NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1359 of 2022

[Arising out of order dated 08.09.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Chandigarh Bench, Chandigarh in C.P. (IB) No. 323/Chd/HP/2019]

IN THE MATTER OF:

Optinova AB
(Business ID: 0686671-0)
(A Company incorporated under the Laws of Finland)
Having its office at
Industrivagen 5 AX-22410 Godby, Aland, Finland
Through
Mr. Soumen Sanyal
Power of Attorney Holder
Rio Abhikaran Apartments
2nd Floor, Flat 2C/1, Fartabad, Garia Station Road
Kolkata, West Bengal- 700084. **...Appellant**

Versus

Bio-Med Health Care Products Private Ltd.
(A Company incorporated under the Companies Act, 1956)
Having its registered office at
Plot No. 30, DLF Industrial Estate - 1
Faridabad -121003, Haryana. **...Respondent**

Present:

Appellant: **Mr. Aditya Dewan, Mr. Praveen Agarwal, Mr. Tarang Agarwal, Mr. Mrigank Kumar, Advocates.**

For Respondents: Mr. Nikhil Verma, Mr. M. Agarwal, Advocates.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 08.09.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in C.P. (IB) No. 323/Chd/HP/2019. By the impugned order, the Adjudicating Authority has rejected the Section 9 application filed by Optinova AB – Operational Creditor/Appellant against Respondent/Corporate Debtor - Bio-Med Health Care Products Private Ltd. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. We heard Mr. Aditya Dewan, Learned Counsel who appeared on behalf of the Appellant and Mr. Nikhil Verma, Learned Counsel who appeared on behalf of the Respondent.

3. The Learned Counsel for the Appellant making his submissions stated that the Appellant – Operational Creditor had been supplying medical tubing to the Respondent – Corporate Debtor against purchase orders issued from time to time and that in terms of the statement of account maintained by the Appellant, an amount of Euro 320,406/- (Rs. 2.56 cr) is required to be paid by the Respondent as outstanding dues. It is further submitted that in spite of reminders, the dues were not cleared by the Corporate Debtor despite admitting their liabilities. Hence, the Appellant was compelled to issue a Demand Notice on 20.02.2019 requesting for payment of Rs.2.56 cr within 10

days of the receipt of the Demand Notice. Further submission was made that the Respondent in response to the Demand Notice did not pay the debt amount. Instead, a reply was sent on 01.03.2019 to the Appellant stating that Euro 206,024/- has already been paid by them and since the payment was subjected to a cyber fraud, it is a disputed amount. Mentioning that they had already filed a police complaint on 14.01.2019 alleging cyber fraud having been committed against them, the Appellant was asked to withdraw the Demand Notice.

4. The Learned Counsel for the Appellant contended that since the cyber fraud had been committed by a third party, this cannot become the basis of a pre-existing dispute between the Appellant and Respondent. In any case, the matter being still under investigation and no complicity of the Appellant having been established, submission was pressed that the Adjudicating Authority without applying its mind has wrongly accepted the bogey of pre-existing dispute raised by the Respondent. It was also added that even if the amount under dispute is not considered, an amount of Euro 111,887/- has already been acknowledged by the Respondent to be due and payable, which amount being above the threshold level, was sufficient for attracting Section 9 of IBC. In support of their contention, the Learned Counsel for the Appellant has relied on the judgment of this Tribunal in ***M/s Manipal Media Network Limited Vs. M/s Vishwakshara Media Pvt Ltd*** in ***CA(AT)(Ins) No. 369 of 2020*** wherein it has been held that the "*law is very clear that it is enough if under Section 4 of IBC the unpaid debt is more than the threshold value of Rs. One Lakh for acceptance of application under Section 9 of IBC.*" However, the

Adjudicating Authority vide impugned order dated 08.09.2022 erroneously dismissed the Section 9 application and aggrieved by the same, the present appeal has been preferred.

5. Refuting the arguments advanced by the Appellant, it was submitted by the Learned Counsel for the Respondent that the Corporate Debtor had never attempted to evade their liability to clear the outstanding operational debt. It has been submitted that against Euro 320,406/- claimed by the Appellant, Euro 206,024/- was already paid to them but allegedly not received by them due to cyber fraud. It was added that both parties had mutually come to the conclusion that this was a case of fraud and a police complaint was also lodged. It is also vehemently contended that this cyber fraud could not have taken place without the help of the employees of the Appellant and thus the direct involvement of the Appellant cannot be ruled out. However, this clearly renders the amount to be disputed. Hence, it was submitted that the Adjudicating Authority had correctly noted that the police complaint having been lodged before the receipt of the Demand Notice, this was a clear case of pre-existing dispute. It is also submitted that in terms of Section 9(5)(ii)(d) of the IBC, if a notice of dispute is received by the Operational Creditor, the Adjudicating Authority has to reject a Section 9 application. Hence the Adjudicating Authority has correctly dismissed the present section 9 application. In support of their contention, reliance has been placed on the ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353*** judgment of the Hon'ble Apex Court which provides that if an existence of a dispute is found before the issue of Demand Notice, the

Adjudicating Authority is required to dismiss a Section 9 application without going into the merits of the dispute.

