IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH,
PRAYAGRAJ

CP (IB) No.24/ALD/2022

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

M/S Law & Kenneth Saatchi & Saatchi Private Limited.
Having its office at
Urmi Estate, Tower A, 22nd Floor, 95, Ganpatrao
Kadam Marg,
Lower Parel (W), Mumbai -400013.

...Applicant/Operational Creditor

Versus

M/S Patanjali Paridhan Private Limited
Having its office at Kripalu Bagh, Kankhal,
Haridwar, Uttarakhand- 249408

...Respondent/Corporate Debtor

Order pronounced on 30.05.2023

CORAM:
Sh. Praveen Gupta : Member (Judicial)
Sh. Ashish Verma : Member (Technical)

PRESENT-
Ms. Somya Chaturvedi alongwith Sh. Sanjeev Kumar Sharma &
Sh. Arunav Guha Roy, Advs. : For the Operational Creditor

Sh. Pulkit Gupta, Adv. : For the Corporate Debtor

-Sd- -Sd-

ORDER

1. The instant application is filed on 03.12.2021 by Ms. Law & Kenneth Saatchi & Saatchi Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') incorporated under the provisions of the erstwhile Companies Act, 1956 having CIN No. U45200MH2002PTC137416, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "I & B Code, 2016") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "the Rules"). The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') in respect of M/S Patanjali Paridhan Private Limited (hereinafter referred as 'Respondent'/'Corporate Debtor') due to default in payment of total outstanding amount of Rs. 1,76,12,000/- (Rupees One Crore, Seventy Six Lakhs and Twelve Thousand Only) only towards invoice amount of Rs.1,19,00,000/- (Rupees One Crore and Nineteen Lakhs) alongwith interest @ 24 % per annum an outstanding amount since 01.03.2019 to 01.03.2021, amounting to Rs.

57,12,000/- (Rupees Fifty Seven Lakhs and Twelve Thousand Only). The date of default as mentioned in the application is 1st March, 2019. While issuing the demand notice under Section 8 of the I & B Code, 2016 dated 12th March, 2021, the interest on default amount has been computed up to 1st March, 2021 as shown in the application for which computation is given as below.

Client name	Invoice No.	Invoice date	Invoice Amt	Balance Invoice Amt		Due date	Current date	Period of days	Rate of interest per annum	Interest amount
Patanjali Paridhan Pvt Ltd	953155608	29-Jan-19	20,650,000	11,900,000		1-Mar-19	1st March 2021	24 months	24%	5,712,000

2. This petition has been filed by the Executive Director, Finance and HR, Sh. Dhanshekhar Nagaratnamiyer of M/S Law & Kenneth Saatchi & Saatchi Private Limited duly authorized by the Applicant/Operational Creditor as stated by him in the affidavit filed alongwith the application. He has further authorized, through a Vakalatnama issued in favor of Ms. Somya Chaturvedi, Advocate and then, further, Sh. Sanjeev Kumar Sharma and Arunay Guha Roy were also authorized, who represented the case of the Applicant/Operational

-Sd-

-Sd-

Creditor from time to time before this Adjudicating Authority.

3. The Respondent Company, M/S Patanjali Paridhan Private Limited was incorporated on 21.08.2009 under the provisions of erstwhile Companies, Act, 1956 having CIN No. U18109UR2009PTC032913 and registered office situated at Kripalu Bagh Kankhal Haridwar, Uttarakhand- 249408. Since the registered office of the Respondent/Corporate Debtor is in Uttarakhand, this Tribunal having territorial jurisdiction, is the Adjudicating Authority in relation to the prayer for initiation of CIRP against the Respondent/Corporate Debtor as per sub-Section (1) of Section 60 of the I & B Code, 2016. The Respondent/Corporate Debtor has been represented by Sh. Pulkit Gupta, Advocate under the letter of authority/Vakalatnama issued by it. He appeared before this Adjudicating Authority from time to time for filing reply and arguing the case on behalf of the Respondent/Corporate Debtor.

4. Briefly stated facts of the present case as averred by the Applicant/Operational Creditor in its application filed in Form-

-Sd-

-Sd-

5 containing part I, II, III, IV & V are that:-

i. The Applicant/Operational Creditor had undertaken for providing services for production of television commercial **("TVC'),** print shoot and digital content for the Respondent/Corporate Debtor under the terms of the proforma invoice dated 17th October, 2018. This proforma invoice is annexed as **Annexure No. 1** in the application.

ii. In terms of the above proforma invoice, the Applicant/Operational Creditor duly rendered the services to the Corporate Debtor to its complete satisfaction, with no dispute regarding the services rendered by them as stated in the application.

iii. Operational Creditor raised the final invoice on 29th January, 2019 bearing number 953155608 after completing the services for a sum of Rs. 2,06,50,000/- (Rupees Two Crores Six Lakhs and Fifty Thousand Only) in terms of the proforma invoice as mentioned above.

iv. Against the above invoice of Rs. 2,06,50,000/- (Rupees

-Sd-

-Sd-

Two Crores Six Lakhs and Fifty Thousand), the Corporate Debtor had paid an amount of Rs. 87,50,000/- on 26.10.2018 after deducting tax at source and the same has been duly acknowledged by the Operational Creditor as shown credited in its bank account; however, the Operational Creditor is aggrieved because of non-payment of balance amount of Rs.1,19 00,000/- as mentioned in part IV of the instant application filed under Section 9. In this regard, as mentioned by the Operational Creditor in its application, several reminders were sent through e-mails and copy of these emails are annexed as **Annexure 4 (Colly)** with the application.

v. By referring its various emails, the Operational Creditor has pointed out its email dated 13.4.2019 vide which, it asked for confirmation of an outstanding amount of Rs. 1,34,14,370/- (Rupees One Crore Thirty Four Lakhs Fourteen Thousand Three Hundred and Seventy Only) as on that day and asked for the payment which

-Sd-

-Sd-

included the outstanding amount of Rs. 1,19,00,000/- relating to the invoice raised on producing a TVC, the subject matter under dispute. It has been pointed by the Operational Creditor that the Corporate Debtor had confirmed the same and assured the Operational Creditor to resolve the position by the coming week. Accordingly, it has been pleaded by the Operational Creditor as this confirmation being an admission of debt owed by the Corporate Debtor amounting to Rs.1,19,00,000/- for which the instant application has been filed. Few more emails of the Corporate Debtors have also been mentioned in the petition of the Operational Creditor, dated 26.03.2019 in which it was said to have been admitted that the payment department of the Corporate Debtor would meet the outstanding payments as per the schedule given to it.

