**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT)(Insolvency) No. 301 of 2022**

**[Arising out of order dated 21.12.2021 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench-IV, in C.P. (IB) No.2844(ND)/2019]**

**IN THE MATTER OF:**

**Continuous Dyeing & Printing Mills**
**Through its Partner Mr. Anubhav Agarwal**
**7A/3A, Rajpur Road Civil Lines,**
**Delhi – 110 054** **...Appellant**

**Versus**

**Bhavika Apparels Pvt. Ltd.**
**414, Sitaram Apartments,**
**IP Extension, Patparganj,**
**New Delhi – 110092** **...Respondent**

**Present:**

**For Appellant:** **Mr. Ritesh Agrawal, Mr. Mani Bhushan Sinha, Ms. Priyanshi Sharma, Advocates.**

**For Respondent:** **Mr. Vaibhav Verma, Mr. Abhishek Panday, Mr. Charag Garg, Advocates.**

**J U D G M E N T**

**[Per: Barun Mitra, Member (Technical)]**

The present appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' in short) by the Appellant arises out of the order dated 21.12.2021 (hereinafter referred as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Bench-IV, New Delhi in CP(IB)

No.2844(ND)/2019). By the impugned order, the Adjudicating Authority dismissed the application filed by Operational Creditor (the present Appellant) under Section 9 of the IBC seeking initiation of Corporate Insolvency Resolution Process ('**CIRP**' in short) against Corporate Debtor-Bhavika Apparels Private Limited (the present Respondent). Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

2. Making his submissions on the factual background of the case, the Learned Counsel for the Appellant pointed out that the Appellant was approached by the Respondent/Corporate Debtor for job work printing and finishing of woven fabrics. The Corporate Debtor had issued a work order dated 13.12.2018 for which the Operational Creditor had raised invoices from 04.01.2019 to 05.02.2019 and raised GST bills for the same. It has been further submitted that the Corporate Debtor on receipt of the printed fabrics used to check the goods and clear the bills for the invoices submitted after making TDS deductions and that payments were cleared on running account basis instead of bill wise payments. Moreover, Form 26A shows acknowledgment of invoices by the Corporate Debtor.

3. It was stated that only when the Operational Creditor took up the matter in January 2019 with the Corporate Debtor for release of payment that the Corporate Debtor for the first time sent debit notes dated 31.01.2019 by email on 05.02.2019 to the Operational Creditor. However, the Appellant/Operational Creditor sent a reply email on 06.02.2019 to the Corporate Debtor conveying the non-acceptance of the debit notes as baseless. The Corporate Debtor later released a payment of Rs.10 lakh on 18.06.2019. Thereafter, due to delay in receipt of further payments, the Appellant sent details of invoices and balance payments to the Corporate

Debtor on 19.08.2019. In the said communication, it was mentioned that if the Corporate Debtor did not clear the payments, the Operational Creditor would be approaching the National Company Law Tribunal (‘**NCLT**’ in short) for due redressal.

4. It has been further submitted that the Corporate Debtor instead of releasing the payments sent a detailed notice on 23.08.2019 to the Operational Creditor disputing 11 invoices and asking the Operational Creditor to come for negotiations. This notice was replied back on 30.08.2019 by the Appellant. Further the very fact that that they had been called for negotiations showed that the Respondent had admitted that payments were due qua the invoices raised during the period 04.01.2019 to 05.02.2019. It is further contended by the Learned Counsel for the Appellant that these invoices were disputed purely in reaction to the communication dated 19.08.2019 sent by the Appellant wherein it had been stated that they would take up the issue of non-payment of operational debt before the NCLT by invoking the provisions of IBC. Further, the very fact that the Corporate Debtor had called the Appellant for negotiations indicated that it was not a case of genuine pre-existing dispute. That these disputes were raised six months after the invoices were raised, it was not a genuine dispute but fabricated to frustrate the provisions of the IBC. It was also contended that the alleged pre-existing disputes were not genuine and therefore deserve to be ignored.

5. Advancing his arguments further, it was stated by Learned Counsel for the Appellant that since no payment was forthcoming from the Corporate Debtor, the Operational Creditor sent a demand notice under Section 8 of IBC on 16.09.2019.

The Learned Counsel for the Appellant admitted that the Corporate Debtor replied to the Section 8 Notice on 27.09.2019 in which reply it was stated that the Section 8 Notice was not maintainable because a suit had been filed in the District Court vide suit No. 517/2019 which shows pre-existence of dispute. The Learned Counsel for the Appellant submitted that the civil suit being not filed by the Corporate Debtor but by one of the Directors of the Corporate Debtor in his personal capacity was, therefore, not competent. Moreover, the very fact that this suit was filed after the letter of 19.08.2019 shows that it was an afterthought. Moreover, the Corporate Debtor had never disputed quality issues of printing job prior to the intimation notice of 19.08.2019 and this bogey has been raised to avoid liability to pay outstanding dues. Furthermore, had the goods not been of acceptable quality, the same should logically have been returned by the Corporate Debtor, but the goods were never returned which shows that the dispute raised is moonshine and an afterthought.