6. On the outstanding amount, it was submitted that besides the disputed amount of Euro 206,024/-, a sum of Euro 2495/- was not payable as no invoices were issued by the Appellant. Admitting that Euro 111,887/- remained unpaid at the time of receipt of Demand Notice dated 20.02.2019, it was added that subsequently the Appellant was paid Euro 57,741/- and another sum of Euro 12,997/- which was paid to a sister concern of the Appellant. The Learned Counsel for the Respondent stated that the admitted liability has not been paid because of frequent changes in the bank account details of the Operational Creditor and for not being sure of the genuineness of the bank account. It was submitted that they are still ready and willing to pay to them the balance amount of Euro 41,148/- for which the Appellant may be directed to furnish their bank details before a competent authority.

7. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

8. Before we dwell on the facts of the present case and weigh the rival submissions of the two parties, a quick glance at the relevant statutory construct of IBC would be useful. Section 8 of the IBC requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding operational debt. Section 8(2) lays down that the Corporate Debtor would have to bring to the notice of the Operational Creditor, the existence of dispute, if any, within a period of 10 days of the receipt of the Demand Notice. Section 9 of IBC

provides for the further course of action to be followed post issue of Demand Notice by the Operational Creditor. Under Section 9(1), if the Operational Creditor does not receive payment or any notice of the dispute from the Corporate Debtor, he may file an application under Section 9(1) of the IBC.

9. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 20.02.2019 and notice of dispute was raised by the Corporate Debtor on 01.03.2019. It is also an undisputed fact that in the present matter, the Operational Creditor did not receive any further payment from the Corporate Debtor and therefore proceeded to file an application under Section 9 of IBC on 22.05.2019.

10. Both parties in support of their respective contention have relied on the judgement of the Hon'ble Supreme Court in ***Mobilox supra***. It goes without saying that the legal precepts laid down by this landmark judgement provides the guiding principles in analysing the admissibility of Section 9 application. The test to be followed to examine an application under Section 9 has been laid down in para 34 of this judgement which is to the effect: -

> *"34. 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 reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

11. On the issue of operational debt having become due and payable and remained unpaid, the Appellant has emphatically asserted that an amount of Euro 300,702/- was still due and payable by the Corporate Debtor. It is the case of the Appellant that Euro 206,024/- which is claimed to have been paid by the Respondent was incorrect as the said sum was never credited to the account of the Appellant. It is further the case of the Appellant that since the Respondent have themselves claimed that they had remitted Euro 206,024/- to the Appellant, this amounted to be a clear acknowledgment of debt having become due and payable. Further, the very fact that the Respondent had admittedly paid the said amount to a wrong bank account which was different from the bank account indicated in the invoices, such payment made to a wrong bank account which did not belong to the Operational Creditor, did not extinguish the liability of the Respondent since the money was not actually received by the Appellant.

12. It is the counter contention of the Learned Counsel for the Respondent that the Corporate Debtor had already made a payment of Euro 206,024/- to the Appellant. Explaining their position, it was stated that historically payments were made by them to the bank account of the Appellant in the Nordea Bank. However, on 26.03.2018, an email was received from the Operational Creditor to send all further payments to their Bank of America account. It is further contended that the Operational Creditor on 14.05.2018 sent an Authorisation Letter to the Respondent/Corporate Debtor regarding

release of payments to their Bank of America account. However, as the fund transfer to the Bank of America account failed, confirmation of bank account details was sought again by the Corporate Debtor to which a reply was received providing new bank account details of Chase Bank. Thereafter, further payments were accordingly remitted to the Appellant by the Corporate Debtor to the Chase Bank account. Only at a later point of time, on an enquiry made by the Appellant with the Respondent regarding outstanding dues that it came to light that the Appellant had not changed their Nordea Bank account and that payment made by the Respondent to the Chase Bank account was a cyber fraud committed on the Respondent/Corporate Debtor. It has been contended by the Learned Counsel for the Respondent that on review of the emails exchanged between the two parties regarding bank account details, both parties had mutually come to the conclusion that this was a case of fraud. A police complaint was also lodged which occurred before the receipt of the Demand Notice and this was also raised by the Respondent in their notice of dispute. Thus, the payment of Euro 206,024/- was a clear case of pre-existing dispute.