vi. After mentioning few emails of the Corporate Debtor to show the default amount as mentioned in the instant petition being an admitted debt by the Corporate

-Sd-

-Sd-

Debtor, it has been further mentioned by the Operational Creditor that Corporate Debtor has later issued a letter dated 08.09.2020 to the Operational Creditor demanding the issuance of a No-Objection Certificate (NOC) in relation to the TVC. However, such demand by the Corporate Debtor has been alleged by the Operational Creditor as raising of frivolous issue for delaying the payment but it is emphasized that even vide this letter, the Corporate Debtor did not dispute the rendering of the service for making TVC by the Operational Creditor and thereby, it is further emphasized allegedly that the Corporate Debtor acknowledged the fact that the TVC had been completed. Despite taking a view on the above letter of the Corporate Debtor as being sent only for raising of frivolous issues, the Operational Creditor responded to the said letter dated 08.09.2020 vide its reply dated 30.09.2020 clarifying that under the terms of profoma invoice, the requirement for providing a NOC would

-Sd-

-Sd-

arise only in the event third party material was used and in this matter, since the content creator was an employee of Operational Creditor, a NOC was not required for registration of the services under intellectual property rights laws. It has also been clarified that since the Corporate Debtor had not paid the balance amount due under the invoice, it was not entitled to register any of the services including the TVC, till such time the Corporate Debtor cleared the dues; hence, the outstanding amount of Rs.1,19,00,000/- has been demanded to be paid immediately, and in any event not later than five business days of receipt of the reply letter alongwith interest at @ 24% per annum for the period the amount was outstanding. It is pointed out further that the Corporate Debtor did not respond to the said reply letter dated 30.09.2020 or discharged the debt.

vii. As the outstanding amount of Rs. 1,19,00,000/- could not be received by the Operational Creditor, it issued

-Sd-

-Sd-

statutory demand notice dated 12.03.2021 under Section 8 of I & B Code, 2016. The same was duly served on the Corporate Debtor on 15.03.2021 but in response to the said notice, no payment was made by the Corporate Debtor. However, Corporate Debtor filed reply to the demand notice vide its letter dated 22.03.2021 raising again the issue of failure of Operational Creditor to provide a NOC to the Corporate Debtor to use TVC. The same has again been clarified by the Operational Creditor issuing a letter dated 22.03.2021 to the Corporate Debtor. In response to this letter, the Corporate Debtor replied back to the Operational Creditor vide its letter dated 30.09.2021 giving the reason for non-payment of pending dues as being non providing of NOC by the Operational Creditor.

viii. The dispute between the Operational Creditor and the Corporate Debtor continued as mentioned above; however, in the view of the Operational Creditors, such dispute is being raised only to deny payment of lawful

-Sd-

-Sd-

dues of the Operational Creditor. It is pointed out that the Corporate Debtor did not dispute the fact that TVC production services as per the proforma invoice were duly rendered by the Operational Creditor but the dispute is being raised only for not providing the NOC as an excuse for not making the payment. Such dispute in view of the Operational Creditor, is frivolous in nature to deny the lawful dues pending against the invoice raised by the Operational Creditor. It is also pointed out that the Corporate Debtor has deducted tax at source on the invoice amount and as such, cannot dispute the debt owed by it under the invoice to the Operational Creditor. In support of its contention, Form 26AS of the Operational Creditor, in respect of the tax deducted by the Corporate Debtor, has been annexed as **Annexure No. 15** to the application.

ix. Explaining the above facts and circumstances of the case, it is finally submitted by the Operational Creditor in its application that the Corporate Debtor has miserably failed and willfully neglected to make the payment of outstanding dues of the Operational Creditor and hence, the instant application under Section 9 has been filed.

5. The Respondent/Corporate Debtor has submitted its reply by filing a counter affidavit dated 08.07.2022 rebutting the allegations levelled by the Operational Creditor as discussed in previous para. In its reply, it has been explained that the alleged outstanding dues of the Operational Creditor is under dispute in view of the fact that the TVC provided by them, could not be put to use due to not providing of NOC for using the same by the Corporate Debtor. The details as provided in the reply of the Corporate Debtor are as under:

i. In its reply, Corporate Debtor has emphasized about their being significant pre-existing dispute between the Petitioner/Operational Creditor and the Respondent/Corporate Debtor prior to issuance of demand notice dated 12.03.2021 under Section 8 of the Code. As per the averments made by the Corporate

-Sd-

-Sd-

Debtor in its reply, it appointed the Petitioner/Operational Creditor for producing a television commercial in terms of proforma invoice dated 17.10.2018 bearing no. 9534138 which according to the Corporate Debtor, the Operational Creditor had failed to adhere. He further pointed out that as a prevailing practice in digital media, the said proforma invoice provided under *Clause 26* for issuance of No-Objection Certificate to the Respondent/Purchaser to utilize/copy right in respect of the said Digital Media produced by the Petitioner on behalf of the Respondent; however, the same was not complied with by the petitioner. The Respondent has repeatedly requested the Petitioner to release a No-Objection Certificate as per *Clause 26* of the proforma invoice sending request emails/letters on various days. However, the Petitioner has failed to perform its obligation under the proforma invoice and challenged the Respondent's entitlement to No-Objection Certificate, vide communication dated 08.05.2019. By

-Sd-

-Sd-

referring to this email of the Petitioner, the Corporate Debtor emphasized its point of view of their being a pre-existing disputes between the Petitioner and Respondent. The Respondent had also contended that the merit of such dispute cannot be adjudicated upon by this Adjudicating Authority; therefore, in view of such pre-existing dispute regarding the alleged default amount, the Corporate Debtor has contended that the petition of the Operational Creditor is liable to be dismissed.

ii. Further, elaborating about the pre-existing dispute, the Corporate Debtor has mentioned about the Retainership Agreement Dated 28.03.2018 entered into by the Respondent/Corporate Debtor with the Petitioner/Operational Creditor even before issuance of the profoma invoice by the Petitioner. Vide this agreement, the Respondent appointed the Petitioner for their advertising/creative/services work for the period between 01.04.2018 to 31.03.2019. About the services

-Sd-

-Sd-

provided by the petitioner under this agreement, it has been pointed out by the Respondent/Corporate Debtor that it has raised serious disputes with respect to quality of services provided by the Petitioner/Operational Creditor and had thus, not renewed the said agreement. By mentioning this agreement, it is also submitted by the Corporate Debtor that though the entire case of the Petitioner is for an amount allegedly due under proforma invoice dated 17.10.2018, despite the fact that it has failed to comply with terms of the said proforma invoice, it has also failed to disclose that there were various agreements that were executed between the Petitioner and the Respondent for other media services like print, publications and setting up website for the Respondent. Therefore, the said proforma invoice only forms a part of the entire composite transactions, for which other agreements were also signed and disputes are also pending with respect to all such contracts but the petitioner has allegedly concealed such disputes

