



**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**JAIPUR BENCH**

**Coram: SHRI DEEP CHANDRA JOSHI,**  
**HON'BLE JUDICIAL MEMBER**  
**SHRI PRASANTA KUMAR MOHANTY,**  
**HON'BLE TECHNICAL MEMBER**

**In CP No. (IB)- 68/9/JPR/2019**

*(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)*

**IN THE MATTER OF:**

**M/S DAMANI SHIPPING PVT. LTD.**

**..... OPERATIONAL CREDITOR**

**VERSUS**

**M/S HINDUSTAN ZINC**

**..... CORPORATE DEBTOR**

**MEMO OF PARTIES**

**M/s Damani Shipping Limited**  
CIN: U63012MH1982PTC028986  
205-206, Verma Chambers,  
11, Homji Street, Mumbai- 400001

**... Applicant / Operational Creditor**

**VERSUS**

**M/s Hindustan Zinc Limited**  
CIN: L27204RJ1966PLC001208  
Yashad Bhavan, Yashadgarh,  
Udaipur- 313004 (Rajasthan)

**... Respondent / Corporate Debtor**



**For the Operational Creditor** : Anuroop Singhi, Adv.  
Aditya Vijay, Adv.  
**For the Corporate Debtor** : U. N. Tiwari, Adv.  
Punit Singhi, Adv.

**Order Pronounced On: 16.03.2023**

**ORDER**

**Per: Shri Deep Chandra Joshi, Judicial Member**

1. The present Application has been filed by M/s Damani Shipping Private Limited through its authorised signatory Mr. Ashwin Damani ('Applicant'/ 'Operational Creditor'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Hindustan Zinc Limited ('Respondent'/ 'Corporate Debtor'/ 'Respondent Company') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the 'Code'/ 'IBC') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, M/s Damani Shipping Private Limited, bearing CHA License No. 11/688 is a Custom House Agent ('CHA') carrying on the business of the entry or departure of conveyances or the import or export of goods at various port customs stations pan across India. The alleged default on the repayment of operational dues amounting to Rs. 3,50,03,725/- (Rupees Three Crores Fifty Lakhs Three Thousand Seven Hundred Twenty-Five Only) along with interest payable @ 18% per annum.



3. The Corporate Debtor, M/s Hindustan Zinc Limited, is a public limited company incorporated under the Companies Act, 1956 on 10.01.1966, having CIN: L27204RJ1966PLC001208 and is engaged in manufacturing of zinc metal at their various projects in India. The Respondent has its registered office at – Yashad Bhavan, Yashadgarh, Udaipur, Rajasthan – 313004. The Corporate Debtor has an Authorised Share Capital of Rs. 10,00,00,00,000/- (Rupees Ten Thousand Crores Only) and Paid-Up Share Capital of Rs. 8,45,06,38,000/- (Rupees Eight Hundred Forty-Five Crores Six Lakhs and Thirty-Eight Thousand Only).
4. The details of the transactions leading to the filing of this Application averred by the Applicant *vide* Diary No. 458/2019 dated 14.03.2019 are as follows:
- i. The present claim of the Operational Creditor arises out of the running account in respect of various bills raised on the Corporate Debtor in respect of charges, deductions made and expenses incurred while clearing the imported goods on behalf of the Corporate Debtor as their clearing agents from various port trust in India.
  - ii. The Corporate Debtor raised a preliminary enquiry for handling the export of concentrates and tolling of material *vide* an email dated 10.06.2003 ('Enquiry Email') and the same is annexed as Annexure – 5 of the Application. In response to Enquiry Email, the Applicant sent the quotation rates *vide* Letter dated 11.06.2003 ('Quotation Letter') and the same is annexed as Annexure – 4 of the Application. The



Corporate Debtor issued a Work Order dated 26.06.2003 ('Work Order') wherein it needed the Custom House Agent ('CHA') for handling and clearance of zinc metal. A copy of the Work Order is annexed as Annexure – 6 of the Application.