13. It is also the case of the Respondent that this cyber fraud could not have taken place without the help of some of the employees of the Appellant and that the involvement of the Appellant cannot be ruled out given their non-cooperative behaviour towards the investigations. It was submitted that while the Appellant had initially agreed to cooperate with the investigation having accepted that a fraud had taken place, they later refused to cooperate and even refused to become a co-complainant before the police authorities to

pursue the investigation into the cyber fraud. In terms of Section 9(5)(ii)(d) of the IBC, the Adjudicating Authority has to reject a Section 9 application if a notice of dispute has been received by the Operational Creditor. Hence, it was submitted that the Adjudicating Authority had correctly noted that this was a clear case of pre-existing dispute. In support of their contention, reliance has been placed on the ***Mobilox judgment*** of the Hon'ble Apex Court which provides that if an existence of a dispute is found before the issue of Demand Notice, the Adjudicating Authority is required to dismiss a Section 9 application without going into the merits of the dispute.

14. Given this backdrop, it will be useful to find out how the Adjudicating Authority has considered the spectrum of facts and passed the impugned order rejecting the Section 9 application on the grounds of pre-existing disputes. The relevant portion of the impugned order is as extracted hereunder:

> *"9. In the instant petition the Demand Notice dated 20.02.2019 has been duly served and reply has been received from the respondent corporate debtor where the alleged amount of default is in dispute. After perusal of the record, it has come to the notice of this Bench that respondent/ corporate debtor has paid a substantial amount out of the amount in default mentioned in part-4 of Form-5 i.e.EUR 320,406.72. The same has been transferred to a wrong bank situated in the United States of America as prima-facie it appears that a cyber fraud has been committed against the Corporate Debtor. The same is verified from the payment transferred by the banker of Corporate Debtor i.e., Axis Bank, which is attached with the reply to the Demand Notice at Annexure-7 of the main petition. Since, there is exchange of communication between the parties dated 14.12.2018, whereby formal reply has been made by the operational creditor to Mr. Deepak C. Arora at Annexure-16. The fact that a fraud has been committed has been apprised to the Operational Creditor can be observed from the reply by respondent corporate debtor dated 14.12.2018 to the*

letter dated 10.12.2018 issued by the petitioner/operational creditor. The investigation with respect to the transaction history between the parties has been dealt with by the Operational Creditor in its email dated 21.12.2018, whereby, it has stated that respondents banker i.e., Axis Bank has not followed Uniform Rules of Collections, 1995 Revision. ICC Publication No.522. The same is attached at page No.89 of the reply submitted by respondent/corporate debtor. Further, the respondent/corporate debtor has submitted complaint to Commissioner of Police, Faridabad dated 14.01.2019, with regard to the alleged fraud committed against the respondent corporate debtor much before the date of default.

10. .....

11. From the aforesaid decision, it is amply clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. In the case at hand it has come to the notice of this Adjudicating Authority that the 'operational debt' is under dispute as the cyber fraud has been stated to be committed against the respondent corporate debtor which is still under investigation. Moreover, the proceedings before this Adjudicating Authority are not in the nature of recovery proceedings. In light of the above, we direct the operational creditor to approach the appropriate forum for proper redressal of its grievance.

12. In the given facts and circumstances, where there is a pre-existing dispute between the parties about the operational debt, the petition is liable to be rejected, in terms of Section 9(5) of IBC, 2016. Therefore, the claim of the petitioner is rejected and the petition stands dismissed, however, without any order to the costs."

15. Coming to our findings, at the outset, we must state that we are clear in our minds, that the incidence of cyber-fraud is an undisputed fact. However, what we need to analyse is whether the cyber fraud committed against the Respondent falls within the ambit and canvas of pre-existing dispute in terms of the statutory construct of IBC. Keeping in mind the ratio of the ***Mobilox judgment***, we entirely agree that the Adjudicating Authority is only required to be satisfied that plausibility of a pre-existing dispute has

been shown without the need of entering into any further detailed investigation or final adjudication with regard to existence of dispute. However, more importantly, given the facts of the present case, we cannot lose sight of the fact that this judgement also clearly postulates that what needs to be carefully examined is "***whether there is existence of a dispute between the parties***". Thus, what needs to be found out is whether this cyber-fraud was a dispute inter-se the two parties.

