

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 621 of 2022

[Arising out of order dated 25.04.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-III passed in C.P. No. (IB) 1288(MB)/2021]

IN THE MATTER OF:

**Mr. Sanjay Bhausahab Bhange,
R/o Vaikule Plot Uplai Road,
Barsh, Solapur,
Maharashtra – 413401**

....Appellant

Vs.

**Khushbu Dye Chem Private Limited,
Gala No.-99, 2nd Floor,
New Unique Industries Estate,
Dr. R.P. Road, Opp Jawahar Talkies,
Mulund (West), Mumbai,
Maharashtra – 400 080**

....Respondent No.1

**Bhange Organic Private Limited,
B-1, Gangai Apt,
S. No. 51/3/A/1 Wadgaon Budruk
Pune, Maharashtra – 411 041**

....Respondent No.2

Present:

For Appellant: Mr. Shashwat Parihar, Mr. Dhruva Vig, Adya Singh, Mr. Akshay Petkar, Advocates

For Respondent: Advocate Aditya Gauri, Advocate Dhananjaya Sud, Mr. Amar Vivek, Mr. Jayesh Gupta, Mr. Chaitanya Bansal, Mr. Abhinav Tyagi, Damini Sreshta and Shalya Agarwal, Advocates for RP/R-2

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 25.04.2022 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-III in CP(IB) No.1288(MB)/2021. By the Impugned Order, the Adjudicating Authority has admitted the petition under Section 9 of IBC and allowed the initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) of the Corporate Debtor. Aggrieved by this impugned order, the present appeal has been preferred.

2. The brief facts of the case which are necessary to be noticed for deciding the appeal are as follows: -

- Khushbu Dye Chem Private Limited – Operational Creditor/Respondent No. 1 has been in the business of trading, supplying, importing and exporting of chemicals while Bhange Organic Private Limited – Corporate Debtor has been in the business of manufacturing and production of Ethyl Acetate.
- An Agreement (hereinafter referred to as the **'agreement'**) was entered into between the Operational Creditor and the Corporate Debtor on 24.06.2019 by which the Operational Creditor was to provide raw materials to the Corporate Debtor including imported Ethanol. For the imported Ethanol, the Operational Creditor was to pay directly to the

third parties including custom duty. In return, the Corporate Debtor was to supply Ethyl Acetate as the finished product to the Operational Creditor.

- The Operational Creditor claims to have incurred a total expenditure of Rs.11,17,19,527/- for providing raw material to the Corporate Debtor besides other payments and taxes against which the Corporate Debtor supplied 15,00,635 kg of Ethyl Acetate for an aggregate value of Rs.9,82,22,873/- thus leaving an outstanding amount of Rs.1,34,96,652/-.
- However, the Corporate Debtor not being in a position to supply more Ethyl Acetate entered into a Memorandum of Understanding (**‘MoU’** in short) with the Operational Creditor on 03.01.2020 by which the Corporate Debtor agreed to pay the said outstanding amount within a period of 18 months i.e on or before 03.07.2021. The Corporate Debtor also handed over 18 cheques for the said amount in terms of the MoU. These cheques were deposited with the bank by the Operational Creditor on 06.07.2021 for encashment. No payment was however received as the cheques were returned by the Bank with the remark “Payment stopped by drawer” on 07.07.2021.
- The Corporate Debtor having failed to make the outstanding payment, the Operational Creditor sent demand notice under Section 8 of the IBC on 30.07.2021 demanding payment of Rs.1,36,11,373/- as unpaid operational debt including interest.
- The Corporate Debtor did not furnish any reply to the demand notice.

- Thereafter, the Operational Creditor filed a Section 9 application before the Adjudicating Authority. The matter was listed for hearing several times before the Adjudicating Authority. The Corporate Debtor neither filed any reply nor made any representation before the Adjudicating Authority. The Corporate Debtor was set ex-parte by the Adjudicating Authority and order passed on 25.04.2022 admitting the Section 9 application.
- Aggrieved by the impugned order, the present Appellant has preferred this Appeal praying for setting aside the impugned order.

