevators, covering the commercial terms and conditions of the transaction, copy of Supply, Installation, Testing and Commissioning (SITC) Agreement dated 05.02.2013 is filed as Annexure-IV.

5. That pursuant to the execution of the said SITC Agreement, Applicant Company had delivered and installed passenger lifts in the project site and raised invoice for a sum of Rs.82,68,620/- (Rs.Eighty Two Lakh Sixty Eight Thousand Six Hundred Twenty Only). FCCPT after the receipt of the passenger lifts made a part payment of a sum of Rs.10,30,000/- (Rs. Ten Lakh Thirty Thousand Only) leaving behind a balance of Rs.72,38,620/- (Rs. Seventy Two Lakh Thirty Eight Thousand Six Hundred Twenty Only), copy of invoice is filed As Annexure-V.

6. That by virtue of certain disputes between the Corporate Debtor Company and FCCPT, FCCPT abandoned the site and did not make the payment to the Applicant Company as aforesaid. It is submitted that vide letter dated 12.07.2013, the Corporate Debtor being the owner of the side acknowledged the dues of the Applicant Company and assured the Applicant Company that they shall pay a sum of Rs.72,10,000/- to the Applicant Company on or before 31.08.2013, copy of letter dated 12.07.2013 from Corporate Debtor to Applicant Company is filed as Annexure-VI. The

Corporate Debtor Company also issued the cheques in favour of Applicant Company which were dishonoured.

7. That, thereafter, the aforesaid project was re-christened as Jade Business Park due to change of Directors of Corporate Debtor Company, who assured the Applicant Company that they shall liquidate the entire dues of Applicant Company and enter into a fresh contract with my clients on 14.03.2015 bearing reference number KEIPL/038/2015/0000004948057 for the supply, installation, testing and commissioning of 4 Nos. Kone 15 Passenger Machine Room less Gearless MonoSpace Elevators at the Project in Jade Business Park, Sector-90, Mohali, Punjab on the terms and conditions which were mutually agreed between the Applicant Company and the Corporate Debtor Company, copy of fresh agreement dated 14.03.2015 is filed as Annexure-VII. However, despite the assurance given to the Applicant Company, the Corporate Debtor Company did not liquidate the due of Applicant Company. It is submitted that the Corporate Debtor Company also issued the following cheque in favour of the Applicant Company:

- a) Cheque bearing No.910973 dated 23.06.2015 for Rs.10,30,000/- drawn on IndusInd Bank, Chandigarh.*
- b) Cheque bearing No.910974 dated 15.08.2015 for Rs.36,05,000/- drawn on IndusInd Bank, Chandigarh.*
- c) Cheque bearing No.910975 dated 15.09.2015 for Rs.36,05,000/- drawn on IndusInd Bank, Chandigarh.*

Copies of aforesaid cheques are filed as Annexure-VIII (Colly)”

16. In Section 9 Application, although reference was made to the Agreement dated 05.02.2013, but in the same Application, subsequent Agreement dated 14.03.2015 was also mentioned and the Corporate Debtor having acknowledged the debt and issued three cheques, it is not open to the Corporate Debtor to contend that it does not owe any operational debt. Section 9 application having clearly pleaded about the Agreement dated 05.02.2013 and subsequent Agreement dated 14.03.2015, no infirmity can be found in Section 9 Application on the ground that Agreement dated 05.02.2013 was referred with Future Colonizer and Construction Pvt. Ltd.

17. Now we come to the submission of learned Counsel for the Appellant that Demand Notice was defective, having been issued in Form-3 and there being no invoices attached to the Notice. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Rule 5 deals with Demand Notice by Operational Creditor. Rule 5, sub-rule (1) provides as follows:

“5. Demand notice by operational creditor.—(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely,-
(a) a demand notice in Form 3; or
(b) a copy of an invoice attached with a notice in Form 4.”