16. It is the case of the Appellant that it is an undisputed fact that the debt has been clearly acknowledged by the Respondent. That apart, there is also no dispute over the fact that the debt has become due and payable. It is also the case of the Appellant that even though there were admittedly some exchange of communication between the Appellant and Respondent with regard to the cyber-fraud suffered by the Corporate Debtor, but the use of the word "dispute" in the context of this fraud was made for the first time only in their Reply to Demand Notice. Since the fraud was perpetrated by unknown third parties, dragging the Operational Creditor into the dispute was a simple and deliberate ploy on the part of the Corporate Debtor to evade payment of liabilities. The pre-existing dispute was a fictional dispute and more of an after-thought. Moreover, it has been contended that even after having become a victim of cyber fraud, the fact that the Respondent had willing paid further sums of money to the Appellant in their Nordea Bank account shows that there was no dispute between the two parties with respect to the operational debt being due and payable.

17. When we look at the material on record, in the instant case, the Respondent by their own admission have conceded that they had become a victim of fraud by "an unknown third party". This is borne out from the fact that the Respondent filed their police complaint on 14.01.2019 "against unknown persons". The complaint was not made by the Corporate Debtor against the Appellant. Neither did the police complaint make mention of any on-going dispute in this regard existing between the parties. Prima-facie, this cannot be treated as a dispute inter se between the parties.

18. At this stage, it may be useful to notice certain contents of the police complaint which finds place at page 308 of the Appeal Paper Book ('APB' in short).

> *To:*
>
> *Shri Sanjay Kumar*
>
> *Commissioner of Police*
>
> *Office of the Commissioner of Police*
>
> *Sector 21 C*
>
> *Faridabad*
>
> *14 January 2019*
>
> *Subject: Complaint against unknown individuals responsible for committing offences punishable under the Indian Penal Code, 1860 and the Information Technology Act, 2000*
>
> *Respected Sir:*
>
> *Under instructions from and on behalf of our client, Bio-Med Health Care Products Private Limited, having its registered office at 30, DLF Industrial Estate, Phase I, Faridabad – 121003, Haryana, India [hereinafter referred to as "Client"], we request you to take on record the following:*
>
> ……

38.That such instances make it abundantly clear that the perpetrators[s] are sophisticated and trained criminals and were somehow able to access and/or delete e-mails residing in Optinova's servers by circumventing the firewall and security of Optinova's email and other servers.

39. Moreover, the very fact that the perpetrator[s] were able to quote the exact amount and invoices numbers, and even produce genuine authorisation letters which were even accepted by our Client's bankers, point to the fact that they had an elaborate network and were able to gather information and produce documents which no one in the ordinary course of action could procure without valid authorisation from Optinova.

40. The perpetrator[s] were well aware of the commercial understanding between Optinova and our Client and were aware about the schedule of delivery of goods and the generation of invoices and the amount mentioned in such invoices. It appears that they were also easily able to suppress e-mails which were sent by our Client to the actual and official e-mails ids of Optinova.

41. That it is to be noted that Optinova and our client has suffered a loss of atleast 206,034.32 EUR [Two Hundred Six Thousand Thirty-Four Euro and Thirty Two Eurocents], that is approximately Rs.1,63,87,076 (Rupees One Crore Sixty Three Lakh Eighty Seven Thousand and Seventy Six] by the hands of these perpetrator[s].

42. That this is a huge set-back to our Client as well as Optinova. Due to this extremely serious fraudulent act by the perpetrator[s], our Client's business activities have been seriously affected and the morale of our Client's employees has gone down considerably.

45. It is to be noted that the perpetrator[s] have committed serval offences punishable under the Indian Penal Code, 1860 and the Information Technology Act, 2000.

…….

We look forward to your urgent assistance and co-operation in this matter.

Sincerely,

Rodney D. Ryder,

Mobile: 98110-13560

(Emphasis supplied)

19. Thus, when the Respondent in their police complaint had expressly admitted that the fraud was committed by an unknown third party and not by the Appellant and did not make the Appellant an accused party in their police complaint, the cyber fraud and the related police complaint cannot constitute evidence of a pre-existing dispute *inter se* between the Operational Creditor and Corporate Debtor. This brings us to the standpoint of the Respondent that since the alleged impersonators were able to quote exact amount and invoice numbers and even produce genuine authorisation letters, it shows that such a fraud could not have been committed without complicity of the Operational Creditor. Since the matter is already under police investigations and there is no finality in the matter, attributing any culpability on the employees of the Operational Creditor based on surmise and conjecture of the Corporate Debtor would be pre-mature and highly presumptuous given the summary jurisdiction of the Adjudicating Authority and this Appellate Tribunal. We therefore do not wish to examine the above contention of the Respondent that the perpetrators of the cyber fraud were assisted by employees of the Operational Creditor.