3. Making his submissions, the Learned Counsel for the Appellant stated that in terms of Clause 3 of the agreement signed between the two parties regarding conduct of their business, the Corporate Debtor was required to supply the final product of Ethyl Acetate after applying conversion charges at the ratio of 0.65 i.e. 65% and that this entire transaction was quantity-based and not amount-based. Thus the Corporate Debtor was only liable to supply proportionate quantity of Ethyl Acetate as a finished product for each kilogram of raw materials supplied by the Operational Creditor and that having already been done, there was no outstanding dues. The Learned Counsel further claimed that the Corporate Debtor had not only fulfilled the obligations laid down in the agreement but in fact supplied additional quantity of Ethyl Acetate to the tune of 3619 kgs. Furthermore, it has been contended that the Operational Creditor supplied raw materials at a higher rate and purchased the final product from the Corporate Debtor at a lower rate and this manipulation led to sale-purchase difference and resultant

dispute. It has also been further pointed out that the Operational Creditor did not make payment towards labour charges for the supply of Ethyl Acetate and that labour charges plus GST @ 18% was due from the Operational Creditor towards conversion. It was also stated that the Operational Creditor had been repeatedly evading requests for reconciliation of accounts.

4. With regard to the MoU of 03.01.2020, it was submitted that the same was signed by the Corporate Debtor under duress and coercion of the Operational Creditor since the Corporate Debtor for commercial reasons had to maintain ties with long term partners for which it was dependent on the Operational Creditor. Furthermore, as there were no outstanding dues payable to the Operational Creditor, the MoU was not a valid contract there being no consideration amount. On the reasons for stopping the payment of cheques which was stipulated in the MoU, it was explained that since the Corporate Debtor had already supplied more than the proportionate quantity of Ethyl Acetate to the Operational Creditor and there were no outstanding payments to be made in terms of the agreement, the cheque encashment were stopped. Thus the Corporate Debtor having fulfilled the obligations under the agreement and there being no dues outstanding when seen together with the fact that there was a pre-existing dispute arising from want of reconciliation of accounts between the two parties, the impugned order passed by the Adjudicating Authority admitting the Section 9 application is illegal and untenable.

5. Refuting the above claims, Learned Counsel for the Respondent No. 1 strenuously contended that the Corporate Debtor was required to supply

Ethyl Acetate in proportion to the supply of Special Denatured Spirit (SDS) and Acetic Acid by the Operational Creditor and not at the conversion ratio of 0.65 as per the terms of their business transactions founded on the agreement entered into on 24.06.2019. It was also stated that in terms of the agreement, the Corporate Debtor had agreed to supply the Ethyl Acetate at the total cost of Rs.47.61 per kg to the Operational Creditor.

6. Elaborating further, it was submitted that in terms of this agreement, the Operational Creditor supplied 12,65,920 kgs of Acetic Acid under 55 separate invoices amounting to Rs. 5,20,83,007/- besides 950 drums under 5 separate invoices amounting to Rs.12,35,903/- to the Corporate Debtor. Further payment towards imported Ethanol amounting to Rs. 5,84,00,616/- was made directly by the Operational Creditor. This aggregated to an expenditure amounting Rs. 11,17,19,527/- by the Operational Creditor. As against this, the Corporate Debtor supplied 15,00,635 kg of Ethyl Acetate for an aggregate value of Rs. 9,82,22,873/- thus leaving an outstanding amount of Rs. 1,34,96,652/.

7. Advancing his arguments, it was stated by the Learned Counsel for the Respondent No.1 that since the Corporate Debtor was not in a position to supply the finished product for the outstanding amount, it agreed to enter into a MoU on 03.01.2020 with the Operational Creditor. The MoU clearly recorded the inability of the Corporate Debtor to further supply Ethyl Acetate and their acceptance to pay Rs. 1,34,96,652/- within a period of 18 months in lieu of that. Thus the entire outstanding amount of Rs. 1,34,96,652/- qualifies as a debt under the IBC. In spite of having admitted their liability

and willingness to repay, the Corporate Debtor failed to honour the terms and conditions of MoU. All the cheques issued by Corporate Debtor pursuant to the MoU had bounced when the Operational Creditor sought to encash them on 06.07.2021. It is also asserted that prior to stopping the payment of the cheques, the Corporate Debtor had not raised any dispute and that cheque payment was stopped with dishonest and malafide intentions. Thus there being an outstanding debt and there being a default in payment by the Corporate Debtor and there being no pre-existing dispute, there was no material irregularity on the part of the Adjudicating Authority in admitting the Section 9 application.

8. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

9. The short point before our consideration is whether there is pre-existing dispute surrounding the operational debt in the facts of the present case. It is a well settled proposition that for a pre-existing dispute to be a ground to nullify an application under Section 9, the dispute raised must be truly existing at the time of filing a reply to notice of demand as contemplated by Section 8(2) of IBC or at the time of filing the Section 9 application. It will be useful to have a look at the provisions of Section 8 IBC which is as follows :-

“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, 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 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 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 payment of the operational debt in respect of which the default has occurred.”

10. A plain reading of the above provision reveals that sub-section (2) of Section 8 obligates the Corporate Debtor who has been delivered a Demand Notice under Section 8(1) by Operational Creditor to bring to the notice of the Operational Creditor the “existence of a dispute, 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”. In the present case, we notice that no reply was furnished by the Corporate Debtor in response to the demand notice dated 30.07.2021.

11. The Operational Creditor neither having received any reply to the demand notice nor having received any further payments from the Corporate Debtor had proceeded to file Section 9 application and at this stage the Adjudicating Authority is only required to look into the substance of the pleadings to find out whether a real dispute is discernible from the stated facts. From the Impugned order, we however find that the Adjudicating Authority noted that ample opportunity was given to the Corporate Debtor to file its reply, the matter having been listed from time to time on board. However, in spite of these opportunities, the Corporate Debtor did not make any appearance before the Adjudicating Authority nor filed any submissions and hence the matter was set ex-parte by the Adjudicating Authority on 08.02.2022 and after hearing the matter on 21.03.2022 reserved the matter for orders. The Learned Counsel for the Appellant submitted that the impugned order dated 25.04.2022 was passed in violation of the principles of natural justice since the Corporate Debtor was denied an opportunity for hearing. It was stated that notice for hearing on 08.02.2022 was received by the Appellant on 09.02.2022. The Corporate Debtor had to thus miss hearing due to non-receipt of notice on time for which he cannot be faulted. The relevant proof for late receipt of notice has been placed at page 322-323 of the Appeal Paper Book (**‘APB’** in short). Moreover, the poor health of the Appellant prevented him from following up the matter in the court and in substantiation

thereof medical certificate has been placed at page 321 of APB which we find to be sufficient cause to explain their inability to agitate the matter before the Adjudicating Authority. In the interest of justice, we are of the considered view that the present appeal filed before this Tribunal deserves to be considered on merit.

12. We now come down to examine whether there was any pre-existing dispute raised by the Corporate Debtor prior to the date of filing the application under Section 9 of the IBC by the Operational Creditor in light of 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). It is relevant to refer to paras 33, 51 and 56 of the said Judgment which is extracted as hereunder:

“33.....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 maybe. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days sent and 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 an operational creditor has encashed a cheque or otherwise received payment from the corporate debt [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).....”

51. 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 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute 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 proceeding 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 mere 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.”

“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.”

13. Further, the Hon’ble Supreme Court in **(2021) 10 SCC 483, Kay Bouvet Engineering Ltd. vs. Overseas Infrastructure Alliance (India) (P) Ltd.** in para 21 has reiterated the same proposition in the following words :-

“21.All that the adjudicating authority is required 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 a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot

go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.”

