NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1322 of 2023

[Arising out of order dated 18.08.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-IV in CP (IB) 893/MB-IV/2022]

IN THE MATTER OF:

Chartered Finance Management Pvt. Ltd.
2nd Floor Wakefield House, Sprott Road,
Ballard Estate, Mumbai-400 038

....Appellant

Versus

Roadways Solutions India Infra Ltd
Plot No. 20, Dhanjibuoy Society,
Near to SERA School, Behind Bizzbay
Off NIBM Road, Pune-411 048

...Respondent

Present:

Appellant:	**Mr. Aayush Agarwala, Mr. Yash Dhruva and Mr. Nishit Dhuruva, Advocates**
For Respondents:	**Mr. Nirav Shah, Ms. Prachi Garg and Mr. Varun Kalra Advocates**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 18.08.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-IV) in CP (IB) 893/MB-IV/2022. By the impugned order, the Adjudicating Authority rejected the Section 9 petition filed by Chartered Finance Management Pvt. Ltd. – Operational Creditor seeking initiation of Corporate

Insolvency Resolution Process (‘**CIRP**’ in short) against the Roadways Solutions India Infra Ltd - Corporate Debtor. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. Outlining the factual matrix, the Learned Counsel for the Appellant submitted that the Corporate Debtor needed financial assistance to complete certain projects including the construction of Vadodara Mumbai Expressway of NHAI and had approached the Appellant to assist in coordinating with the lenders for sanction of credit facilities. For this purpose, a Mandate Letter dated 14.07.2021 was issued to the Appellant to engage their advisory services to raise credit facilities up to Rs.1750 cr for its projects including the Package X Project. It was submitted that the Appellant performed its obligations under the Mandate Letter and on 04.01.2022, due to their efforts, a term loan of Rs.480 cr was sanctioned by Canara Bank and the facility was credited in favour of the said SPV of the Corporate Debtor set up for Package X. Thus, an amount of Rs.7.20 cr along with GST became due and payable by the Corporate Debtor to the Appellant towards fees of the Appellant under the terms of the Mandate Letter being 1.5% of the sanctioned amount i.e. Rs.480 cr. The Appellant raised a partial invoice of Rs. 3.60 cr plus GST towards 50% of the fees. The Respondent/ Corporate Debtor made only partial payment of Rs.45 lakhs on 16.02.2022 which payment by itself constituted an admission of debt. The Appellant subsequently raised a full invoice of Rs.8.49 cr but the Corporate Debtor failed to make payment of the said amount. Thereafter, a Section 8 Demand Notice was issued on 12.07.2022 by the Appellant to the Respondent calling upon them to make payments of the

outstanding amount of fees. As there was no response to the Demand Notice, the Appellant filed the Section 9 application of the IBC in August 2022. The Adjudicating Authority erroneously dismissed the same on 18.08.2023 on the ground of prior dispute in relation to existence of debt and assailing the said impugned order, the present appeal has been preferred.

3. It was strenuously contended by the Appellant that the Adjudicating Authority failed to notice that prior to the issue of demand notice, no disputes had been raised by the Corporate Debtor. No notice of dispute was raised by the Corporate Debtor though the Section 8 Demand Notice had been duly served. It was argued that the Appellant had complied to the Mandate Letter and performed its obligations therein and countered the contention that the Appellant did not have the mandate to raise finance for Package X project as one which lacked foundational basis. It was also asserted that the Adjudicating Authority had wrongly concluded that the obligation to pay the fees for the services provided by the Appellant under the Mandate Letter was payable by the SPV and not by the Corporate Debtor. It was also canvassed that the Adjudicating Authority incorrectly held that the obligation to pay the fees would arise not on raising of proforma invoices by the Appellant but only by raising of debit note. It was asserted that such issues were not previously raised by the Corporate Debtor that invoices were not in terms of Mandate Letter or that debit notes were not raised by the Appellant as per the Mandate Letter. Furthermore, though the Appellant had addressed several emails to the Corporate Debtor with the subject line of "Debit Note" calling upon them to make payment of the balance amount of the towards the work done under

the said Mandate Letter for Package X Project, the Corporate Debtor never responded either to the emails or invoices. Neither did they send any response to the Demand Notice. All objections/disputes are a belated after-thought raised after the filing of Section 9 application. Thus, though the Appellant had acted in compliance of the Mandate Letter, the Corporate Debtor by failing to make payment of the outstanding fees had committed a default which has been wrongly glossed over by the Adjudicating Authority in dismissing the Section 9 application.

