NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1043 of 2021

(Arising out of the Order dated 27th July, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh, in C.P. (IB) No.-9/CHD/HRY/2019)

IN THE MATTER OF:

Greymatter Entertainment Pvt. Ltd.
Through its Authorised Representative
Mr. Chandradev Bhagat
Having its registered office at:
B—802, Express Zone, Western Express Highway,
Malad (East), Mumbai – 400097
Email ID:
chandradev@greymatterentertainment.com **...Appellant.**

Versus

Pro Sportify Pvt. Ltd.
Having its registered office at:
Plot No.243, Near ACC Cement Factory,
Opp Halidram
Khandsa Road, Village Mohammadpur,
Jharsa, Gurugram – 122001
Email ID: ks@itvnetwork.com **...Respondent.**

Present

For Appellant:	**Mr. Kuriakose Varghese, Ms. Aishwarya Hariharan & Mr. Akshat Gogna, Advocates.**
For Respondent:	**Mr. Arvind Nayar, Sr. Advocate with Mr. Varun Tankha, Mr. Akshay Joshi and Mr. Prannoy Joe Sebastian, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Impugned Order dated 27.07.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in C.P. (IB) No.9/CHD/HRY/2019,

by which Order, the Adjudicating Authority dismissed the Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code') by 'Operational Creditor'/*'M/s. Greymatter Entertainment Private Limited',* observing as follows:

> *"9. The second issue to be decided is whether the petitioner proved get, the debt and the liability of the respondent-corporate debtor to pay the same per the demand notice (Annexure-l) dated 20.09.2018 of the petitioner an amount of 830,05,590/- pertaining to Season 2 was due and an amount of ¢34.46.000/- in respect of Season 3 was due totalling an amount of 265.41.590/ was due from the respondent-corporate debtor. In reply to the said contention. the respondent-corporate debtor in its reply stated that it has paid an amount of 21.25 crores as against the agreement requirement of 21.20 crores in respect of Season 2 and has aid 21 crore in full and final settlement in respect of Season 3 for which no agreement was entered into. The petitioner, in spite of the specific averments made by the respondent-corporate debtor in its reply, has not chosen to dispute the same by filing any rejoinder to the said reply. The petitioner has also not denied the contention of the corporate debtor that the invoices raised in respect of Season 3 were not in accordance with the work done and the amount. for the service was over charged and accordingly an amount of 21 crore has been paid in full and final settlement of all the claims in respect of Season 3 In the absence of specific denial of the averments made by the corporate debtor and since the petitioner failed to prove the debt and the liability to pay the same by the corporate debtor, this issue is held against the petitioner."*

2. Succinctly put, the facts in brief are that the 'Operational Creditor' is a Limited Liability Company which has provided services of Live TV Production of Season-1, Season-2 and Season-3 of the Pro Wrestling League ('PWL') held in India in 2015 to the 'Corporate Debtor'. It is averred that it is only for the TV Services of Season-2 of PWL, that the 'Operational Creditor' had entered into a Live Production Agreement dated 29.01.2016. It is stated that the entire

consideration for the three Seasons was not paid and there is a 'debt' and 'default' and hence the 'Operational Creditor' preferred an Application under Section 9 of the Code.

3. Learned Counsel Mr Kuriakose Varghese appearing for the Appellant/'Operational Creditor' submitted that Live TV Production Services for Seasons-1, 2 & 3 were provided to the 'Corporate Debtor' for a total consideration of Rs.2,23,29,790/- for Season-1, Rs.1,20,00,000/- for Season-2 and Rs.1,24,50,000/- for Season-3. It is submitted that out of the total invoices issued by the Appellant for all three Seasons of PWL, despite several emails and even a Legal Notice dated 24.01.2017, the 'Corporate Debtor' had defaulted in payment of Rs.65,41,590/- in addition to interest @12% p.a., the 'date of default' being 10.01.2017. A Demand Notice dated 20.09.2018, as required under Section 8 of the Code was sent to the 'Corporate Debtor', claiming the outstanding amount of Rs.65,41,590/- together with the interest component of 12% p.a.