14. The Learned counsel for the Appellant has challenged the impugned order on the ground that the Adjudicating Authority had failed to appreciate that a pre-existing dispute was apparent from material on record. It has been submitted that the demand notice issued by the Operational Creditor on 13.07.2021 itself reflects that the Operational Creditor had themselves disputed and denied certain bills which had been raised by the Corporate Debtor and that in itself suffices to establish a pre-existing dispute. For better appreciation, it will be useful to reproduce the relevant excerpts from the demand notice appearing at page 303 of APB which is as follows:-

“7) In meanwhile around 21st May 2021, M/S Khushbu Dye Chem Pvt Ltd while filing its GST returns on the GST portal was shocked, surprised to discovered that M/s Bhange Organic Chemicals Pvt Ltd has raised 6 false, baseless and fabricated bill for an amount of Rs 2,20,22,808/-(Rupees Two Crore Twenty lakh Twenty-Two Thousand Eight Hundred Eight only) which is inclusive of the GST amount of Rs.33,58,816/-(Rupees Thirty-Three Lakh Fifty-Eight Thousand Eight Hundred and Sixteen Only). M/s Khushbu Dye Chem Pvt Ltd by its

letter dated 15th June 2021 disputed and denied the aforesaid bills and put to strict proof thereof.”

15. Since the above demand notice speaks of a letter issued by the Operational Creditor on 15.06.2021, we have gone through the said letter as placed at page 63-70 of the APB. On perusing the said letter, we find that the Operational Creditor in the said communication addressed to the Corporate Debtor has highlighted the issue of 6 false, baseless and fabricated invoices purportedly raised by them and uploaded on the GST portal. The Operational Creditor in the said letter has further asked the Corporate Debtor to withdraw the said invoices. The authenticity of this letter not having been questioned by Respondent No 1 and the very fact that it finds mention in the demand notice, it is clearly indicative that there was a pre-existing dispute before the issue of the demand notice. It is also pertinent to note that four of these invoices are dated 31.03.2020 and the other two are dated 01.01.2021 and 19.03.2021.

16. It is equally pertinent to note that the letter dated 15.06.2021 was responded in detail by the Corporate Debtor on 19.07.2021 which finds place at page 72-73 of APB and is as reproduced below:-

“BOCPL BHANGE ORGANIC CHEMICALS PVT LTD

BOCPL/KDCPL/155/2021-155

Dated 19.07.2021

*To,
Khushbu Dye Chem Pvt. Ltd.
Gala No.99, New Unique Ind. Estate,
Dr. R.P. Road, Opp. Jawahar Talkies,
Mulund (W), Mumbai – 400 080.*

Subject - Reply for your letter dtd. 15.06.21 & request for to submit us our business ledger account statement regarding.

Dear Sir,

We are in receipt of your above referred letter by post. In this regards we are giving herewith stepwise reply for the same.

Step 1.

As per our mutual commitment we were engaged for doing the business for conversion basis of raw material to finished good @ Rs.5/- per kg for total quantity of supplying raw material Denatured Ethyl Alcohol 12,65,920.B.L. & Acetic Acid also 12,65,920.0 kg. having committed ratio 0.65% . As per the ratio for the total quantity of manufacturing Ethyl Acetate should be 1649.315 M.T. As per the committed ratio we had supplied total quantity 1649.315 M.T. to you within the time frame period as per your submitted purchase order.

Where as, our business with you was under conversion basis, then all the required raw material Denatured Ethyl Alcohol & Acetic Acid need to be supplied by you at our company premises. Raw material prices with applicable taxes and duties should be born by you. Our responsibility is to convert the supplied raw material to Ethyl Acetate & further the manufactured Ethyl Acetate purchase & sale price was your responsibility. The price of Ethyl Acetate also decided by you.

In your letter, you have specified that, we agreed for prices of raw material and finished product. As our business was only conversion basis, hence prices of raw material & finished product is wholly your responsibility. Its not our responsibility.

Our business relation with you was only conversion basis @ Rs.5/- per kg of finished product. Practically we observed we have made business with you on conversion charges basis without single profit margin. As per commitment, you have to bear conversion cost to us for total EA quantity 1643.315 M.T. But till date you have partly released our conversion payment to us, our balance payment till date you have not released. Also you have not released any advance payment to us from your bank account. We have telephonically & by mail requested to you many times for to submit your ledger account statement to us for settle the account, but you have not responded till date.

Again, you are requested please submit/give us our business ledger account statement for to settle the account accordingly.

Step 2.