4. Refuting the contentions raised by the Appellant, the Learned Counsel for the Respondent submitted that the Appellant had been given mandate to procure financial credit facility for Package VIII & IX. It was further pointed out that the sanction of Rs.480 cr by Canara Bank to the SPV for Package X was not facilitated by the Appellant but by another party. Thus, when the Appellant did not provide any services to the Corporate Debtor in relation to Package X, it cannot enforce its rights for seeking fees on this count. Since the Adjudicating Authority must first satisfy itself that there was a debt payable by the Corporate Debtor and the Appellant having failed to provide sufficient evidence thereof, the impugned order has been rightly passed by the Adjudicating Authority. It is also claimed by the Respondent that the Demand Notice under Section 8 was defective as no date of default was mentioned in the demand notice. No invoice is annexed to the demand notice to support the alleged debt due to the Appellant. It was also pointed out that the Demand Notice was not served at the correct address and online delivery status of the same from the courier agency has not been made available.

5. Submission was also made that there was a pre-existing dispute with regard to the amount of fees payable to the Appellant. The Appellant had raised incorrect amount in the proforma invoices contrary to the stipulations of the Mandate Letter. The Appellant was entitled to a fee of 1.5% of the processing charges imposed by the lending institution towards issuing the loan amount exclusive of GST and other taxes and not 1.5% of the facility as is being wrongly claimed by the Appellant. Hence, the amount of fees claimed by the Appellant for the loan amount released by the Canara Bank was a disputed amount. In the face of such disputes surrounding the quantification of the fees payable to the Operational Creditor, there was no scope for admission of a Section 9 application.

6. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully. The short point which is before us for consideration is whether there was a pre-existing dispute between the two parties with regard to the operational debt.

7. In the present case, from material on record, it is clear that the demand notice was issued by the Operational Creditor on 12.07.2022 and no notice of dispute was raised by the Corporate Debtor. We have not been persuaded by the argument of the Corporate Debtor that the notice was not effectively served upon him for reasons spelt out by the Adjudicating Authority in para 5.3.1 of the impugned order. It is also an undisputed fact that in the present matter the Operational Creditor did not receive any further payment from the Corporate Debtor and therefore proceeded to file an application under Section 9 of IBC. The statutory scheme of IBC in such circumstances pretty much

entitled the Operational Creditor to file an application under Section 9 and this is exactly the course of action followed by the Operational Creditor and we therefore find nothing wrong in this course of action. It is only at this stage when the Operational Creditor moved an application before the Adjudicating Authority under Section 9 that the Corporate Debtor has endeavoured to protect its interests and raised the issue of pre-existing disputes.

8. Given this backdrop and the factum that the Corporate Debtor has not replied to the Demand Notice but raised its defence for the first time before the Adjudicating Authority, it will be useful to find out how the Adjudicating Authority has considered the spectrum of facts and passed the impugned order rejecting the Section 9 application on the grounds of pre-existing disputes. The relevant portion of the impugned order is as extracted hereunder:

> *"5.3.2. As regards contention that the mandate letter allegedly did not contemplate the provision of services in relation to the Package X Project, This bench finds that the agreement for the advisory services was entered for raising finance up to Rs 1750 Crores and the Operational Creditor was responsible for preparation of Information Memorandum and Financial Modelling. The said agreement is silent whether such services shall be for the purpose or benefit of group/associate companies or not. Even if the contention of the Operational Creditor is accepted that the agreement dated 14.07.2021 was a master agreement and contemplated raising of finance for different SPVs promoted by the Corporate Debtor, this bench feels that the obligation to pay the fee in terms of this agreement shall be on such associate/group company and not on the Corporate Debtor. It is not in dispute that the loan was sanctioned to VNMP10PL and it can only be made liable to pay the fees, if any to the Operational Creditor. Accordingly, this bench feels that the amount claimed by the Operational Creditor is not payable by the Corporate Debtor. This preposition holds good on another ground i.e. the failure of the Operational Creditor to raise debit note or final invoice as the said*

agreement specifically contemplates payment of fees within 7 days of raising of such debit note.

