NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1203 of 2022

IN THE MATTER OF:

1. Ms. Manju Agarwal,
W/o, Lt. Shree Sushil Agarwal,
Aged 64 years,
Office At: E-649, M.I.A. IInd Phase,
Basni Jodhpur – 342005,
Ex-Director M/s. M/s. Agarwal Polysacks Limited. **...Appellant**

Versus

1. M/s. Shree Maru Tradelink Ltd.
215, Ganpati Plaza, M.I. Road,
Jaipur – 302001, Rajasthan **...Respondent No. 1**

2. Ramakishan Agarwal,
F-155, Times Square, Central Spine, Vidhyadhar
Nagar, Jaipur.
I.R.P. of Agarwal Polysacks Ltd. **...Respondent No. 2**

For Appellant: Mr. Manish Paliwal, Ms. Megha Yadav, Advocates.

For Respondent: Mr. Rishabh Khandelwal, Advocate for R-1. Mr. Aditya Gauri, Mr. Amar Vivek, Mr. Abhinav Tyagi, Mr. Dhananjaya Sud, Advocates for R-2.

J U D G E M E N T

ASHOK BHUSHAN, J:

1. This Appeal has been filed against the Order dated 16.09.2022 passed by the National Company Law Tribunal, Jaipur Bench (hereinafter referred to as “The Adjudicating Authority”), by which order, Section 9 Application of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “The Code”) filed by the Respondent has been admitted.

2. The brief facts of the case necessary to be noted for deciding this Appeal are:-

- The Corporate Debtor had been engaged in manufacturing bubble film rolls, Woven sack bags, foam sheets, etc. There have been transactions between the Corporate Debtor and the Operational Creditor since 2005. Purchase Orders were issued by the Corporate Debtor to the Operational Creditor. Payments were made to the Operational Creditor from time to time. With respect to last transaction between the parties, invoice dated 02nd June, 2016 amounting Rs. 4,21,633/- was received from the Operational Creditor. The payment of said invoice was not made, on account of certain dispute regarding the quality. An email dated 03.06.2016 was sent by the Operational Creditor to the Corporate Debtor demanding payment of interest upto April, 2016 of Rs. 8,170/-. The email further requested the Corporate Debtor to issue interest amount at the rate of 18% with invoice value in the next payment done. Email was sent by the Operational Creditor on 06th April, 2018 enclosing the account statement. A Demand Notice dated 18th April, 2019 under Section 8 of the Code was issued by the Operational Creditor claiming payment of Rs. 10,20,763.84/- as principal plus Rs. 5,91,118.49/- as interest up to 15th April, 2019 totaling Rs. 16,11,882.33/-. The Demand Notice was replied by the Corporate Debtor vide Reply dated 01st May, 2019 disputing the demand. Reply Notice dated 01st May, 2019 raised dispute regarding the claim of the Operational Creditor. The Reply notice pleaded that account has been settled between the parties till 31st March, 2016 and thereafter two purchases made on 25th May, 2016, were paid on 02nd June, 2016 of both invoices.

- It was further pleaded that last invoice was received on 2nd June, 2016 for Rs. 4,21,633/-, the Corporate Debtor raised dispute regarding supply of poor/deteriorated quality products and requested to take back the same. The goods however were not taken back and an email was sent on 06th April, 2018 and thereafter demand notice was issued on 18th April, 2019 demanding the amount as noticed above. The Adjudicating Authority heard the parties and by Impugned Order admitted Section 9 Application. Aggrieved by the Impugned Order, the Appellant has come up in this Appeal.

3. Learned Counsel for the Appellant challenging the Order contends that no amount is due on the Corporate Debtor and the demand notice was *mala fide* issued. It is submitted that accounts between the parties were settled upto 31st March, 2016 and thereafter two purchases made on 25th May, 2016 were duly paid for and the last transaction with regard to which invoice dated 2nd June, 2016 was issued by Operational Creditor was not paid for, on account of quality issues and Corporate Debtor requested the Operational Creditor to take back the entire goods which was not taken back. There was no agreement between the parties to pay any interest, in any view of the matter. Email dated 3rd June, 2016 which was sent after the last transaction only asking for payment of interest up to April, 2016 to the amount of Rs. 8,170/- hence there was no question of any liability of interest of any earlier period. The ledger maintained by Operational Creditor were their own document which was never shared with the Corporate Debtor. Last invoice was not paid due to quality issue and in spite of asking to take back the goods they were never taken back hence the payment was not made. The Corporate Debtor was always ready to pay the principal amount of the last invoice dated 02nd June, 2016. The said offer was never accepted by the Operational Creditor. Present was not a case for initiating any ‘'Corporate Insolvency Resolution Proces' against the Corporate Debtor which is solvent company and to show the *bona fide* of the Appellant, Appellant has offered to deposit the entire amount in the Court. Appellant has already deposited the entire amount in this Court. It is submitted that the notice of dispute having been raised by the Corporate Debtor, the Application under Section 9 ought not to have been admitted. Section 9 Application cannot be filed for recovery of dues.