In your letter, you have specified that our submitted business service bills are faulty fabricated & bogus. In this regard, we would like to inform you that, the bills are not faulty fabricated & bogus. We have charged the same bills with applicable taxes and duties to you as per the law. The bills are for conversion charges & other business support reimbursement charges as applicable. For reconciliation the same bills you may depute your authorised person/representative at our site with our ledger account statement for to settle the account.

We hope that, you will clear all above information for maintaining our good faith relations. Your kind co-operation in this regard is highly appreciated.

Thanking you,

Yours Faithfully,

*(Sanjay B. Bhange)
Director Bhange Organic Chemicals Pvt. Ltd.”*

17. From the contents of the above letter dated 19.07.2021 it is clear that before the issue of demand notice on 30.07.2021 the Corporate Debtor had clearly articulated an array of disputes arising from the fact that their business model was based on conversion cost; that the operational creditor had not released balance conversion payment due to them; that the bills submitted by them were not faulty or fabricated and that the operational creditor has not submitted ledger account statement to settle the accounts.

18. It is however the case of Respondent No.1 that the MoU signed between the two parties is a document which clearly establishes admission of debt on the part of Corporate Debtor and failure to honour the cheques on or before

03.07.2021 reinforces debt and default. It has also been contended that the claim that the MoU was signed under duress is false and is belied by the fact that no steps were taken by the Corporate Debtor to seek cancellation of the MoU or dispute the MoU. Be that as it may, we find that the Corporate Debtor has contended that it is the agreement of 24.06.2019 which constitute the underpinning of their business engagement with the Operational Creditor and as per that agreement there is no due owed by the Corporate Debtor and that placing reliance on the MoU by the Operational Creditor is misplaced. Apart from questioning the legal tenability of the MoU, the Corporate Debtor has stated that the MoU was made without prior reconciliation of accounts.

19. In their reply affidavit before this Tribunal, the Respondent No.1 has stated that they had visited the office of the Corporate Debtor on 24.12.2020 and reconciled the ledger account statement and tallied the missing entries but have also admitted that the Corporate Debtor even thereafter continued to insist for production of the ledger of the Operational Creditor. We also find from material on record that the issue of reconciliation of accounts had been raised several times by the Corporate Debtor with the Operational Creditor on 22.12.2020 (page 59 of APB); 29.12.2020 (page 61 of APB); 02.01.2021 (page 62 of APB); 25.05.2021 (page 71 of APB) and 19.07.2021 (page 72 of APB) which all predate the demand notice. When we look at the contents of these emails, we find that they constitute sufficient basis to show that there was genuine and substantial dispute with regard to both the business model and the claims arising therefrom between the Corporate Debtor and

Operational Creditor. We are thus satisfied that present is a case where it cannot be said that the defence taken by the Corporate Debtor is a moonshine unsupported by any evidence.

20. It is well settled that in Section 9 proceeding, there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent court. If we apply the above cited test laid down in *Mobilox* by the Hon'ble Supreme Court to the facts of the present case in the light of the submissions and pleadings made by the Learned Counsel of the Appellant before this Tribunal, it becomes clear that the defence raised by the Corporate Debtor is not illusory or a sham and that the nature of dispute raised is such that it requires adjudication by the competent court. The present is not a case where there is an undisputed debt for which insolvency can be initiated against the Corporate Debtor. The Adjudicating Authority having heard the matter ex-parte has failed to appreciate the facts of the case in its entirety and therefore committed an error in admitting the Section 9 application and we therefore hold that the impugned order passed is unsustainable.

21. With the aforesaid discussion, we are of the considered view that the Adjudicating Authority has erroneously admitted the application under Section 9 of IBC. We therefore set aside the Impugned Order. The orders passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor and appointing Interim Resolution Professional and all other orders pursuant to impugned order are declared illegal and set aside. The Corporate

Debtor is released from the rigours of CIRP with immediate effect. This appeal is allowed with the above observations. Since this company appeal is disposed of, the prayer contained in I.A. No.4364 has become infructuous and accordingly disposed of.

22. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

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

Place: New Delhi

Date: 18.01.2023

PKM