5.3.3. Further, the date of default is not mentioned in the said Demand Notice. This further fortifies our findings in the preceding para that the obligation to pay arises on raising of debit note and not on proforma invoice. Further, Part IV has stated date of default 25.04.2022 i.e. after 7 days after date of proforma invoice, this bench does not find the said determination to be in order because obligation to pay does not arise from the proforma invoice in terms of the Agreement.

5.3.4. The Corporate Debtor has placed on record and mandate agreement date 20.07.2021 entered with IDBI Capital Markets and Securities Limited (IDBI Caps) by VNMP10PL and submitted that the Operational Creditor had no role to play in procuring the Sanction, Letter for the Package X Project for the Corporate Debtor. The said loan is stated to have been sanctioned because of services rendered by IDBI Caps, and has placed on record an invoice dated 25.03.2022 for Rs.59,00,000/- raised by IDBI Caps on VNMP10PL, which was duly paid by VNMP10PL. This bench finds that IDBI Caps was engaged specifically for package 10 funding i.e. Financial Modelling & Information Memorandum and Assistance in arranging the Debt for the project. Accordingly, this bench is of the considered view that there exists dispute as to the claim of Operational Creditor about raising of Finance for package 10 project, while the IDBI Caps is also been paid for the similar services.

5.4. In view of the above findings this bench feels that present petition deserves to be dismissed on the ground of prior dispute in relation to existence of debt."

9. It is the case of the Appellant that the Adjudicating Authority had erroneously dismissed the Section 9 application on the ground of prior dispute by holding that the Appellant did not have the mandate to raise finance for Package X project as this task had been performed by IDBI Capital for which services IDBI had been paid. The Adjudicating Authority also wrongly concluded that the obligation to pay the fees for the services provided by the Appellant under the Mandate Letter was payable by the SPV and not by the

Corporate Debtor. It is the contention of the Appellant that though the Mandate Letter provided for establishment of an SPV of the Corporate Debtor to which the monies sanctioned amount would be disbursed to, the obligation for payment of fees is on the Respondent- Corporate Debtor. It is also their case that the Adjudicating Authority has incorrectly held that the obligation to pay the fees would arise only on the raising of the debit note by the Appellant and not by raising proforma invoices.

10. We feel that at this stage it would be useful and constructive to peruse the relevant provisions of the Mandate Letter of 14.07.2021 as placed at page 79-83 of the Appeal paper Book ('**APB**' in short) and the Offer Letter for Financial Advisory Services from Vadodara Mumbai Expressway Pkg 10 Private Limited to IDBI Capital as placed at pages 172-182 of APB. The relevant provisions of the Mandate Letter are as under:

14.07.2021

"To
Chartered Finance Management Limited
2nd Floor, Wakefield House,
Sprott Road, Ballard Estate
Mumbai-400 038

Dear Sir,

Advisory services for raising credit facilities upto Rs.1750 crores

*Pursuant to our discussions, we are pleased to confirm our arrangements under which you (the "**Advisor**") are engaged by us (the "Company") to render advisory services for raising credit facilities upto Rs.1750 crpres.*

In terms of the above understanding, we wish to engage you in order to provide advisory services ("Engagement") for

1. Project Advisory
……

1.1 Preparation of Information Memorandum
…….
1.2 Financial Modeling
…….
2. Co-ordination with the lenders
…….

Fee structure

a) Fees

The gross fees payable to the Advisor for the Engagement shall be 1.5% and would be exclusive of Goods and Service Tax (GST) and any other statutory taxes, as may be applicable ("Fee").

The Advisor shall raise debit notes with regard to the services rendered and the Company shall make good/pay the amount of debit note raised as agreed within seven (7) days from the date it is received by the Company. It is understood that all the amounts payable to the Advisor under the terms of this Engagement are non-refundable and the Company shall be liable to pay GST and/or any other similar taxes, not being Income tax (the "Taxes") over and above the Fees.