-Sd-

-Sd-

pertaining to other connected matters to hide the fact of pre-existing dispute between the Petitioner and Respondent.

iii. While further elaborating other disputes between the Petitioner and Respondent in other connected matters, it has been submitted that it had also entered into an agreement dated 25.01.2019 vide which Petitioner was appointed for designing and developing its E-commerce website but the Petitioner failed to fully launch the website in accordance with the agreed terms and conditions and instead launched only the beta version of the website with numerous defects and hence, the Respondent has suffered huge business losses amounting to approximately Rs. 20,40,00,000/- and has claimed the same through a demand notice dated 08.09.2020.

iv. After giving a brief background of various disputes between the Petitioner and Respondent pertaining to the services being provided by the Respondent in respect of

-Sd-

-Sd-

advertising/creative/services for the petitioner, the Respondent/Corporate Debtor has further elaborated the dispute regarding the non-payment of the amount as per the proforma invoice dated 17.10.2018, the subject matter of the instant application. The relevant portion of the proforma invoice under dispute has been reproduced by the Respondent as under:

"5. 50% advance on total cost of master production payable 10 days prior to the shoot.

6. Balance against the delivery of the master TVC.

26. Files will be handed over in digital format only. Client will be free to make the registration under any of the Intellectual Property Rights Acts. LKSS or Producer will provide the necessary NOC or any other paper which may require for the IP registration to the Client."

v. By referring to Clause 26 of the proforma invoice as reproduced above, it has been contended by the Corporate Debtor that the Petitioner/Operational Creditor was under an obligation to provide requisite No-Objection Certificate (NOC) at the request of the

-Sd-

-Sd-

Respondent to enable it to register all such intellectual property rights ('IPR") arising in its favour out of TVC. In this regard, various requests were made by the Respondent/Corporate Debtor to the Petitioner vide e-mails dated 07.05.2019, 08.05.2019, 29.05.2019, 01.06.2019 and 05.06.2019. These e-mails are also attached with the Section 9 application filed by the Petitioner. It has been further emphasized by the Corporate Debtor that there was a breach of Clause 26 of the proforma invoice by the Petitioner, which resulted into the Respondent getting disabled from enjoying its rights arising out of TVC to which it was legally entitled to. It has been further emphasized that a NOC from the *Author* of the *Work* is a mandatory pre-requisite to register the Copyright in the name of the applicant; hence, the failure of the Petitioner in providing the said NOC has resulted into the Respondent being unable to register its copyrights of the TVC and consequently, the Respondent is unable to use the TVC. In support of its

-Sd-

-Sd-

above contention, the Corporate Debtor has also enclosed the application form for registration of copyrights in Annexure A-2 of its reply, specifying that in the general instructions given for filling up the form at point no.6 of such general instructions, obtaining of NOC is shown to be mandatory. The same is reproduced as below:

> "*In case of Sound Recording & Cinematograph category enclose the copy of agreement. If no agreement is made, please obtain NOC from various copyright holders and enclosed the same with the application.*"

vi. It is further mentioned that in order to get requisite NOC in accordance with Clause 26, the Corporate Debtor has also sent a demand notice dated 08.09.2020 to the Petitioner/Operational Creditor and the same has also been attached with the Section 9 application. In reply to this notice, the Petitioner has refused to issue the NOC as demanded by the Respondent vide its reply dated 30.09.2020. This reply of the Petitioner has been further countered by the Respondent vide its rejoinder dated

-Sd-

-Sd-

13.10.2020 clarifying that the advance amount of 50% of the total consideration was paid by the Respondent in accordance with the Clause 5 of the proforma invoice, as was required, thereby performing its part of the contract. It has further been pointed out that by not issuing NOC under the agreement, the Petitioner has breached the terms and conditions of the agreement and because of not providing this NOC, the TVC could not be registered preventing it to use the TVC by releasing it on Television and therefore, further causing substantial loss of revenue to the Corporate Debtor.

vii. By explaining the above details of dispute between the Petitioner/Operational Creditor and Respondent/Corporate Debtor, it has been pointed out that the dispute under the subject agreement, has arisen way before the statutory demand notice dated 12.03.2021 under Section 8 was sent by the Petitioner to the Respondent and hence, this application under Section 9 is not maintainable. It is also alleged in the

-Sd-

-Sd-

reply by the Respondent that due to dissatisfaction in services rendered by the Petitioner, the Respondent company was also constrained to discontinue seeking services from the Petitioner and also demanded from the Petitioner to make good the business losses and damages suffered by it under another agreement, which the petitioner has unjustly denied. It is also alleged that because of discontinuing services from the Petitioner and raising demand for making good the business losses and damages from the Petitioner, this petition has been filed under Section 9 against the Respondent Company with the malicious intent to harass it.

viii. After showing from the facts and circumstances of the case that a pre-existing dispute existed in respect of the amount not paid by the Corporate Debtor as per the proforma invoice, it has been contended by the Corporate Debtor that there is no default even on payment of 50% of remaining amount of the proforma invoice as during the course of the production of the TVC, the petitioner has failed to perform its part of the obligation under the proforma invoice by breaching its Clause 26 in view of not issuing NOC as demanded by the Petitioner and therefore, the services rendered by the petitioner cannot be said to have been fulfilled, consequently disentitling the Petitioner to raise any claim under the proforma invoice.

ix. About the plea taken by the Petitioner regarding deduction of tax at source on the proforma invoice amount as per Form-26 AS issued by the Income Tax Department, it has been contended that the deduction of tax at source during the continuance of services under the proforma invoice, does not amount to admission of any debt and beach of Clause-26 of proforma invoice by the Petitioner by not issuing the NOC has itself disentitled the Petitioner to raise any claim on the basis of the proforma invoice.

x. As regards to certain emails of the Respondent referred by the Petitioner in its application drawing inference from

-Sd-

-Sd-

the content of these emails about admission of operational debt by the Respondent, it has been emphatically denied by the Respondent stating that such emails do not amount to any admission/acknowledgement of any debt in any manner, rather it is an intimation by the Respondent that their exists issues that need to be resolved. The Respondent has also disputed charging of interest by the Petitioner @ 24% per annum on the principal amount, levied on the basis of tax invoice dated 29.01.2019, stating that such interest amount is not maintainable as it does not form a part of the proforma invoice, which contains the terms and conditions of the contract as agreed between the parties and imposed unilaterally without consulting the Respondent on later date, i.e. after more than 3 months of issuance of proforma invoice.

xi. The sum and substance of the entire reply of the Corporate Debtor is that there is a pre-existing dispute relating to unpaid amount of the profoma invoice taken

-Sd-

-Sd-

as operational debt in the petition filed under Section 9 by the Operational Creditor and therefore, the Corporate Debtor has denied existence of any operational debt as defined in I & B Code, 2016.