- iii. The Operational Creditor offered its services *vide* Letter dated 10.06.2004 ('Offer Letter') and specified the agency charges thereon for customs and dock clearance of capital goods arrived at Mumbai Port Trust and Jawaharlal Nehru Port Trust. A copy of the Offer Letter is annexed as Annexure – 7 of the Application. The Offer Letter got accepted by the Corporate Debtor *vide* Letter dated 30.06.2004 ('Acceptance Letter') wherein it specified the scope of work for clearing of custom consignment from the port trust(s). A copy of the Acceptance Letter is annexed as Annexure – 8 of the Application. Further, the Applicant seeks certain clarification in the Acceptance Letter *vide* Letter dated 12.07.2004 ('Clarification Letter'). A copy of the Clarification Letter is annexed as Annexure – 9 of the Application.
- iv. Consequently, the Operational Creditor to the satisfaction of the Corporate Debtor commenced its work as per the terms and conditions of the Work Order. Given the nature of the work contract, it incurred various overhead expenses including clearing charges, shipping charges, and sorting charges. Against this Work Order, Applicant raised various invoices from 05.02.2004 to 23.10.2007 ('Invoices') including



debit notes for the service tax. A copy of the Invoices is annexed as Annexure – 3 of the Application.

- v. The payment of invoices was made on the ‘running account’ basis in the usual course of business by the Respondent Company. The Corporate Debtor made part payment of the invoices whereby principally a total of Rs. 1,16,11,344/- (Rupees One Crore Sixteen Lakhs Eleven Thousand Three Hundred and Forty-Four Only) is due and payable. The last payment received from the Respondent was on 26.06.2010. A copy of the outstanding amount and due dates are annexed as Annexure – 2 of the Application.
- vi. The Applicant put various reminders and requests for payment of the remaining dues. However, given the failure of the Respondent to repay the balance amount regularly, the Applicant sent a Notice dated 05.02.2010 (‘Legal Notice’). The same was replied *vide* Letter dated 16.02.2010 (‘Legal Notice Response’) wherein the Corporate Debtor denied any outstanding payment and nevertheless requested for furnishing relevant documents for reconciliation of account statements.
- vii. Accordingly, the Applicant *vide* Letter dated 05.03.2010 (‘Information Letter’) supplied the desired statement of accounts’ details. The Corporate Debtor *vide* its Letter dated 14.04.2010 (‘Information Clarification Letter’) further requested the bill of entry invoices and its related accounts in respect of the above-mentioned letter. The



Information Clarification Letter was responded *vide* Letter dated 21.04.2010 ('Clarification Response') stating that the information of the documents as sought by the Respondent Company has already been supplied at the time of raising the invoices, along with the bill of entry, which included details such as the description of commodities, name of the ship and port trust. In addition, the Corporate Debtor being the importer of goods has to submit the bill of entry to its respective banker as per RBI guidelines. There are three copies of the bill of entry; the first copy goes to customs authorities, the second copy, if required, is to be submitted to the respective bankers as an Exchange Control Copy, and the last copy is retained by the importer itself.

- viii. Given the non-payment of operational dues, the Operational Creditor sent another Legal Notice dated 07.08.2010 calling for final payment wherein Mr. Ashwinbhai Damani (*director of the Respondent Company*) on 14.05.2010 made a personal visit for discussing the outstanding amount. The act of the Corporate Debtor in not clearing the operational dues is against the laws as it had approached the Applicant *via* an email on 20.11.2018 for settlement of accounts and has never raised any concerns on the services of the Applicant.
- ix. It filed a suit before the Hon'ble Bombay High Court which was transferred before the District Judge, Udaipur, Rajasthan bearing suit number 1723 of 2011. Subsequently, the suit was further transferred



before the Commercial Court, Udaipur. This suit was withdrawn by the Applicant *vide* Order dated 14.12.2018, the operative part of the order was passed by the Commercial Court is reproduced herein below:

*'Heard the arguments on the application. Submissions of the parties were primarily and mainly as per the written arguments. This is a settled principle of law that the plaintiff is the decision maker of its suit and if it does not want to proceed with the same, it is entitled to withdraw the suit at any stage. Plaintiff wants to withdraw the present suit for which there is no objection from the defendant.*