4. It is contended by the Learned Counsel that sub-Section (1) of Section 9 of the Code makes it abundantly clear that a Demand Notice under Section 8 of the Code is a condition precedent for filing an Application under Section 9 and the Application can be filed only after the expiry of a period of 10 days from the date of delivery of the said Demand Notice. Once the 'Corporate Debtor' receives the Demand Notice, he *shall* within a period of 10 days of the receipt, bring to the notice of the 'Operational Creditor', either the 'Existence of Dispute' or the payment of unpaid 'Operational Debt'. Section 8 mandates the complete procedure for the initiation of Corporate Insolvency Resolution Process, ('CIRP') and once 10 days has passed and no payment is

received or no Notice of dispute is raised under Section 8(2), then the Application enters the jurisdiction realm of the Adjudicating Authority and the wheels of CIRP process will start to roll. It is contended that the Adjudicating Authority should not seek to go beyond what is an express mandate of the Statute particularly when the Statute is clear in its interdict. Learned Counsel, placed reliance on paragraphs 35 and 38 of ***'Mobilox Innovations Private Limited' Vs. 'Kirusa Software Private Limited'[1],*** in support of his submissions. The relevant paras read as follows:

> ***"35.*** *…The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it.…"*
>
> ***"38.*** *It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any.…"*

5. It is submitted by the Learned Counsel for the Appellant that in Section 9(3)(a) an 'Operational Creditor' shall furnish a copy of the invoice demanding payment, or a 'Demand Notice' delivered by Creditor to Debtor. In Section 9(3)(b) an Affidavit is to be filed to the effect that there is no Notice given by the 'Corporate Debtor' relating to a dispute of an unpaid 'Operational Debt'. It is the case of the 'Operational Creditor', that as the 'Corporate Debtor'

[1] (2018) 1 SCC 353

had not replied to the Notice issued under Section 8, both 'debt' and 'default' and the question of no 'Pre-Existing Dispute', is already crystallised prior to the Admission of the Section 9 Application.

6. It is the further case of the Appellant that though under Rule 42 of the NCLT Rules, 2016, the Applicant/Appellant can file a Rejoinder to the Reply filed by the 'Corporate Debtor', the law does not compel the Applicant to file a Rejoinder and any non-filing of the same cannot be held against the Applicant. Learned Counsel placed reliance on the Judgement of a Division Bench of the Madras High Court in ***'Veerasekhara Varmarayar' Vs. 'Amirthavalliammal'***[2] in which it is categorically held that *'the law does not compel the plaintiff to file a Rejoinder challenging the allegations made in the written statement and the failure to file a Rejoinder cannot be treated as an admission of the plea in the Written Statement'.*

7. It is the case of the Appellant that the payment of the outstanding dues was never made in full and final satisfaction and rather it was a part payment of the services rendered during Season-3 of PWL that there was no amicable discussion so as to render the payment of Rs.1,00,00,000/- in full and final settlement that there is no evidence on record filed by the Respondent regarding this full and final settlement; payment of Rs.1,00,00,000/- was admittedly made on 04.01.2018, while invoices for Season-3 are dated 09.01.2018 and 16.01.2018, which has not been disputed; that the Respondent has paid the TDS for the years 2015–16 and has also paid for the year 2016–17 and 2017–18 and has never disputed the invoices sent to it by

[2] AIR 1975 Mad 51

email. It is further the case of the Appellant Counsel that the Appellant had issued a Legal Notice to the Respondent on 24.10.2017 for which there was no response and therefore the Adjudicating Authority was not justified in dismissing the Application filed under Section 9 of the Code.

8. Learned Sr. Counsel Mr. Arvind Nayar appearing for the Respondent contended that some of the documents filed by the Appellant herein (I.A.78/2022) were not part of the record before the Adjudicating Authority; that the Appellant did not choose to rebut the submissions made by the Respondent/'Corporate Debtor' before the Adjudicating Authority by filing a Rejoinder. The same was recorded by the Adjudicating Authority in their Order dated 04.09.2019. It is submitted that no Agreement was entered into for Seasons-1 & 3; that as per 'Settled Terms', total consideration for the services for PWL for Season-1 was Rs.1.75Crs./- and not Rs.2,23,29,790/- as claimed by the Appellant; after proper negotiations an Agreement dated 29.12.2016, was entered into for Season-2 for a total consideration of Rs.1.20Crs/- and it is an admitted fact that the 'Corporate Debtor' had paid Rs.1.25Crs./- after signing this Agreement; there was no agreement for Season-3 and admittedly an amount of Rs.1Cr./- was paid for the services rendered by the Appellant and there is no document on record to substantiate that this amount was paid only towards part payment; that the cheque of Rs.34,46,000/- was erroneously issued by the Accounts Department and this factor cannot be taken as Admission on the part of the 'Corporate Debtor' with respect to issues; that the Appellant had never chosen to avail the remedy available to them under Section 138 of the Negotiable Instruments Act, 1881; the Appellant had never raised any dispute with regard to any shortfall of