6. Against the above reply of the Operational Creditor, a rejoinder has been filed by the Operational Creditor on 07.09.2022, vehemently disputing the claim of any pre-existing dispute in relation to the operational debt claimed in the petition under Section 9, stating that these are belated and untenable disputes which in the view of the Operational Creditor are moonshine defences and raised with the sole objective to wriggle out of its crystalized and admitted obligations and defeat the insolvency proceedings. As per the arguments further taken by the Petitioner in the rejoinder, it is again reiterated that no such NOC is warranted under law or facts for the TVC supplied to the Corporate Debtor and as demanded by them, which is already elaborately discussed in detail in the petition. As regards the NOC which is the main point of dispute in the present matter raised by the Corporate Debtor for not

-Sd-

-Sd-

paying the balance amount of the proforma invoice, it is again submitted forcefully by the Petitioner that such arguments raised by the Respondent is untenable because the TVC product produced by the Operational Creditor has not only been provided to them but they are also seeking for its registration without paying the entire dues to the Petitioner under the terms of the preforma invoice even after acknowledging its liability to pay the same. It is emphasized by the Petitioner that there is no assertion by the Respondent that they have not received the TVC. As after receiving TVC, they are seeking for its registration; hence, the failure by the Respondent to pay the balance dues is a failure to pay the operational debt which in view of the Operational Creditor is a fact that has been admitted by the Respondent through its correspondences. The arguments put forward by the Petitioner in its rejoinder are as under:-

i. In its rejoinder, the Petitioner has mainly put forward his argument relating to following three issues emerging from the claim made by the Corporate Debtor about there being any pre-existing dispute or not between the parties prior to the issuance of notice under Section 8 of the IBC:

a) There existed an alleged dispute in relation to Proforma Invoice dated 17.10.2018, wherein according to clause 26 of the said Proforma Invoice the Petitioner was required to provide a No-Objection Certificate ("NOC") to the Respondent for the utilization/copyright of Digital Medial produced by the Petitioner, which the Petitioner failed to provide.

b) There also existed disputes in relation to the Retainership Agreement dated 28.03.2018 entered into between the parties for the purposes of advertising and creative services, wherein the Respondent had raised various disputes in relation to the quality of services provided by the Petitioner and that since same are a part of the composite transaction forming a part of the current case.

c) *There also existed a dispute in relation to the Agreement dated 25.01.2019 wherein the respondent appointed the Petitioner to design an e-commerce website, which the Petitioner failed to fully launch in accordance with the agreed terms and only launched the beta version of the website.*

ii. As regards the first issue about providing of NOC in

-Sd-

-Sd-

accordance with the Clause 26 of the proforma invoice, which has been explained that under the facts and circumstances of the case the NOC as alleged by the Respondent, is not required as the works i.e., the Digital Media forming part of the TVC were rendered under a contract of service by the Petitioner to the Respondent and for which the Respondent was to pay certain monies to the Petitioner. Under such circumstances, the Respondent would be the first owner of the copyright by virtue of Section 17(b) of the Copyright Act, 1957, as the same was made by the Petitioner for valuable consideration at the instance of the Respondent, and as no third party material was used in the making of the TVC. It is reiterated that vide letter dated 30.09.2020, the Petitioner had clarified to the Respondent that the issue of NOC would only arise in the event of third party material being used. Since the content creator for the TVC was an employee of the Petitioner and hence, in view of the Petitioner, no NOC was required for the registration of copyright; therefore, it is contended by the Petitioner that the Respondent's argument that the NOC is a formal legal requirement for the registration of copyright is frivolous and must be disregarded. In support of his these arguments, reliance has been placed on various documents which have already been made part of its petition discussed earlier, as well as some other documents attached with the reply of the Corporate Debtor.

iii. As regards the dispute in relation to the Retainership Agreement dated 28.03.2018, it has been contended that such dispute mentioned by the Corporate Debtor is unsubstantiated and has no factual basis at all. It has also been emphasized that the dispute in the current case has arisen out of proforma invoice dated 17.10.2018. The subject matter of the proforma invoice and the Retainership Agreement dated 28.03.2018 are completely different; therefore, any dispute, which may or may not exist in the context of the Retainership

-Sd-

-Sd-

Agreement dated 28.03.2018, cannot in any ways form part of the present claim that has arisen from the proforma invoice and accordingly, the matter pertaining to the Retainership Agreement, has no relation to the rendering of service in making of the TVC which was under the terms of the proforma invoice; hence, no credence can be given to the misleading allegation of not providing NOC to the Respondent with respect to Retainership Agreement dated 28.03.2018 having any relation with the disputes. In the current case, the Operational Creditor has again referred to various emails of Corporate Debtor in which, it has been stated that *"noted your mail and we are already on the job"* and also mentioned in another email that "*as already explained, we have been given a schedule for the outstanding payment and we would wait for our payment department to meet the same"*. By picking up such sentences in the email communication with the Corporate Debtor during the course of resolving the dispute relating to unpaid

-Sd-

-Sd-

amount of proforma invoice, the Operational Creditor tried to present in the pleadings that the Respondent did not dispute or deny the payments to be made as per claim by the Petitioner or raised any frivolous dispute pertaining to NOC or there being composite transactions. Referring to the said emails, the Applicant pointed out that a perusal of the said emails sent by the Respondent would go to show that the Respondent treated this transaction separately and did not raise any concern or disputes with regard to the TVC, the proforma invoice or tax invoice dated 29.01.2019; hence, it has been pleaded in the rejoinder that all such disputes were evidently raised only later, and cannot be given any credence.

iv. As regards the pre-existing dispute in relation to the agreement dated 25.01.2019, it has been explained by the Operational Creditor that the parties had entered into an agreement dated 25.01.2019 under which the petitioner was required to design and developing the respondent's e-commerce website and that since the

-Sd-

-Sd-

petitioner failed to do so and only launched the beta version with numerous, the Respondent had issued a demand notice, upon the Petitioner dated 08.09.2020. Such dispute has been denied by the Operational Creditor and it has been pointed out that this issue has been brought up by the Respondent for the first time while submitting its reply in this case vide counter affidavit dated 15.07.2022. It is also mentioned that this issue was not raised by the Respondent in the reply dated 22.03.2021 to the Petitioner's demand notice dated 12.03.2021; therefore, it has been contended that any dispute there may or may not be in the context of the agreement dated 25.01.2019, cannot be construed as pre-existing disputes and such dispute is also not connected to the matter covered under the proforma invoice; hence, in view of the petitioner, the agreement dated 25.01.2019 does not form a subject matter of the present insolvency proceedings.