*But the plaintiff wants liberty to be granted by this Court for the appointment of an Arbitrator and adjudication through it, which is not justified. This Court while granting the liberty to withdraw the suit cannot grant liberty to proceed against the defendant before other forums. Plaintiff as per its legal right, limitation and other legal provisions, may proceed in accordance with the law. On perusal of records, it is also evident that matter between the parties has travelled to different courts.'*

A copy of the order dated 14.12.2018 is annexed as Annexure – 13 of the Application. Meanwhile, it also moved an application for the appointment of the arbitrator before the Hon'ble Rajasthan High Court, Jodhpur, which was dismissed *vide* Order dated 23.08.2018.

- x. The Operational Creditor had sent two demand notices under Section 8 of the Code dated 27.02.2018 ('First Demand Notice') and 10.01.2019 ('Second Demand Notice') through the registered post at the registered office of the Corporate Debtor. The copy of the First and Second Demand Notice including postal slips is annexed as Annexures – 10 and 14 of the Application, respectively. *It is stated that the Second Demand*



*Notice was sent due to a change in circumstances and withdrawal of the suit filed before the Commercial Court, Udaipur. The First and Second Demand Notice was responded to by the Corporate Debtor vide reply dated 10.03.2018 ('Reply to the First Demand Notice') and 04.02.2019 ('Reply to the Second Demand Notice'). The copy of the Reply to First and Second Demand Notice is annexed as Annexures – 11 and 15 of the Application, respectively.*

- xi. There is an outstanding debt due, and the same is substantiated through the ledger account of the Corporate Debtor, and the email dated 20.11.2018 ('Invitation Email') indicating the intention of the Corporate Debtor in settling the matter. Copy of the ledger account of the Corporate Debtor in the books of Applicant showing the actual transactions and Invitation Email dated 20.11.2018 is annexed as Annexures – 1 and 12 of the Application.
- xii. The aforementioned details as reflected in Part IV of the Application are as follows:

**PART IV**  
**PARTICULARS OF FINANCIAL DEBT**

|    |  |   |
|----|--|---|
| 1. | Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due. | Total amount of debt:<br>Rs. 3,50,03,725/-<br>(Rupees Three Crores Fifty Lakhs Three Thousand Seven Hundred and Twenty-Five Only) |
|----|--|---|



|    |  |   |
|----|--|---|
| 2. | Amount claimed to be in default and the date on which the default occurred | Amount Claimed to be in default:<br>Rs. 3,50,03,725/-#<br><br>Total Principal Amount:<br>Rs.1,16,12,344/-<br>Total Interest Due: Rs. 2,33,91,381/-*<br><br>Date from which Debt fell Due:<br>23.10.2007 |
|----|--|---|

\* Calculated the Interest Amount @18% p.a. from the period of 23.10.2007 to 31.12.2018.

# Computation of Amount to be claimed from Corporate Debtor is annexed at Annexure A – 2 of the Application.

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 755/2019 dated 26.04.2019 stating, reiterating, controverting, or adding to, what is stated beforehand as follows:

- i. The Applicant has not approached the Tribunal with clean hands and concealed material information in order to place itself as Operational Creditor as the claims submitted are not only barred by limitation but also Applicant had already filed a suit for adjudication of the same.
- ii. The Corporate Debtor issued two separate Work Orders dated 26.03.2003 and 30.06.2004 to engage CHA for custom clearance of consignments. Admittedly, the invoices were raised between February 2004 to August 2007. As per Clause 8 of the Work Order, the Corporate Debtor was required to make the payments within thirty days of receipt of the original invoice; the Applicant would raise a such invoice upon the execution of its part of the performance.