……

b) Payment
The Company shall pay 50% on acceptance of Sanction and 50% of the fees to the Advisor on first disbursement of the respective SPVs"

The relevant provisions Offer Letter for Financial Advisory Services from Vadodara Mumbai Expressway Package X Private Limited to IDBI Capital are as under:

"4. Scope of Services

4.1 The scope of services envisaged for the Assignment is outlined as follows:
……
d. Assist the Client in approaching potential leader(s), initiating discussions, associating in joint presentations along with the Client (if required) getting commitments and negotiating detailed term sheet/s

e) Assist in arranging the debt for the Project from Banks/NBFCs/Multilateral Financial Institutions. Any increase in the quantum of syndication of the required debt and/or addition of new lenders would be taken up after due consultations with the Client.

……

8. Remuneration and Expenses

The remuneration payable to the Advisor for the various services as stated above would be realized at milestone completion basis as under:

Sr. No.	*Milestone*	*Fees Payable (Rs. In Lakhs)*
1.	*On receipt or in – principle sanctions, which are not accepted by the Client*	*10.00*
2.	*On receipt of in-principle sanctions, which are accepted by the Client*	*0.35% of the sanctioned amount*

……

10. Payment Conditions

a. Payments for the invoices raised towards professional services shall be made within 15 calendar days from the date of invoice.

b. The above fees shall exclude statutory, technical and legal costs, if any, that shall be payable extra at actual."

11. Coming to the quantum of fees payable, we find that there is evidence of dispute in the calculation thereof between the amount claimed by the Appellant and the Corporate Debtor. Going by the terms of Fee Structure outlined in the Mandate Letter, it was inter-alia agreed that a fee of 1.5% on the sanctioned amount would be payable by the Company to the Operational Creditor and that 50% of the fee would be paid upon sanction and 50% of the fee would be paid upon disbursement to the SPV. However, while the

Corporate Debtor has contended that the fee payable was 1.5% of the processing fee, the Appellant has contended that fees was 1.5% of the funds mobilised. In support of their contention, it was stated that fixation of fees on the basis of 1.5% of the processing fees is unrealistic as it would be an extremely negligible amount for the volume of effort and work undertaken for arranging the credit facility. Even when we see the agreement with IDBI, the fees payable is actually shown as percentage of the sanctioned amount and not of the processing fees but the percentage is pegged at 0.35% and not 1.5% as claimed by the Appellant. Seen from this perspective, the Adjudicating Authority did not commit any mistake in holding the calculation of quantum of fees to be a ground of existing dispute between the two parties.

12. There is also a difference of views between the Appellant and the Corporate Debtor on which entity is to pay the fees payable. It is the contention of the Appellant that though the Mandate Letter provided for establishment of an SPV of the Corporate Debtor to which the facilities sanctioned would be disbursed to, the obligation for payment of fees is on the Respondent-Corporate Debtor since the SPV is the alter ego of the Respondent being owned and controlled by the Respondent. This payment modality was contended to be the standard practice in such business operations. In any case as the services were to be provided for the ultimate benefit of the Corporate Debtor, hence the liability to pay the fees would fall on the Corporate Debtor. When we look at the wordings of the Mandate Letter, we find that the word “Company” has not been defined. However, in the payment clause, it states that the ‘Company’ shall pay 50% on the acceptance of the

sanction and 50% on the disbursement of the respective SPVs. Quite clearly there is ambiguity in the terms contained in the Mandate letter, on whether the SPV or the Corporate Debtor is to be treated as the 'Company' for the purposes of deciding as to who shall be liable to pay the fees. This is clearly a bone of contention and a ground of existing dispute between the two parties.

13. Coming to the role of the Appellant in raising the loan facility, it is contended that the Mandate Letter dated 14.07.2021 was issued to them by the Corporate Debtor to engage their advisory services to raise credit facilities up to Rs.1750 cr including the Package X Project that active efforts were put in by the Appellant is reflected in the correspondence exchanged between the Appellant and the Respondent as well as the correspondence exchanged between the Appellant and Canara Bank in this regard. The concession agreement and information memorandum of Package X was shared by the Corporate Debtor as placed at page 270 and 274 of APB. Furthermore, there is correspondence between the Appellant and the Canara Bank regarding loan repayment schedule in respect of Rs 480 cr disbursed to the Corporate Debtor as placed at page 328 of APB. All this shows that the Appellant had performed its services under the Mandate Letter in securing funding for Package X Project. Per contra, it is the case of the Respondent that the Appellant had no role to play in procuring the sanction letter for Package X. It was asserted that the Corporate Debtor had engaged the services of IDBI Capital vide a contract dated 20.07.2021 and hence the claim staked by the Operational Creditor for Package X is ill-founded. The contract for this purpose as signed between IDBI Capital and Package X – SPV has been placed at page 172 of