6. Submitting further that several reminder emails were sent for release of outstanding payment from 30.12.2018 onwards and the total outstanding amount as on 04.01.2019 stood at Rs.35,33,737/- and the payment not having been cleared even after the receipt of the demand notice, the Appellant had filed Section 9 application on 15.10.2019.

7. The Learned Counsel for the Respondent refuting the submissions of the Appellant contended that there was pre-existing dispute with respect to quality of goods supplied by the Operational Creditor which had been raised on 23.08.2019 which was prior to the issue of demand notice under Section 8. It had been brought to the notice of the Appellant that the fabric supplied by the Operational

Creditor was inferior quality as it had 10% contraction as against the order placed for 18% contraction, due to which the Corporate Debtor faced deduction of payment from their client. Further a civil suit had also been filed on 06.09.2019 which also predated the issue of demand notice. It has also been submitted that the Operational Creditor had raised different demands for the same alleged operational debt, thereby, rendering the Section 9 application defective.

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

9. Before dwelling on the facts of the present case, 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 within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. Section 8 of the IBC is as follows:

> *"**8. <u>Insolvency resolution by operational creditor</u>**- (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or 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. This now brings us to the statutory construct of IBC post issue of demand notice by the Operational Creditor as laid down in Section 9 of IBC. Under Section 9(1), if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, he may file an Application under Section 9(1) of the Code. It is also an undisputed fact in the present matter that the Operational Creditor did not receive any payment from the Corporate Debtor and therefore proceeded to file an application under Section 9 of IBC.

11. For convenience, we reproduce Section 9(1) of IBC which is to the following effect:

> *"**9. <u>Application for initiation of corporate insolvency resolution process by operational creditor</u>**.- (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 sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process."*

Section 9(5)(ii) is as follows:

*"(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order—*

*(i).....*

*(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 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 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."*

12. From a plain reading of the above provisions, it is clear that with regard to an Operational Creditor, the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 16.09.2019 and notice of dispute raised by the Corporate Debtor on 27.09.2019.

13. It is the case of the Appellant that the Corporate Debtor had been receiving the printed fabric goods from the Operational Creditor for which invoices were raised by the Operational Creditor. Moreover, it was contended that Form 26A clearly evidences the acknowledgement of invoices by the Corporate Debtor. Further, since goods were received by the Corporate Debtor after due quality check, the question of defective goods having been supplied was denied. It was pointed out by the Learned Counsel for the Appellant that for six months after raising of invoices, no grounds were ever raised with regard to supply of defective and substandard goods and therefore the debit notes issued by the Corporate Debtor were not accepted. However, since payments were not forthcoming, Section 8 demand notice issued on 16.09.2019 was followed by Section 9 application before the Adjudicating Authority. While admitting that the Corporate

Debtor had raised disputes in their communication dated 23.08.2019, it was pointed out that the Adjudicating Authority failed to appreciate the fact that this communication had been triggered by the fact that the Corporate Debtor had been informed on 19.08.2019 that action would be initiated against them before the NCLT in case of non-payment. It is also the Appellant's contention that the very fact that they were called for negotiations by the Corporate Debtor in their communication dated 23.08.2019, this was an implied admission on the part of the Corporate Debtor that they had acknowledged their liability.

14. When the matter came up before the Adjudicating Authority, it was observed by the Adjudicating Authority that even prior to issue of demand notice by the Operational Creditor, a communication was issued by the Corporate Debtor on 23.08.2019 raising questions about defective goods supplied by the Operational Creditor. The Adjudicating Authority took notice of the fact that the above notice of 23.08.2019 to the Operational Creditor for supply of defective goods predated the Section 8 Demand Notice which was issued on 16.09.2019. The Adjudicating Authority while observing that the notice of the Corporate Debtor raising defects in the goods supplied dated 23.08.2019 was six months after the issue of last invoice on 05.02.2019, it also took cognizance of the fact that this notice nevertheless preceded the demand notice thereby establishing evidence of dispute between the two parties.