- iii. Any failure to clear the dues within the aforesaid period of the Operational Creditor would result in default. Thus, the period of limitation would start immediately after the expiry of thirty days from the receipt of the invoice. The Application filed by the Operational Creditor is barred by Section 238A of the Code read with Article 137 of the Limitation Act, 1963.
- iv. The Respondent denied any pending liabilities arising out of the invoices. The Legal Notice and its reply by the Corporate Debtor, the Respondent Company specifically stated that there is no outstanding amount due to the Operational Creditor, nevertheless, it requested for unpaid invoices and related documents thereon to reconcile errors and omissions, if any. This act of the Corporate Debtor cannot be considered an admission of non-payment of any open invoices. A copy of the Legal Notice and Legal Notice Response is annexed as Annexure R – 1 and R – 2 of the Reply, respectively.
- v. The Respondent did not receive the information and supporting documents as asked. It was informed by the Applicant that the documents were allegedly given to them at the time of raising the invoice. However, no such information or document was given to the Respondent. Hence, the Applicant did not have the necessary documents to substantiate its alleged claim.



- vi. Further, it already initiated Civil Suit No. 1723/2011 before the Hon'ble High Court of Bombay for recovery of unpaid invoices. The Hon'ble High Court of Bombay *vide* Order dated 07.12.2016 (Bombay High Court Order), returned the plaint with the following observations:

*'To the query as to why the plaint was silent about the exclusive jurisdiction clause and why was it not mentioned in the petition for leave under Clause 12, the counsel to chose to remain silent.*

*Therefore, Mr. Presswala is justified in insisting that the court should return the plaint to the plaintiff to be filed in Udaipur.*

*In view of the exclusive jurisdiction clause, the plaint is returned to the plaintiff to be filed in the appropriate court at Udaipur. All the contentions of the parties, including limitation are kept open.'*

A copy of Civil Suit No. 1723/2011 presented by the Operational Creditor is annexed as Annexure R – 3 of the Reply. Subsequently, the Applicant presented the case in the civil court of Udaipur.

- vii. Furthermore, during the pendency of the civil suit, the Applicant invoked Clause 13 of the Work Order for arbitrating the matter *vide* Letter dated 06.02.2017 ('Arbitration Letter'), which was replied to *vide* Letter dated 07.02.2017 ('Response to Arbitration Letter'). In the Response to Arbitration Letter, that pointed at the pendency of the civil suit and limitation barred claims. A copy of the Response to Arbitration Letter is annexed as Annexure R – 4 of the Reply.
- viii. Nonetheless, the Applicant proceeded to file a Civil Misc. Arbitration Application No. 23/2017 ('Arbitration Application') under Section 11



of the Arbitration and Conciliation Act, 1996 before the Hon'ble Rajasthan High Court for the appointment of the arbitrator(s) for adjudication of unpaid invoices. The Corporate Debtor *vide* Reply dated 31.10.2017 ('Reply to the Arbitration Application') objected to the Arbitration Application and maintained its earlier stance as stated in the Response to Arbitration Letter. A copy of the Reply to Arbitration Application is annexed as Annexure R – 5 of the Reply.

- ix. While awaiting the verdict on the Arbitration Application, the Applicant issued a First Demand Notice demanding a sum of Rs. 1.89 crores for the open invoices. The Respondent *vide* Reply to First Demand Notice objected not only to the maintainability of the proceedings under the Code given the pendency of the civil suit and arbitration proceedings but also contested the claim as no amount was due or payable. Subsequently, received an advance copy of the Applicant's application under Section 9 of the Code, however, it elected not to proceed with the filed application. A copy of the postal cover and index of the Application under Section 9 of the Code, received on 04.09.2018, to the Respondent is annexed as Annexure R – 6 of the Reply.
- x. The Hon'ble High Court of Rajasthan dismissed the Arbitration Application on 23.08.2018 ('Arbitration Order'), giving the following reasons which reproduce herein for ease of reference:



*‘ ... The conduct and the submissions of the applicant are dichotomous inasmuch as on the one hand it has filed the suit ignoring the arbitration clause and now during the pendency of the said suit itself, the present application has been filed by claiming that the suit is not maintainable*

*.  
. .*

*In view of the above discussion, it is apparent that the present application filed by the applicant during pendency of the suit before the civil court (now Commercial Court) in which admittedly no application under Section 8 of the Act has been filed by the Respondent, the initiation of the parallel proceedings under Section 11 of the Act of 1996 cannot be countenanced. Consequently, the application filed by the Applicant has no substance and the same is, therefore, dismissed.”*

A copy of the Arbitration Order passed by the Hon’ble Rajasthan High Court is annexed as Annexure R – 7 of the Reply.