v. Apart from discussing elaborately again in the rejoinder

-Sd-

-Sd-

on the issue relating to NOC forming the basis of pre-existing dispute, the Petitioner has reiterated its contention regarding there being operational debt acknowledged by the Corporate Debtor as mentioned in the petition and therefore, such an acknowledgement of the Operational debt cannot be denied by the Corporate Debtor and due to its failure to pay such operational debt, it is liable for CIRP as per section 9 of the I & B Code, 2016. In support of its arguments as placed in the proceedings through the Ld. Counsel representing the petitioner, reliance has been placed to the judicial decisions by the Hon'ble Supreme Court in the case of ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017 dated 21.09.2017***. By relying on this decision, it has been argued by the Ld. Counsel of the Petitioner that the contentions raised by the Respondent with respect to pre-existing disputes ought to be out rightly rejected for want of strict proof since the same lacks factual basis

-Sd-

-Sd-

and are evidently moonshine defenses, without being backed by any documentary evidence, and have evidently been raised by the Respondent with the sole objective to wriggle out of its crystallized and admitted obligation. It is also contended that the Respondent has not annexed/exhibited any document to support its contentions of pre-existing dispute and it is settled law that enquiry whether their exists dispute between the parties, necessitates plausible contention and not mere assertion of fact unsupported by evidence.

7. We have considered all the facts placed by the Petitioner and Respondents through their Ld. Counsels and as discussed in the petition filed under Section 9, reply of the Respondent/Corporate Debtor and rejoinder filed by Petitioner/Operational Creditor placed before us during the course of the proceedings. As the instant petition is under Section 9 of the I & B Code, its admission or rejection as the case may be, is to be examined in terms of the provision of this section. The same is reproduced as under for a ready reference:

-Sd-

-Sd-

9. "Application for initiation of corporate insolvency resolution process by operational creditor."

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt 1 [by the corporate debtor, if available;]

[2][(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may

-Sd- -Sd-

propose a resolution professional to act as an interim resolution professional.

(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 3 [payment] 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 1 [payment] 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 is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before

-Sd-

-Sd-

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.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

8. The pre requisite condition for filing of application under Section 9 is that a demand notice under Section 8 of I & B Code, 2016 is required to be issued to the Corporate Debtor on *occurrence* of default. The same is reproduced as under:

8. Insolvency resolution by operational creditor.

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –

(a) existence of a dispute, 1 [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the 2 [payment] of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the

-Sd-

-Sd-

operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding 3 [payment] of the operational debt in respect of which the default has occurred.

9. In the above provision certain terms mentioned as being "default," dispute," "operational creditor" and "operational debt" are also defined in the I & B Code, 2016, as under:

3 (12) "Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[paid] by the debtor or the corporate debtor, as the case may be;

(5) (6)"Dispute" includes a suit 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;

(5) (20) "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(5) (21) "Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 4[payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

-Sd-

-Sd-

10. The Operational Creditor has filed the application under the Section 9 after issuing demand notice under the Section 8 and not receiving the outstanding operational debt and also not getting satisfied with the reply filed by the Corporate Debtor mentioning about certain pre-existing dispute regarding non issuance of NOC to enable it to register the TVC prepared by the Petitioner and then using it for advertisement in TV commercials to promotes the products manufactured by it. In the application filed under Section 9, it is claimed that all the conditions of the petitioner being Operational Creditor and debt being operational debt and there is default as defined in the I & B Code, 2016, are fulfilled. It is also contended that there is no pre-existing dispute in terms of the I & B Code in relation to the default amount of the operational debt. However, on the scrutiny of the application filed by the Petitioner under Section 9, it has been found that the affidavit as required under the provision of Section 9(3)(b) regarding " no notice given by the Corporate Debtor relating to dispute," was not filed. Later, on

-Sd-

-Sd-

pointing out by the Registry, a affidavit was filed but nothing was specifically mentioned about the notice of dispute as not being received from Corporate Debtor. It is only mentioned that reply of the Corporate Debtor is vague and bald. This finding will be discussed later in this order while discussing about the nature of dispute raised by the Corporate Debtor as regards to outstanding operational debt, which is the subject matter in the present proceedings.

11. While countering the contention of the Corporate Debtor about there being any pre-existing dispute in relation to operational debt, the Petitioner heavily relied upon the judgment of the Hon'ble Supreme Court in the case of ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. In Civil Appeal No. 9405 of 2017*** dated 21.09.2017. We have carefully gone through this judgment. In this judgement, first the entire structure of the provision of Section 9 is summarized in paras 24, 25 & 26 of the said judgment, as the same is reproduced as under:

> *24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined,*

-Sd-

-Sd-

may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 64 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2),

-Sd-

-Sd-

the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of 65 the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution 66 professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete

-Sd- -Sd-

and has not been completed within the period of 7 days granted by the proviso (Section 9(5)(ii)(a)). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b)), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c)). It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility (Section 9(5)(ii)(d)). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected (Section 9(5)(ii)(e)).

25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:
(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.
Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or 68 reject the application, as the

-Sd-

-Sd-

case may be, depending upon the factors mentioned in Section 9(5) of the Act.

26. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under Section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more.

12. From reading of the above paras of the judgment of the Hon'ble Supreme Court and also reading the provision of Section 9(5), it can be seen that any application under Section 9 can be admitted if all the conditions of Section 9(5) (i) are fulfilled and in case, any of the condition given in Section 9(5)(ii) is found existing, the application under Section 9 can be rejected.

13. In the case of ***Mobilox Innovations Pvt. Ltd. (Supra),*** there was a dispute of breach of agreement between the appellant and the respondent and because of this reason, the appellant

-Sd-

-Sd-

(being the Corporate Debtor) did not pay to the respondent (being Operational Creditor). Initially, because of such existing dispute, the Adjudicating Authority (NCLT) has rejected the application under Section 9 filed by the Operational Creditor (respondent in this decision). Later, the application of Operational Creditor was allowed by the NCLAT on appeal and hence, the matter has travelled to the Hon'ble Supreme Court taken by the Corporate Debtor pleading that there was a pre-existing dispute and hence, the proceeding under Section 9 is not maintainable. In the above background and after analyzing all the criteria laid down in para 24, 25 & 26 of the said judgment and after examining all the terms used in the I & B Code about "default" "dispute", "operational debt" and "operational creditor" as well as provision of Section 8 and Section 9, it has been finally held by the Hon'ble Supreme Court as under:

> *"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute*

-Sd-

-Sd-

in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is more bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious. Hypothetical or illusory, the adjudicating authority has to reject the application.