15. A perusal of the notice of dispute sent by the Corporate Debtor on 23.08.2019 to the Operational Creditor as at page 115-116 of the Appeal Paper Book ('**APB**' in short) clearly articulates the allegations that the Operational Creditor had supplied inferior quality fabric of Machine Drying Variant with 10%

contraction as against the requirement of Line Drying Variant having 18% contraction. Since extra expenditure had to be incurred to render the defective goods marketable it has also been alleged that debit notes were raised as well. It was also indicated in the notice that there has been 8% extra printing charges levied by the Operational Creditor besides also complaining that the Corporate Debtor's shipment to its suppliers were rejected on quality grounds thereby causing losses. In the said notice, the Corporate Debtor had intimated the Operational Creditor to negotiate in the matter failing which they had threatened to initiate legal proceedings.

16. The Learned Counsel for the Respondent has also submitted in the reply affidavit that the Operational Creditor had demanded different amounts on different occasions and therefore the legal debt cannot be ascertained. The legal debt claimed has been varying from time to time being Rs.35,33,737/-; Rs. 40,24,320/- on another occasion and Rs.50,24,320/- and Rs.50,26,260/- on two other occasions. We note that the Adjudicating Authority has looked into this issue and correctly held that the lack of consistency of legal debt claimed was occasioned by calculation of interest component and therefore not sufficient ground to hold that the Section 9 petition was not maintainable.

17. It has also been contended by the Learned Counsel for the Respondent that the Corporate Debtor in their reply to the demand notice dated 16.09.2019, as placed at page 132-134 of the APB, had sent a reply on 27.09.2019 stating that the notice of demand was unwarranted, untenable and frivolous. It has been clearly mentioned that there is a pre-existing dispute and that inspite of having pointed out these discrepancies, the operational creditor had continued to ignore

the same and rejected the debit notes which has led to filing of a civil suit No.517/2019. It has been pressed in the said reply that the Civil Suit was filed before the receipt of the demand notice of the Operational Creditor and hence the demand notice is illusory and unwarranted having no legs to stand. Paras 8 and 9 of the Reply Notice is relevant and is to the following effect: -

> *"8. That the dispute as regards the amount claimed by you from our client is a pre-existing dispute, that is, this dispute is prior to the receipt of the demand notice under reply if and therefore on this ground alone the demand notice under reply must fail in light of the provisions of the Insolvency and Bankruptcy Code, 2016.*
>
> *9. In view of the above stated facts and legal precedents, we request you, to withdraw your unwarranted, untenable and frivolous notice of demand by issuing forged invoices preferred under the Insolvency and Bankruptcy Code, 2016."*

18. The contention raised by the Appellant that the Civil Suit filed by the Corporate Debtor was not filed by the Corporate Debtor but by one of the Directors in his individual capacity has also been looked into by the Adjudicating Authority and it was observed that the contention of the Appellant lacked substance as the company was also impleaded in the said civil suit subsequently. Hence the civil suit has been treated as a ground for pre-existing dispute by the Adjudicating Authority. It is also the contention of the Operational Creditor that the civil suit had been dismissed for non-appearance of the Corporate Debtor on 24.03.2022 and was restored on 08.07.2022 purely with the intent to create a pre-existing dispute to frustrate the provisions of the IBC. On a pointed question asked by this

Tribunal, it has been admitted by both the parties that the civil suit is still pending which therefore validates existence of dispute between the two parties.

19. At this stage, it may be useful to reproduce para 23 of the Impugned Order wherein the Adjudicating Authority has held as follows: -

> *"23. Thus, there also exists dispute prior to demand notice with respect to the quality of the goods supplied by the Operational Creditor to the Corporate Debtor and litigation is also pending, qua the said dispute. The said question was also raised in the reply to the demand notice sent by the petitioner. Therefore, there was a clear 'existence of dispute', which was genuine in nature and it could not be said that the same was raised falsely just to defend the present matter. Hence, the petitioner is not entitled to the relief claimed.*
>
> *24. As per Section 9(5)(ii)(d) of the Code provides that adjudicating authority shall reject the application if notice of dispute has been received by the operational creditor or there is record of dispute in the information utility.'*

***(Emphasis supplied)***

20. In the present factual matrix, the defence raised by the Corporate Debtor therefore cannot be held to be moonshine, spurious, hypothetical or illusory. The tone and tenor of the letter dated 23.08.2019 clearly manifested existence of dispute prior to the date of Section 8 demand notice on 16.09.2019. 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. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. The Adjudicating Authority has therefore correctly noted that the application filed by the Operational Creditor under Section 9 has been hit by Section 9(5)(ii)(d) and accordingly rejected.

21. Given this backdrop, we have no reasons to disagree with the findings of the Adjudicating Authority. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that it will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

**[Justice Ashok Bhushan]**
**Chairperson**

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

Place: New Delhi
Date: 18.04.2023

**PKM**