- xi. The Applicant filed a Withdrawal Application on 15.11.2018 (‘Withdrawal Application’) before the Commercial Court, Udaipur seeking to withdraw the case in view of the arbitration clause in the underlying contract and the same was allowed. A copy of the Withdrawal Application is annexed as Annexure R – 8 of the Reply.
- xii. Therefore, the action of the Operational Creditor in withdrawing the civil suit had abandoned its claim and no fresh proceeding(s) under the Code can be initiated. Besides, all or any proceeding seeking to recover the amount that was the subject matter of the civil suit is now barred by Order XXIII Rules 1 – 4 of the Code of Civil Procedure, 1908 (‘CPC’).



- xiii. In addition, the Applicant's conduct of inferring the Invitation Email as an admission on the part of the Respondent is untenable. In order to infer acknowledgement and admission, the Applicant must establish that the Respondent was conscious of its alleged liability, which is not forthcoming from the Invitation Email as the claim has been disputed at each stage. The Invitation Email merely invited the Applicant for a meeting and, no meeting was held between the parties pursuant thereto.
- xiv. Moreover, a Second Demand Notice and proceeding subsequently under the Code after abandoning the first proceeding in February 2018 is not maintainable. Sections 8 and 9 of the Code postulate a scheme which suggests that once the Code is triggered by sending the demand notice, the only option available to the Applicant is to approach the Adjudicating Authority, for the non-payment of unpaid invoices.
- xv. For the reasons mentioned above, while submitting the written arguments, the Respondent emphasised these cases:
- a. *Madhavrao Narayanrao Patwardhan v. Ram Krishna Govind Bhanu*, AIR 1958 SC 767.
  - b. *Upadhyay & Co. v. State of U.P. & Ors.*, (1999) 1 SCC 81.
  - c. *Deena v. Bharat Singh*, (2002) 6 SCC 336.
  - d. *Transmission Corporation of AP v. Equipment Conductors & Cables Ltd.*, Civil Appeal No. 9597 of 2018.
  - e. *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17.
  - f. *J. C. Budhraja v. Chairman, Orissa Mining Corp.*, (2008) 2 SCC 444.



- g. *Firm Bansi Dhar v. Firm Alopi Pershad, AIR 1963 P&H 556.*
- h. *Khan Chand Malhotra v. Ruby General Insurance, PLR (1959) 61 114.*
- i. *Dinesh Gupta v. Hajura Singh, Company Appeal (AT) (Ins) No. 99 of 2018.*
- j. *Krishna Enterprises v. Gammon India, Company Appeal (AT) (Ins) No. 144 of 2018.*

6. The Applicant filed its rejoinder *vide* Diary No. 946/2019 dated 27.05.2019 submitting the following:

- ii. The period of limitation is wrongly calculated by the Respondent under Clause 8 of the Work Order which mandates the requirement of making the payment within thirty days of the receipt of the invoices. The payment of Rs. 3,631/- (Rupees Three Thousand Six Hundred and Thirty-One Only) was made on 01.07.2010. Therefore, the cause of action arose after the receipt of the payment on 01.07.2010, the limitation of three years would be calculated accordingly. Further, the Applicant was contesting the suit in the wrong jurisdiction genuinely.
- iii. As per the Bombay High Court Order, the plaint was returned to Udaipur Commercial Court. However, the suit could not be listed for a long time due to the non-establishment of a Commercial Court in Udaipur. In due course, when the commercial court got established, the Applicant applied for withdrawal of the suit, which was allowed.



Hence, the Applicant filed the original suit within the period of limitation and is falling under Section 14 of the Limitation Act, 1963.