46. The learned counsel for the respondent, however, argued that the breach of NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to the respondent under NDA till the matter is resolved. Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the email dated 30.01.2015 except for the present insolvency application, which was filed almost 2 years after the said email. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.

-Sd-

-Sd-

14. On reading the above judgment, it is clear that if notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility, the Adjudicating Authority must reject the petition in view of the provision of Section 9(5)(ii)(d). It is further elaborated in the said decision that it is clear that such notice must bring to the notice of the Operational Creditor the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties and hence, all that the Adjudicating Authority is to see at this stage is whether there is a plausible contention which requires further investigation and the dispute is not a patently feeble legal argument or an assertion of fact unsupported by the evidence. It is further clarified as regards the requirement of further investigation into the dispute that in order to doing so, the Court does not need to be satisfied that the defence is likely to succeed and the Court does not at this stage examine the merits of the dispute except to the extent indicated in the judgment that

-Sd-

-Sd-

the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. In the end of the judgment, it is also held by the Supreme Court on further argument taken by the respondent that the claim of the Corporate Debtor about any damage on breach of the agreement is not crystalized as no legal proceedings were filed. It is held by the Hon'ble Supreme Court that matter has never been resolved and the respondent (the Operational Creditor in the above cited decision) itself has not commenced any legal proceeding after receiving communication from the Corporate Debtor except for filing of insolvency application two years after receiving the communication from the Corporate Debtor and finally, the insolvency proceeding against the appellant (Corporate Debtor) has been set aside.

15. After drawing guidance from the above judgment, we find in the instant proceeding that a legal notice dated 8th September, 2020 was sent by the Corporate Debtor to the Operational Creditor for providing no objection certificate

-Sd-

-Sd-

after exchanging of various emails to negotiate with the Operational Creditor for providing NOC before making the full payment, which is also referred by the Operational Creditor in its petition filed under Section 9. This legal notice dated 8th September, 2020 has also been attached by the Operational Creditor on page 54 and 55 of the petition and the same is reproduced as under:

> *To,*
> *Law & Keneth Saatchi & Saatchi Pvt Ltd*
> *Urmi Estate, Tower A, 22nd Floor,*
> *95 Ganpatrao Kadam Marg*
> *Lower Parel (W) Mumbai-4000 0013.*
> *Sub: LETTER TO PROVIDE THE NO OBJECTION CERTIFICATE FOR PROTECTING INTELLECTUAL PROPERTY RIGHTS.*
>
> *"We PATANJALI PARIDHAN PRIVATE LIMITED (herein after referred to as **PATANJALI**) a private limited company incorporated under the provisions of the Companies Act, 1956 having its Registered Office at Kripalu Bagh Kankhal Haridwar- 249408 (UK) and head office at Admin Block, Patanjali Food & Herbal Park, Vill.-Padartha, Laksar Roadm Haridwar-249404, Uttarakhand, India being the seller of readymade apparels of women's; men's and kids, home furnishing, footwear, sportswear and accessories tenders you this letter as under:*
>
> 1. *That, you were appointed for rendering the services related to the (Television Commercial)*

-Sd-

-Sd-

*hereinafter referred to as the **"TVC"**. Pursuant to your appointment performa invoice no. 9534138 contained the terms & condition as agreed between PATANJALI & LAW & KENNETH SAATCHI & SAATCHI PRIVATE LIMITED, for rendering the services related to the **"TVC"***

2. *That in order to protect our Intellectual Property Rights in relation to **"TVC"** you have assured us of the NO OBJECTION CERTIFICATE (NOC) from the writer/lyricist, Music Composer, Whole TVC but it has been more than 22 months and we are yet to receive the NOC from your side. It is pertinent to mention that as per the agreed terms & condition as laid down in the profoma invoice dated 17.10.2018, it was your obligation to provide the NOC signed by the writer/lyricist, Music Composer*

3. *Thus by this letter, we request you to arrange the NO OBJECTION CERTIFICATE signed by the writer/lyricist, Music Composer and provide the same to us within 7(Seven) days so that we can protect our Intellectual Property Rights at earliest. In case on non-adherence of our request by you, we reserve the rights to initiate appropriate legal proceedings against you and in that event you, shall be solely responsible for all the costs and consequences itself."*

16. This legal notice was sent by the Corporate Debtor before issuance of the demand notice under Section 8 by the Operational Creditor on 12.03.2021. Though the above legal notice of the Corporate Debtor was disputed by the

-Sd-

-Sd-

Operational Creditor vide its letter dated 30th September, 2020 and demand for payment of outstanding amount of Rs. 119,00,000/- was raised. The same was rebutted by the Corporate Debtor by filing a rejoinder dated 13.10.2020. The letter dated 30th September 2020 of the Operational Creditor is available on page no. 56 & 57 of the petition and letter dated 13th October, 2020 of the Corporate Debtor is available on page no. 103 to 106 of the petition. Both these letters are reproduced as under:

(I) 30.09.2020 Letter from Operational Creditor to Corporate Debtor

Legal Department,
Patanjali Paridhan Private Limited
Kripalu Bagh,
Kankhal, Haridwar,
Uttarakhand- 24908
Also at:
A 105, Aastha Bhawan,
Sector- 5 Gautam Buddh Nagar
Uttar Pradesh- 201301

Subject: Legal Notice dated 8 September 2020 bearing Ref No. 321 issued by Patanjali Paridhan Private Limited
Dear Sir

We write on behalf of and under instructions from Our Client, Law & Kenneth Saatchi & Saatchi Private Limited. Our Client is in receipt of the captioned legal ("Notice) issued by

-Sd-

-Sd-

Patanjali Paridhan Private Limited ('PPPL'). Our client has since gone through the said Notice and at the outset, Our Client denies all allegations made by PPPL in the Notice regarding alleged failure in performance of any terms and conditions as alleged or at all. Our Client has instructed us to reply as under:

1. *Our client had rendered services for production of a television commercial ("TVC"), print shoot and digital content for PPPL (hereinafter collectively referred to as the '**service'**) to PPPL, under terms of the proforma invoice dated 17th October 2018 issued by Our Client to PPPL (**"Prororma Invoice").***

2. *The terms and conditions attached to the Proforma Invoice inter alia stipulate that in the event PPPL intends to go for registration of the Services then Our Client will provide the no objection certificate. Please note that this stipulation was made part of the terms and conditions with the understanding that if any third party material was being used only then a no objection may be needed for registration of the Services under IPR laws and not otherwise.*