18. The Operational Creditor is at liberty to submit Demand Notice either in Form-3 or Form-4. When Notice is issued in Form-4, copy of the Invoice is required to be attached with the Notice. The Demand Notice issued by

the Operational Creditor was in Form-3, hence, no infirmity can be found in the Demand Notice, if invoices were not attached. In the Application, which was filed under Section 9 Demand Notice dated 15.10.2018 clearly mentions that debt of 92,70,000/- is due and payable on the basis of supply, installation, testing and commission Agreement dated 05.02.2013. The Demand Notice further referred to letter dated 25.11.2015 addressed by the Corporate Debtor confirming the debt of Rs.92,70,000/- payable by the Corporate Debtor. Thus, the basis of the Demand Notice was Supply Agreement and acknowledgement letter issued by the Corporate Debtor. No invoices were referred to in the Demand Notice. Hence, submission of the Appellant that Demand Notice should have been accompanied with the invoices cannot be accepted.

19. Now we come to the judgment of this Tribunal in **Neeraj Jain** (supra) relied by the learned Counsel for the Appellant. In the aforesaid case, one of the questions framed by this Tribunal was that whether it is the discretion of the Operational Creditor or the nature of the Operational Debt, that determines the issuance of notice in Form 3 or Form 4 under Sec 8 (1) of the Insolvency and Bankruptcy Code, 2016? This Tribunal answered the aforesaid question and laid down following in paragraph 43 to 46, which are to the following effect:

“43. However, it cannot be the discretion of the Operational Creditor to deliver the Demand Notice in Form 3 even if the operational debt involves transactions where corresponding invoices are generated but are not

filed in court on the pretext that the Operational Creditor has chosen to send the Notice in Form 3.

44. *The use of the phrase, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved‘ in Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice in Form 3 or Form 4 as per its convenience. Rather, it depends directly on the nature of the operational debt and applicability of Form 3 or Form 4 as per the nature of the transaction.*

45. *It is important to mention that legislative provisions are made with a larger perspective to deal with all the eventualities that may arise in the implementation of the said provisions. Therefore, the use of the word —OR in Section 8 cannot be interpreted as such, that the Insolvency and Bankruptcy Code has provided a choice or a discretion to an Operational Creditor, to provide an escape route from submission of the invoice, which can be treated as the most relevant document to prove the debt and amount in default.*

46. *On perusal of the language of Section 8, it is clear that an Operational Creditor on the occurrence of default has been provided with the option of delivering a demand notice of the unpaid operational debt or raising an invoice demanding payment of the amount involved. The two options available for initiation of Corporate Insolvency Process are provided to deal with all the eventualities that may occur. For example, if an operational debt is in the nature of salary dues, then in that situation, the question of submitting an invoice does not arise. To deal with such a situation, Section 8 contains the provision for*

issuance of demand notice of the unpaid operational debt. Form 3 of the Adjudicating Authority Rules has only laid down the condition that the applicant has to give the details of the amount of debt, details of the transaction on account of which such debt fell due and the date from which such debt fell due, and as per Column 7 of the said Form 3, applicant has to attach the documents to prove the existence of operational debt and the amount in default. Likewise, where the operational debt involves the generation of the invoice, then in that case, invoice raising the demand may be sent to the Corporate Debtor demanding the invoice amount. In such a situation, the Operational Creditor has to issue the demand notice in Form 4 along with the invoice.”

20. The present is a case where the Demand Notice issued by the Operational Creditor on the basis of supply and installation Agreement and the acknowledgement letter issued by the Corporate Debtor. In the facts of the present case, Notice having not been issued in Form-4, cannot be faulted with. There can be no defect and infirmity in Demand Notice issued in Form-3 in the facts of the present case. Thus, the submission of learned Counsel for the Appellant that Demand Notice is defective, cannot be accepted.