- iv. The provision of Order XXIII of the CPC neither precludes nor opposes the Applicant to file an Application under Section 9 of the code for non-payment of the operational dues as there is no stipulation of the provision in the Code that makes the requirement of CPC applicable to the insolvency proceedings. There is no liberty of the Commercial Court required to pursue a case against the Corporate Debtor before this Adjudicating Authority. Thus, the Operational Creditor can withdraw the suit filed by it before the Commercial Court.
- v. There can be multiple reasons for sending more than one demand notice to the Corporate Debtor, and cognizance of the same is found in the proviso to Section 9 of the Code. The act of issuance of the First Demand Notice and receiving an advance copy of the Application by the Corporate Debtor thereto cannot be equated to the actual records of filing the application under Section 9 of the Code before the Adjudicating Authority. There were no actions undertaken by the Operational Creditor under the First Demand Notice. This Application was filed after correctly issuing Second Demand Notice.
- vi. There is no dispute raised by the Respondent Company, it asked for the details of the outstanding invoices and the reconciliation of the accounts. In addition, the Arbitration Application was merely for the



appointment of the arbitrator, which was dismissed *vide* Arbitration Order. There was no adjudication on merits in the present matter. In Reply to the Arbitration Application, the Corporate Debtor only raised the grounds for limitation and did not dispute the operational debt.

- vii. The Invitation Email suggests admission of debt liability because it was the Respondent who approached the Applicant for settling the matter and the existence of a liability results in negotiation. Pursuant to the Invitation Email, the Applicant deputed its officer, Mr. Rakesh Panchmatia, Chartered Accountant, for a meeting on 26.11.2018 at the Office of the Respondent Company, with prior written communication. In the said meeting, Mr. Madan Singh Bhadoria, Associate General Manager, offered an unreasonable amount for settlement.
- viii. For the reasons mentioned above, while submitting the written arguments, the Applicant emphasised these cases:
- a. *Mobilox Innovative Pvt. Ltd. v. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353.*
  - b. *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department & Ors., (2008) 7 SCC 169.*
  - c. *Mohinder Singh v. Paramjeet Singh & Ors., (2018) 5 SCC 698.*
  - d. *M. P. Steel Corporations v. Commissioner of Central Excise, (2015) 7 SCC 58.*
  - e. *R. L. Steel & Energy Ltd. v. Shyam Industries Ltd., Company Appeal (AT) (Ins) No. 221 of 2017.*



- f. *V. V. Nagarjan v. Vishnusuddha Textiles, Company Appeal (AT) (Ins) No. 30 of 2018.*
- g. *Suryaa Chmball Power Ltd. v. Prakriti Power Pvt. Ltd., CP No. (IB) – 237/9/JPR/2019.*

7. We have heard the Learned Counsels for the parties and perused the averments made in the application, reply, rejoinder, written submissions and the documents enclosed with the application. The issue for consideration is whether the claim of the Operational Creditor falls within the period of limitation and under Section 5 (6) of the Code.
8. In the instant case, the Applicant's claims pertain to unpaid invoices raised from 05.02.2004 to 23.10.2007. As per Clause 8 of the Work Order, '*Payment will be released within 30 Days from the date of receipt of original invoice along with all statutory charges receipts and delivery of material at our site subject to receipt of the Bill of Entry and other Original Documents of the Customs cleared item.*' Thus, the period of limitation for the last invoice expired on 24.10.2010. However, it is alleged that payments were being made on a 'running account' basis instead of a 'bill-to-bill' basis. Consequently, the period of limitation should be calculated based on the last payment made. The last payment was made on 01.07.2010 by the Respondent, accordingly, the period of limitation would expire on 02.07.2013. The late filing of the present application on 14.03.2019 is further justified by the Operational Creditor on the basis of a *bonafide* proceeding undertaken in the wrong jurisdiction and non-establishment of the commercial court.