3. *Kindly note that after rendering the Services, Our Client had duly informed PPPL, in June 2019, that a no objection certificate was not required as the writer/lyricist of the song, in the TVC, was an employee of Our Client. Being satisfied with this response, PPPL did not raise any issue and exchanged no further communication with Our Client in this regard. Therefore, the allegation in the notice under reply regarding any alleged failure or Our Client to provide on objection certificate is incorrect, baseless and frivolous and hence denied.*

4. *Without prejudice to the above, kindly further note that Our Client, after rendering the Services, had raised invoice dated 29th January, 2019 bearing number 953155608 for a sum of Rs. 2,06,50,000/- (Rupees Two*

*Crores Six Lakhs and Fifty Thousand Only) (**'Invoice')** payable within 30 days of its issuance. It is pertinent to note that PPPL had acknowledged the said debt under the Invoice, while undertaking to clear the same. Despite the same, the Invoice has till date not been cleared by PPPL, with PPPL only having cleared 50 per cent of the invoice till date. Considering that PPPL had accepted the Services including the TVC, but has not made the complete payment for the same till date, the intellectual property rights to the services cannot be considered as having been passed on to PPPL and would remain with Our Client till such time the entire payment is made. Therefore, PPPL is not entitled to register the intellectual property rights for the Services, including the TVC, to itself as claimed in the Notice till such time it clears the dues payable to Our Client. The allegation by PPPL that Our Client has allegedly failed to issue a no objection certificate is an afterthought and has been made to deny Our Client its right to claim the outstanding dues as detailed herein above.*

5. *Our Client further calls upon PPPL to immediately, and in any event no later than 5 business days of the receipt of this reply, pay the amounts due under the Invoice totaling to Rs. 1,19,00,000/- (Rupees One Crore Nineteen Lakhs Only) along with interest at 24 per cent per annum for the period the amount continues to be outstanding; failing which Our Client will be constrained to initiate appropriate legal proceedings against PPPL at the sole cost and risk of PPPL.*

(II) 13.10.2020 Letter from Corporate Debtor to Operational Creditor.

To,

L & L Partners Law Offices
103A. Ashoka Estate
24 Barakhamba Road
New Delhi- 110001

-Sd-

-Sd-

E-mail: delhi@luthra.com

Sub: ***Rejoinder to your Reply dated 30th September, 2020 to Our Client's Legal Notice dated 8th September, 2020 bearing Ref No. 321.***

Sir.

We write to you on behalf of and at the instruction of our client, M/s Patanjali Paridhan Private Limited (hereinafter referred to as "Our Client"), who are in receipt of your Reply dated 30.09.2020 to the Legal Notice dated 08.09.2020 bearing reference no. 321, and have placed the same in our hand with instructions to respond to the said reply as uder:

At the outset, we state that the allegations made by you on behalf of your client in the Reply are absolutely, wrong, frivolous, concocted and based on conjectures and surmises. All allegations and averments in the said Reply are denied in entirety, save and except those being mater of record.

Our Client is shocked to receive your reply dated 30.09.2020 wherein your client has refused to provide Our Client with the requisite No Objection Certificate for the protection of Intellectual Property Rights that Our Client is legally entitled to under Proforma Invoice since the work, regardless of being complete or incomplete, has been carried out specifically under the instructions and for Our Client. Furthermore, it is shocking that while your client acknowledge the fact that the material and content used for providing work under the Agreement has been done solely for Our Client. Therefore, refusal to provide Our Client with a No Objection Certificate is blatantly unethical.

Without prejudice to the aforesaid, the rejoinder to your reply dated 30.09.2020:

1. *The contents of para 1 of the reply are a matter of record and merits no reply.*

2. *The contents of para 2 of the reply are false and baseless and denied in toto, unless specifically accepted herein. It is denied that the terms and conditions of the Agreement stipulate that Our Client is entitled to a No Objection Certificate only when third party material were used. As per Clause-26 of the Agreement, which categorically provided that "files will be handed over in digital format only. Client will be free to make the registration under any of the Intellectual Property Rights Act. LKKS or producer will provide the necessary NOC or any other paper which may require for the IP registration to the Client." Our Client wishes to clarify herein that in case the terms and conditions of the Agreement intended to entitle Our Client with a NOC only in the event of third party material were being used. Then Clause 26 would have specifically provided for the same. In the absence of any such provision contrary to same, your client is bound to provide us with NOC with regard to all Intellectual Property material used for an under the instructions of Our Client in terms of the Agreement.*

3. *The contents of para 3 of the reply are false and baseless and denied in toto. That your client has been intending to deviate from the biding Agreement by virtue of an e-mail which is in complete contradiction with the terms and conditions of the Agreement, which is absolutely illegal and arbitrary, thereby entitling Our Client to seek damages for the same. Your Client's refusal to provide Our Client with the requite NOC has resulted in rendering of incomplete services under its scope of work and terms and conditions. Further, it is pertinent to bring to your notice that vide an e-mail dated 02.09.2020, key professional of your client had assured to Our Client to revert on NOC issue, but till date Our Client has not received any response from your client on the said issue.*

17. Instead of resolving the above dispute, the Operational

Creditor chose to issue a demand notice dated 12th March, 2021 under Section 8. This demand notice is available from page no. 58 to 70 of the petition. As there was already pre-existing dispute as it is evident from the legal notice sent by the Corporate Debtor vide its letter dated 8th September, 2020 and further correspondences took place between the Operational Creditor and the Corporate Debtor vide their letters dated 30th September, 2020 and 13th October, 2020 respectively as discussed above, the Corporate Debtor has submitted its reply dated 27.08.2021 in response to the demand notice under Section 8 elaborating the pre-existing dispute for non-payment of outstanding operational debt mentioned in the notice under Section 8. This reply of the Corporate Debtor is available from page no. 93 to 98 of the petition. As the dispute of NOC between the Petitioner and Corporate Debtor has been found to be quite serious in nature, the correspondence between them continued even after reply to the demand notice under Section 8 has been given by the Corporate Debtor vide its letter dated

-Sd-

-Sd-

22.3.2021. After receiving the reply of the Corporate Debtor dated 22.03.2021, the Operational Creditor sent another letter to the Corporate Debtor dated 27th August 2021 as rejoinder. In response to the rejoinder dated 27th August, 2021 of the Operational Creditor, the Corporate Debtor sent a sur-rejoinder dated 13th September, 2021. It is available from page no. 110 to 112 of the petition. Looking to all these correspondences, it has been found that the issue of NOC is constantly being discussed among the Operational Creditor and the Corporate Debtor. The Corporate Debtor is constantly demanding for providing of NOC to enable it to register the TVC for its commercial use on TV but Operational Creditor kept on denying to provide NOC till the entire payment is made and also emphasized that such NOC is not required to be given for the purpose of registration. In these correspondences, in its letter dated 13th October, 2020 that was written before issuance of notice under Section 8 by the Operational Creditor, it has been clearly informed by the Corporate Debtor to the