21. Now we come to the question as to whether the operational debt was due and not paid by the Corporate Debtor? The Demand Notice was issued for an amount of Rs.92,70,000/- for which amount Section 9 Application was filed. The Corporate Debtor and Operational Creditor entered into a Settlement Agreement on 27.09.2021, which Agreement was also brought

on the record by IA No.301 of 2022. The Settlement Agreement between the parties acknowledged the liability of Corporate Debtor for an amount of Rs.92,70,000/-. The Settlement Clauses (i) to (iv) of the Agreement are relevant, which are to the following effect:

“1. COPL acknowledges that pursuant to the above, they are liable to pay the claimed amount to KONE. However, due to financial constraints, COPL has offered to pay a sum of Rs.60,00,000/- (Rupees Sixty Lakhs Only) to KONE as a full and final settlement of all the dues of KONE as are payable by COPL.

2. KONE has accepted the said offer of COPL, and are agreeable to accept an amount of Rs.60,00,000/- (Rupees Sixty Lakhs Only) as full and final settlement of the claiming pending before the NCLT on COPL complying with the terms of payment as per the Settlement Agreement.

3. COPL shall pay an amount of Rs.25,00,000/- (Rupees Twenty Five Lakhs Only) being the first instalment at the time of signing of this Settlement Agreement. The second instalment of Rs.20,00,000/- (Rupees Twenty Lakhs Only) shall be paid on or before 15.12.2021, and the third instalment of Rs.15,00,000/- (Rupees Fifteen Lakhs only) shall be paid on or before 15.03.2021. The first instalment shall be paid by means of a demand draft and towards the second and third instalment, the post dated cheques shall be given by COPL to KONE at the time of signing the present Settlement Agreement. It has been assured and represented to KONE that COPL shall ensure that the post dated cheques are honoured on their first

presentation. In case of default and dishonour of the cheques, KONE shall be entitled to continue with the existing pending proceedings before the NCLT and to take initiate any other legal proceedings as may be advised to them to claim the entire claim amount of Rs.92,70,000/- (after adjusting the amount received) with interest @ 12% per annum and costs. The breakup of the payment shall be as under:

- a. Demand Draft no.009371 dated 27.09.2021 for an amount of Rs.25,00,000/- in favor of KONE Elevator India Pvt. Ltd.*
- b. HDFC Bank Cheque no.000901 dated 15.12.2021 for an amount of Rs.20,00,000/- in favor of KONE Elevator India Pvt. Ltd.*
- c. HDFC Bank Cheque no.000902 dated 15.03.2022 for an amount of Rs.15,00,000/- in favor of KONE Elevator India Pvt. Ltd.”*

4. The parties have further agreed that the terms and conditions recorded in the Settlement Agreement are final towards the entire obligations of both parties against the SITC agreement referred above and that this settlement agreement is irrevocable and shall not be reopened are questioned by the parties in any manner whatsoever to the extent of the amount settled. Since considerable time has lapsed, and therefore any part found missing or damaged while installation and commissioning of the aforesaid elevators shall be charged as actual, and the contract value shall be adjusted to the extent of increase in cost towards the balance work for which payment will be released on raising of invoice. All other terms and conditions shall remain same as per contract bearing reference number KEIPL/038/2015/0000004948057

dated 14.03.2015. KONE undertakes to withdraw all pending case after the final payment is made (whether disclosed or undisclosed in present settlement agreement) against COPL/ its officers, in terms of the present settlement.”

22. It is further relevant to notice that although Corporate Debtor agreed to pay sum of Rs.60,00,000/-, but an amount of only Rs.25 lakhs was paid and the second installment of Rs.20 lakhs to be paid on or before 15.12.2021 and third installment of Rs.15 lakhs on or before 15.03.2022 were not paid. Thus, there was clear default on the part of the Corporate Debtor of acknowledged debt and on the date when Section 9 Application was heard on 25.01.2023, the operational debt remained unpaid. The Adjudicating Authority after considering all materials on record returned a finding that Operational Creditor has proved the debt and default, which is more than Rs.1 lakh.