payment received by them with respect to Season-1; there is no reference to any shortfall in the payment despite Written Agreement entered into for Season-2 on 29.12.2016; at this stage also no dispute was raised by the Appellant and it was specifically pleaded by the 'Corporate Debtor' that a payment of Rs.1Cr./- was made to words Season-3 in full and final satisfaction.

9. It is denied that there was any shortfall or that there was any adjustment of Rs.29,95,590/- and the same was pleaded specifically in the Written Statement. But the Appellant did not choose to file a Rejoinder and therefore it has to be inferred that there is no dispute regarding the amounts paid in full and final satisfaction. Clause 30 of the Agreement dated 29.12.2016 provides for Arbitration for settlement of any disputes and the Appellant ought to have resorted for the same.

10. It is also contended that merely because there was no Reply to the Section 8 Notice, there is no estoppel for the 'Corporate Debtor' to raise all the relevant issues in their Reply to the Section 9 Notice.

Assessment:

11. The main point for consideration in this Appeal is whether if Section 8 Notice is not replied to, does any provision under the Code prevent the 'Corporate Debtor' from pleading issues of 'Pre-Existing Dispute' or that the 'debt' has been paid, in their Reply to the Petition filed under Section 9 of the Code and whether the Adjudicating Authority was justified in dismissing the Section 9 Application filed by the Appellant herein.

12. At this juncture, it is relevant to reproduce Sections 8 & 9 of the Code which reads as hereunder:

"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 3[payment] of the operational debt in respect of which the default has occurred.

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

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

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

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

> *(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;*
>
> *(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;*
>
> *(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;*
>
> *(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and*
>
> *(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.*

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order–

> *(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -*
>
> > *(a) the application made under sub-section (2) is complete;*
> >
> > *(b) there is no payment of the unpaid operational debt;*

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(a) the application made under sub-section (2) is incomplete;

(b) there has been 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 subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

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

13. It is observed from the aforenoted Sections that neither Section 8 nor Section 9 of the Code indicate that in event Reply to Notice was not filed within 10 days, the 'Corporate Debtor' is precluded from raising the question of

dispute or pleading that there or no amount 'due and payable', the 'Corporate Debtor' is not prevented from establishing by way of a Reply and relevant documents, any 'Pre-Existing Dispute' or paid 'Operational Debt'. We place reliance of the Judgement of this Tribunal in ***'M/s. Brandy Realty Services Ltd.' Vs. 'M/s. Sir John Bakeries India Pvt. Ltd.'***[3]**,** where this has been considered in detail:

> ***"12.*** *... Section 8(2) of the Code provides that 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. Section 9(1) of the Code provides that 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 8(2) when read with Section 9(1), it is clear that Section 9(1) enables the Operational Creditor to file Section 9 application if no payment has been received by the Operational Creditor form Corporate Debtor or no notice of the dispute under sub-section (2) of section 8 has been received. The statutory scheme under Section 8 and 9 does not indicate that in an event Reply to Notice is not filed within 10 days by Corporate Debtor or no Reply to Notice under Section 8(1) have been given, the Corporate Debtor is precluded from raising the question of dispute.*
>
> ***13.*** *Our above conclusion is further fortified then we look into the scheme of Section 9(5)(ii) which provides that the Adjudicating Authority can reject the Application if-"notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility". The above provision indicates that even if no notice of dispute has been received, and there is record of dispute in the Information Utility the Application under Section 9 is to be rejected by the Adjudicating Authority. The above provision clearly*