20. We are also of the considered view that the Appellant cannot be held responsible in any manner for the payment made by the Respondent into a wrong bank account. When we see the reply affidavit of the Respondent as placed at pages 13-14 thereof, we find that the Respondent has conceded that while sending payments to the changed bank account details of the Appellant, they have relied on emails which were not sent from the domain name of the

Appellant. The relevant excerpts from the reply affidavit is as reproduced below:

> *"(xxv) It was noticed that several e-mails from the Operational Creditor were not sent from the domain name <optinova.com>, which is the official domain name of Optinova, but were instead sent by the domain name <optimova.com>, which allegedly did not belong to the Operational Creditor, as claimed by them.*
>
> *(xxvi) In addition to this, one of the e-mails dated April 19, 2018 was sent from yet another domain name <optiinova.com>, which also allegedly was not in the ownership of the Operational Creditor."*

21. There is force in the contention of the Appellant that since the Corporate Debtor and the Operational Creditor were in a long-standing business relationship, had the Corporate Debtor shown professional diligence and due rigour, they would have been able to easily detect the suspicious emails and averted the ensuing cyber fraud. This clearly shows the negligence and carelessness on the part of the Respondent which led to the cyber fraud. This is further corroborated by the fact that the Corporate Debtor has in their Notice of Dispute dated 01.0.2019 vacillated on fixing responsibility on the Appellant for the cyber fraud maybe seen at para 11 of the Notice of Dispute at page 181 of APB which is extracted below:

> *"That, as discussed in the past, such instances made it abundantly clear that the perpetrator[s] were sophisticated and trained criminals and were somehow able to access and/or delete e-mails residing in your servers by circumventing the firewall and*

security of your e-mail and other servers <u>with or without any help from your officials</u>."

22. In the backdrop of the foregoing discussion, we find that the Adjudicating Authority wrongly dismissed the Section 9 application, in complete disregard of evidence on record, by treating the cyber-fraud as a pre-existing dispute between the parties while being singularly oblivious of the role of unknown third-party perpetrators which cast serious doubts on the plausibility of dispute inter se between the Appellant and the Respondent.

23. It is the case of the Appellant that the requirement of Section 9 of IBC is that the Operational Creditor should have directly received their operational dues. In the present case, the Corporate Debtor has made payments but admittedly not to the correct account of the Operational Creditor and hence such payment cannot be treated as discharge of liability. We also find that the Corporate Debtor in their various communications have admitted their liabilities. Even in their Notice of Dispute of 01.03.2019, they have acknowledged an outstanding balance of Euro 111,887/- which was agreed to be paid in monthly instalments of Euro 10,000/- only. Further the very fact that much after the issue of the Demand Notice, an amount of Euro 49,664/- has been claimed to have been paid by the Corporate Debtor to the Appellant as stated in their Reply Affidavit as placed at pages 26-27 shows that they have acknowledged that outstanding operational debt qua the Appellant was payable by them. Furthermore, we find that in the said Reply affidavit of the Respondent, the Respondent has accepted and admitted that

it owed the Appellant a sum of Euro 62,222/-. This acknowledgement in itself is sufficient to satisfy existence of undisputed operational debt exceeding the threshold level of Rs.1 lakh.

24. We notice that the Respondent has placed reliance on the judgment of the Hon'ble Supreme Court in ***SS Engineers vs Hindustan Petroleum Corporation Ltd, [2022] 18 SCR 391*** wherein it has been held that if a debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed as the objective of the IBC is not to penalise solvent companies for non-payment of disputed dues claimed by an Operational Creditor. We have no reasons to disagree with the above judgment. However, what the Respondent has failed to appreciate is that the overall tenor and spirit of the principle of law as settled down in the judgment of ***S.S. Engineers supra*** is that if the claim of an Operational Creditor is undisputed and the operational debt remains unpaid, CIRP must commence.

25. With the aforesaid discussion, we are of the considered view that the Adjudicating Authority has erroneously rejected the application under Section 9 of IBC. We allow the appeal and set aside the impugned order with the following directions :-

(i) To meet the ends of justice, the Corporate Debtor is given the liberty to release payment of outstanding operational debt as per terms mutually agreed between the two parties.

(ii) The above payment shall be released by the Corporate Debtor by way of Demand Draft in favour of the Operational Creditor within 30 days from the

date of uploading of this order failing which the Corporate Debtor would come under the rigours of CIRP on the expiry of said 30 days period.

(iii) The Appeal is disposed of with the above observations. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 01.05.2024

Ashok Kumar