23. The learned Counsel for the Appellant also contended that the Corporate Debtor has offered to make payment of Rs.20 lakhs for which Bank Draft was also prepared, but the same was not accepted by the Operational Creditor. The Adjudicating Authority has noticed the submissions in paragraph 8 to 10. An IA No.529 of 2023 was filed on 24.02.2023 offering to make part payment of Rs.20 lakhs as per settlement dated 27.09.2021, which Application came to be rejected by the Adjudicating Authority. The Adjudicating Authority has heard the arguments on 25.01.2023, after which the said Application was filed. The

Adjudicating Authority has rightly observed in paragraph 10 that in event the Corporate Debtor is interested to settle the dispute, the same can be done even after admission of Section 9 petition. We further notice that even offer of payment of Rs.20 lakhs was not treated to be complete in liquidating the operational debt, hence, the operational debt remained due and unpaid, in which default was committed by the Corporate Debtor. Hence, no exception can be taken to the admission of Section 9 Application. It is further relevant to notice that at the time of admission of the Appeal, the Appellant offered to deposit an amount of Rs.35 lakhs, which according to the Appellant was the amount due and payable and for which the default was committed, but as noted above, there being breach in the Settlement Agreement and Corporate Debtor having failed to make the payment as per the Settlement Agreement, the amount for which the Application was initiated became due and the payment of Rs.35 lakhs in no manner can satisfy the entire debt and due. The Settlement Agreement having breached, the Appellant cannot insist to accept the Settlement Agreement at this stage.

24. The learned Counsel for the Appellant submitted that Assignment Agreement in favour of Respondent No.3 is void and inoperative. It is submitted that Assignment Agreement is an unstamped document and cannot be relied. The learned Counsel for the Appellant has relied on judgments of the Hon'ble Supreme Court in ***Khardah Company Ltd. vs. Raymon & Co (India) Pvt. Ltd. – AIR (1962) SC 1810*** and ***M/S. N.N.***

Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd. & Ors. in Civil Appeal No(s). 3802-3803 of 2020.

25. Challenge in the present appeal is to the admission order passed by the Adjudicating Authority in Section 9 Application filed by the Operational Creditor. The Assignment Deed in favour of Respondent No.3 on 03.02.2023 was not the subject matter of any issue between the parties in Section 9 Application. On the basis of the Assignment, Respondent No.3 has only prayed to be impleaded in this Appeal to support the impugned order. Respondent No.3 was impleaded in this Appeal by order dated 20.03.2023. The learned Counsel for Respondent No.3 placed the order of Hon'ble Supreme Court dated 08.05.2023 passed in Civil Appeal No.3181 of 2023 in which Appeal order dated 20.03.2023 passed by this Tribunal, impleading the Respondent was challenged. The Hon'ble Supreme Court on 08.05.2023 dismissed the Appeal by following order:

“We do not find any good ground and reason to interfere with the impugned judgment, which in fact only allows the assignee to be impleaded. Hence, the appeal is dismissed.

We clarify that all issues in question on merits are left open.

Pending application(s), if any, shall stand disposed of.”

26. We, thus, are of the view that the Assignment in favour of Respondent No.3 is not subject matter of any dispute in the present Appeal, except that Respondent No.3 has been impleaded to advance submission

on behalf of it to support the impugned order. We, thus, are of the view that for the purpose of this case, various arguments made by the Appellant regarding Assignment dated 03.02.2023, needs no consideration.

27. In view of the foregoing, we are of the view that there are no grounds made out to interfere with the impugned order passed by the Adjudicating Authority admitting Section 9 Application. In result, the Appeal is dismissed. No order as to costs.

28. The amount deposited by the Appellant, pursuant to order of this Tribunal dated 02.03.2023 be returned to the Appellant.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

4th July, 2023

Ashwani