[3] Comp. App. (AT) (Ins.) No. 958/2020

indicates that even in absence of notice of dispute, Adjudicating Authority can reject the Application if there is record of dispute in the Information Utility. It goes without saying that record of dispute in the Information Utility can very well be pointed out by the Corporate Debtor before the Adjudicating Authority when notice is issued under Section 9. Further in Reply to Section 9 Corporate Debtor can bring the material to indicate that there are pre-existing disputes in existence prior to issuance of demand notice under Section 8. We thus are of the considered opinion that mere fact that Reply to notice under Section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application. In the above context, we may refer to Judgement of this Tribunal in "Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited" (Company Appeal (AT) Ins. No. 1354 of 2019) decided on 24th February, 2020 in paragraph 50 following observations have been made by this Tribunal:

> *"…Even otherwise, mere failure to reply to the demand notice does not extinguish the rights of the Operational Creditor to show the existence of a pre-existing dispute…"*

(Emphasis Supplied)

14. We find force in the contention of the Learned Counsel for the Appellant that though a Rejoinder has not been filed, it cannot be construed that the pleadings in the Reply have been admitted to by the Appellant. The failure to file Rejoinder cannot be treated as Admission of the pleadings in the Written Statement. Be that as it may, now we address to the merits of the case on hand.

15. A perusal of the material on record shows that a cheque of Rs.34,46,00,000/- was issued on 01.02.2018, which was subsequently returned on account of 'Stop Payment' instructions given by the 'Corporate

Debtor'. It is the case of the Appellant that this amount is the exact balance amount which was ought to be paid and is still 'due and payable'. It is the case of the Appellant that despite several emails and phone calls in the year 2018, the 'Corporate Debtor' failed to pay the balance amounts and that there is absolutely no evidence on record brought forth by the 'Corporate Debtor' in support of their contention that the amount of Rs.1Cr./- was paid in full and final satisfaction.

16. It is seen from Item 33 of Part IV of the Application that the sum which the Appellant states is payable by the 'Corporate Debtor' is Rs.65,41,590/- i.e., Rs.30,95,590/- set to be the balance of PWL Season-2 and Rs.34,46,000/- which is said to be the balance of PWL Season-3. It is an admitted fact that there was an Agreement entered into for Season-2 dated 29.12.2016 whereby the total consideration was agreed at Rs.1.20Crs/-. A perusal of the record evidences that there are 'Claims' and 'Counter Claims' regarding the amount which was agreed upon. The email dated 22.11.2015 seen by the Appellant themselves shows the agreed value of the contract for the first Season as Rs.1.75Crs./-, whereas it is the contention of the Learned Counsel for the Respondent that the amount is not Rs.1.75Crs./- but is Rs.2,23,29,790/-. It is also the case of the Respondent that because of the deficient services rendered in Season-3, the cheque which was wrongly issued for Rs.34,46,000/-, was later instructed to the Bank to stop 'payment'. Admittedly, no action has been initiated under Section 138 of the Negotiable Instrument Act, 1881. As there was no Agreement entered into for Season-3, there is no documentary evidence on record to establish that any amount was 'due and payable' by the Respondent herein. There is no communication on

record to establish that the Appellant was entitled by some provisions/promise that this particular amount was liable to be paid.

17. The Hon'ble Apex court in ***'Mobilox Innovations Private Limited' Vs. Kirusa Software Pvt. Ltd.'*** while discussing the 'Pre-Existing Disputes' has observed as follows:

> *"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."*

18. The ratio of ***'Mobilox Innovations Pvt. Ltd.' (Supra)*** is applicable to the facts of this case as it is clear from the material on record that there are 'Claims' and 'Counter Claims' with respect to the amounts to be paid and the defense is not 'spurious' or 'mere bluster'. To reiterate, an Agreement has been entered into only for Season-2 and in the absence of any such Agreement for the other seasons, we are of the considered opinion that the Appellant/'Operational Creditor' has failed to discharge its burden that there was indeed an 'Operational Debt' which was 'due and payable'.

19. For all the aforenoted reasons, this Appeal is dismissed accordingly. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Ms. Shreesha Merla]
Member (Technical)

Principal Bench,
New Delhi
09th February, 2023

himanshu