APB. Furthermore, the invoice dated 25.03.2022 raised by IDBI Capital seeking payment and the proof of payment made by Corporate Debtor to IDBI Capital on 31.03.2022 is also seen at pages 186-187 of APB shows that the facility agreement was mustered by their efforts. The Appellant has contended that even if it is accepted that IDBI Capital was also engaged for the same purpose, that cannot deny the Appellant from claiming its fees under the Mandate Letter for performing its services of securing funding for Package X Project. That the Corporate Debtor had engaged multiple agencies for the same project cannot become a ground for denying the Appellant of his fees. Viewed from this angle too, there is clearly a dispute as to which entity discharged the advisory role and can be held to be the rightful claimant of the fees, and to that extent the Adjudicating Authority cannot be faulted from holding this as a basis of dispute between the parties.

14. Yet another facet of dispute between the two parties is on the issue of proforma invoice and the propriety of these invoices to claim the operational debt. It is the case of the Appellant that it is standard practice that proforma invoice is raised first before the issue of final tax invoice. There is no special sanctity attached to a debit note or any invoice and that proforma invoice constitute as much a valid demand and hence the obligation to make payment on the part of the Corporate Debtor cannot be contested. Moreover, this practice had never been disputed by the Corporate Debtor prior to the filing of the Section 9 application. It is also submitted that part payment by the Corporate Debtor basis the proforma invoice is a clear acknowledgment on the part of the Corporate Debtor of its liability to make payment of the fees

due and payable to the Appellant. In any case, the emails dated April 26, 2022; May 2, 2022; May 24, 2022; and May 30, 2022 sent by them to the Corporate Debtor were captioned "Debit Note Roadway Solutions" and therefore constituted a debit note as it provided information to the Corporate Debtor of their upcoming debt obligations based on amounts which were to be officially invoiced in near future. The rival submission made in the reply to the Section 9 application by the Corporate Debtor is that the Mandate Letter stipulated the raising of debit note by the Operational Creditor to seek payments. The Mandate Letter being in the nature of contract was required to be followed in letter and spirit by both the Operational Creditor and Corporate Debtor. Further it is the contention of the Respondent that the Appellant has not paid GST or accounted for it in their books of accounts which shows that the proforma invoices were not final invoices and hence cannot be held as operational debt. Thus, in the present case, it is contended by the Corporate Debtor that there is no valid and legal claim to receive payment. The issue of proforma invoice in place of debit note has been voiced by the Corporate Debtor as tantamount to breach of contractual obligations and therefore held by the Adjudicating Authority to be yet another ground of dispute.

15. It is relevant at this juncture to refer to the guiding principles laid down by the Hon'ble Supreme Court in ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353*** ('**Mobilox**' in short). Para 56 of the **Mobilox** judgment is extracted hereunder which reads as follows:

"56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability."

16. If we apply the above-cited test laid down in **Mobilox** by the Hon'ble Supreme Court to the facts of the present case, it is clear that the defence which was raised by the Corporate Debtor in their detailed reply filed in Section 9 Application cannot be said to be moonshine. Where operational creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which however is not so borne out by the facts of the present case. That pre-existing dispute was very much there is amply supported by material on the record. Such contractual disputes require further investigation and cannot be considered by the Adjudicating Authority in the exercise of their summary jurisdiction. And for such disputed amounts, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. Keeping in view that the present facts of the case indicates that the operational debt is disputed, the Adjudicating Authority has therefore correctly rejected the Section 9 application.

17. Considering the overall facts and circumstance of the present case, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 application filed by the Appellant. There is no merit in the Appeal. Appeal is dismissed. The Appellant will have the liberty to resort to other remedies that may be available to it under any other law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 14.05.2024
Ashok Kumar