9. This contention of the Operational Creditor of exclusion of time under Section 14 of the Limitation Act, 1963 is untenable, firstly, it is an established principle of the contract law that the courts are passive enforcers of the *consensus ad idem* of parties in the contract. The courts ought to enforce the contract as the parties agreed unless the contrary appears from the context. The Applicant has attached a copy of the raised Invoices; however, it did not evidence any documentary proof to substantiate its contention that the payments were made on a 'running account' basis by the Corporate Debtor.
10. The Applicant filed the civil suit for recovery of alleged unpaid invoices before the Hon'ble Bombay High Court despite having an exclusive jurisdiction clause in the Work Order. Supplementary, upon the direction of the Hon'ble Bombay High Court, it continued the recovery proceedings before the civil and commercial courts in Udaipur. This act of Applicant cannot be considered as *bonafide* and being pursued as diligently as none of the adjudicating forums that were approached by the Applicant has granted any liberty in excluding the period of limitation for pursuing the suit in good faith.
11. Further, Section 18 of the Limitation Act, 1963 can only be considered as an acknowledgement of liability when before the expiration of the prescribed period for a suit or application, the party against whom such right is claimed has acknowledged the liability in writing. The Invitation Email states that '*any mutual decision with respect to case will be taken post discussion*'. Neither the meeting took place thereafter nor any authentication of the meeting that



occurred is placed on record. A mere invitation to discuss does not constitute an admission of liability. Profoundly, such an Invitation Email cannot revive an alleged claim which is already barred by limitation.

12. Furthermore, the steps taken forward by the Operational Creditor not only by filing Civil Suit before the Hon'ble Bombay High Court and pursuing it further but also by invoking an arbitration clause suggests that there exist prior disputes between the parties. Over and above, the Operational Creditor failed to assign any cogent reasons for a withdrawal application given the Arbitration Order. Moreover, the Respondent Company in various instances was disputing and denying the claim of the Operational Creditor *via* Legal Notice Response, Reply to the First Demand Notice, Response to the Arbitration Letter, Reply to the Arbitration Application and Reply to the Second Demand Notice.

13. We have closely gone through the facts of the case. As per Section 8(2)(a) of the Code, '*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 invoices in relation to such dispute*' can interdict Section 9 proceedings under the Code. The Hon'ble Supreme Court in '*Rajratan Babulal Agarwal v. Solartex India Pvt. Ltd. & Ors., Civil Appeal No. 2199 of 2021*' held that '*60. ... that the court need not be satisfied that the defense is likely to succeed. The standard, in other words, with reference to which a case of a pre-existing dispute under the IBC must be employed cannot be equated with even the principle of*



*preponderance of probability which guides a civil court at the stage of finally decreeing a suit.*' Thus, there is a prior civil suit filed by the Operational Creditor before the Commercial Court, Udaipur, for adjudicating the same amount, which is the pivot for the present application and is an indicator of prior contentious issues.

14. It is seen that the Operational Creditor has placed heavy reliance on the invoices raised, but such invoices purported services which were rendered before the period of limitation. In the absence of any confirmation/acknowledgement by the Corporate Debtor, such invoices cannot be deliberated as it is barred by limitation. Consequently, the same cannot be considered an indicator of the operational debt being due and defaulted in the current set of circumstances of the case.
15. An application under Section 9 of the Code is only maintainable when the contention of the defendant is rejected in its entirety in the civil matter and goes past the appellate stage; it can be presumed that there is no cause of dispute between the parties.
16. The action of the Operational Creditor reflects recovery as the motive for filing the instant application as a dual chance to recover dues. The pre-existence of a pending dispute is an undeniable fact, whatever may be the outcome of the *lis* between parties. Therefore, there is a pre-existing dispute whose merits need not be examined by this Adjudicating Authority, and the



claim of the Operational Debt cannot be raised before this Adjudicating Authority for CIRP of the Respondent Company.

17. Furthermore, the Hon'ble Supreme Court of India, in the matter of 'Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353', held as follows:

*“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 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.”*



18. In view of the foregoing, *inter-alia* including prior civil dispute and time-barred claim, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of the IBC.
19. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
20. Let the copy of the Order be served to the parties and IBBI.

DEEP  
CHANDR  
A JOSHI

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by DEEP  
CHANDRA JOSHI  
Date: 2023.03.16  
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**DEEP CHANDRA JOSHI,  
JUDICIAL MEMBER**

PRASANTA  
KUMAR  
MOHANTY

Digitally signed by  
PRASANTA KUMAR  
MOHANTY  
Date: 2023.03.16  
18:31:05 +05'30'

**PRASANTA KUMAR MOHANTY,  
TECHNICAL MEMBER**