-Sd-

-Sd-

Operational Creditor that by not providing the requisite NOC, the Operational Creditor has caused great hardship to the Corporate Debtor and thereby resulting in its inability to seek Intellectual Property Rights registration from the relevant authority under law. It has further barred the Corporate Debtor from use of the TVC by release on the Television and therefore, it further caused substantial loss of revenue to the Corporate Debtor. In every correspondence, the Corporate Debtor kept on mentioning that under Clause 26 of the proforma invoice, the Operational Creditor is required to provide NOC in respect of all the Intellectual Property Rights in the TVC which is required by the Corporate Debtor without which performance of the contract cannot be said to be complete and therefore, unless the Operational Creditor complies with these terms and conditions of the proforma invoice, no claim can be paid to the Operational Creditor.

18. In order to examine the dispute between the Operational Creditor and Corporate Debtor we have also examined

-Sd-

-Sd-

Clause 26 which is reproduced as under:

> *"Files will be handed over in digital format only. Client will be free to make the registration under any of the Intellectual Property Rights Acts. LKSS or Producer will provide the necessary NOC or any other paper which may require for the IP registration to the client."*

Though it has been written in Clause 26 that the client will be free to make the registration under any of the Intellectual Property Rights Acts, it is also mentioned that the Operational Creditor will provide the necessary NOC which may require for the IP registration to the client. Looking to this clause, we fail to understand as to why NOC was not provided by the Operational Creditor to settle the dispute with Corporate Debtor when the same was demanded by them and the matter was dragged on for almost two years before initiating insolvency proceedings under Section 9. We also find that while filing the mandatory affidavit required to be filed under Section 9(3)(b) to the effect that there is no notice given by the Corporate Debtor relating to a dispute of the unpaid operational debt, the Operational Creditor has not

-Sd-

-Sd-

mentioned categorically in the said affidavit that no such notice of dispute has been given, rather it has been vaguely mentioned that the demand notice dated 12.03.2021 which was served to the Corporate Debtor but he has responded on 22.03.2021 and made bald denial and it is further said in the affidavit that the reply was sent on 27.08.2021 to which the reply was given on 13.09.2021; however, the same was also vague and bald in view of the Operational Creditor. Content of the said affidavit is reproduced as under:

> *I, N, Dhanshekhar Iyer, authorized representative, resident of 22nd Floor, Tower-A, Urmi Estate, 95, Ganpatrao Kadam Marg, Lower Parele (W) Mumbai-400013, Maharashtra , do solemnly affirm and say as follows:-*
>
> 1. *That I am the authorized representative of operational creditor vide authority letter dated 11.11.2011 to inter alia depose, file, verify and institute proceedings on behalf of the operational creditor and as such I am aware of the facts and circumstances and therefore competent to make this affidavit.*
>
> 2. *I say that the demand notice dated 12.03.2021 which was served to the Corporate Debtor but he has responded on 22.03.2021 and made bold denial and I further say that a reply was sent on*

-Sd-

-Sd-

27.08.2021 to which the reply was given on 13.09.2021. However the same was also vague and bald.

3. *The contents of the above affidavit are true and correct and based upon the records as maintain by the operational creditor during the course of his business from time to time.*

Looking to the above affidavit and the facts of the entire case so for discussed in this order, it is quite clear that there is serious dispute between the Operational Creditor and the Corporate Debtor on the issue of providing NOC for using the TVC produced by the Operational Creditor. Therefore, the Operational Creditor has not clearly mentioned in the affidavit of Section 9(3) "about there being no notice given by Corporate Debtor relating to a dispute of the unpaid operational debt." The serious nature of this dispute can been seen in the light of repeated correspondences having been taken place between the Operational Creditor and the Corporate Debtor as discussed above. However, the Corporate Debtor has chosen not to settle this dispute but to file the insolvency proceedings under Section 9. Now, while filing the rejoinder on 7th September, 2022, it has been

-Sd-

-Sd-

submitted by the Operational Creditor without prejudicing to the contents of the petition about there being no requirement of issuing of NOC and such defence taken by the Corporate Debtor is frivolous defence, the petitioner is always ready and willing to provide the NOC to the respondent upon the respondent clearing the outstanding dues under the proforma invoice. It has been categorically stated by the Ld. Counsel of the Corporate Debtor that the TVC made by the Operational Creditor has no commercial value if it is not allowed to be put to use at the relevant time. This renders the product not capable of being put to use as such because advertisement loses its effect with passage of the time

19. After analyzing the above facts and documentary evidences as available on record and as presented before us, it is very clear that there is a pre-existing dispute between the Operational Creditor and the Corporate Debtor as found by the Hon'ble Supreme Court in the case of ***Mobilox Innovations Pvt. Ltd. (Supra)*** as referred by the Operational Creditor itself and such dispute cannot be said to be

-Sd-

-Sd-

moonshine as it is supported by the repeated correspondences made between the Operational Creditor and the Corporate Debtor due to difference of interpretation on Clause 26 of the proforma invoice. However, as held by the Hon'ble Supreme Court, the court does not at this stage examine the merit of the dispute except to the extent that such dispute should not be patently feeble legal argument or an assertion of fact not supported by the evidence. Here it can be seen from the available correspondences between the Operational Creditor and the Corporate Debtor that the dispute between the Operational Creditor and the Corporate Debtor arose on account of interpretation of Clause 26 of proforma invoice and instead of resolving the dispute, a considerable time has been wasted in arguing the matter between these two parties taking different interpretation of Clause 26, which we at this stage, do not intent to examine on merits; however, such dispute cannot be said to be based on feeble legal argument and it is duly supported by the correspondences between both the parties; therefore, we find

-Sd-

-Sd-

that in view of the provision of Section 9(5)(ii)(d), the petition filed by the Operational Creditor under Section 9 is not maintainable and deserves to be dismissed.

20. Therefore, the petition filed by the Operational Creditor is hereby dismissed. Accordingly, CP (IB)No.24/ALD/2022 is disposed off.

-Sd- -Sd-

(Ashish Verma) **(Praveen Gupta)**

Member (Technical) **Member (Judicial)**

30th May, 2023

Bipul Kumar Tiwari
(Stenographer)