4. Learned Counsel for the Respondent refuting the submissions of Learned Counsel for the Appellant contends that the demand notice demanding principal and the interest totaling Rs. 16,11,882.33/- was as per ledger account of the Operational Creditor, details of which has already been given in Section 9 Application. The Respondent was obliged to pay 18% interest. There was no quality issue regarding the goods supplied and there is no material on record to indicate that Corporate Debtor ever raised any quality issue. It is submitted that notice of dispute issued by the Corporate Debtor was sham and moonshine and could not have been taken into consideration. The Operational Creditor did not accept the offer of the Corporate Debtor to receive the principal amount since the interest is also part of the debt.

5. We have considered the submissions of the Learned Counsel for the parties and have perused the record.

6. Before we come to the facts of the present case, the statutory scheme with regard to the Application under Section 9 need to be recapitulated. Section 8 of the Code requires the Operational Creditor on occurrence of a default to deliver a Demand Notice on unpaid Operational Debt. Section 8(2) provide that Corporate Debtor within a period of 10 days of the receipt of the Demand Notice bring to the notice of the Operational Creditor existence of dispute, if any. Section 8 of the Code is as follows:

> *"Section 8: Insolvency resolution by operational creditor.- (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 2[payment] of the operational debt in respect of which the default has occurred."

7. Under Section 9(1), Operational Creditor if does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, may file an Application under Section 9(1) of the Code. Section 9(1) is as follows:

"Section 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 sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process."

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

"(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (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(i) of the date of receipt of such notice from the adjudicating Authority."

9. With regard to an Operational Creditor, the existence of dispute and its communication to the Operational Creditor is statutorily provided for. Section 9(1) entitles the Operational Creditor to file an Application when it does not receive the payment or notice of the dispute under Sub-Section (2) of Section 8.

10. Now coming to the facts of the present case, after demand notice sent by the Operational Creditor on 18th April, 2019, Reply dated 01st May, 2019 was sent by the Corporate Debtor disputing the demand and categorically mentioning that no debt is due on the Corporate Debtor and all the accounts have been settled between the clients.

11. As noted above, Section 9(5)(ii) contemplates 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. The object and purpose of IBC is to reorganize and revive the Corporate Debtor. Section 9 Application is not contemplated to decide the dispute between the parties regarding the operational dues. The law on the subject has been categorically laid down by the Hon'ble Supreme Court in **[2018] 1 SCC 353 "Mobilox Innovations Private Limited Vs. Kirusa Software Prviate Limited"**. In Paragraph 33 of the Judgement, following has been laid down:

> *"…What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send*

> *an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2)….”*

12. The Hon'ble Supreme Court has further laid down that dispute which is contemplated is not patently feeble legal argument or an assertion of fats unsupported by evidence. In paragraph 51 of the above Judgment, following has been laid down:

> *"…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 fats 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."*

13. To the same effect is another subsequent judgement of the Supreme Court in **[(2019) 12 SCC 697] "Transmission Corporation of Andhra**

Pradesh Limited Vs. Equipment Conductors and Cables Limited" wherein paragraph 13, following has been laid down:

> *"13. From the aforesaid, it follows that existence of an undisputed debt is sine qua non of initiating CIRP. It also follows that the adjudicating Authority shall satisfy itself that there is a debt payable and there is operational debt and the corporate debtor has not repaid the same..."*

14. Same principles have been again reiterated by Hon'ble Supreme Court in **[(2021) 10 SCC 483] "Kay Bouvet Engineering Limited Vs. Overseas Infrastructure Alliance (India) Pvt. Ltd."** where in paragraph 21, Hon'ble Supreme Court again reiterated following:

> *"**21.** It is thus clear that once the Operational Creditor has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is, whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is a mere bluster. It has been held that*

however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application."

15. The crux of the matter in the present case is to find out as to whether there was a plausible dispute supported by the materials raised by the Corporate Debtor in Reply to Demand Notice.

16. The Reply to Demand Notice was admittedly served to the Operational Creditor which is clearly mentioned in Section 9 Application. To find out as to whether the dispute raised by the Corporate Debtor is moonshine dispute unsupported by any evidence, we need to look into the nature of allegations made in the Reply Notice. In paragraph 5, the Corporate Debtor has pleaded that accounts until financial year 2013-14, 2014-15, 2015-16 were settled by 31st March, 2016 and after 31st March, 2016 purchases made by the Corporate Debtor were to be cleared on invoice to invoice basis. In paragraph 6, the last purchase order with regard to invoice dated 2nd June, 2016 has been mentioned. It is useful to extract paragraph 5 and 6 of the Reply to Demand Notice:

"5. That my client has been regularly raising he quality concern of the goods supplied by you and after the purchase made via invoice no. SMPL/JDR/614 dated 10.03.2016 my client made it very clear that he shall stop buying the products forth

you due to the poor quality supplied by you which is adversely effecting the business of my client and as such to resolve the dispute pertaining to the purchase and payments and to continue the business my client a total rebate/discount of Rs. 2,76,413.85/- was offered by you on 31.03.2016 which was accepted by my client and resultantly the accounts until the financial year 2013-14, 2014-15, 2015-16 were settled and as such a MOU was entered between Haldia Petrochemicals ltd. (of which you are authorized direct trading agent) any my client and it was agreed between you and my client that now onwards if they is any variation/deterioration of the quality of goods my clients shall stop business with you and it was further agreed that post 31.03.2016 i.e. after financial year 2015-16 all the purchase made by my client shall be clear on invoice to invoice basis i.e. the exact amount due shall be paid within three working da6ys or before any purchase is made and as such my client has cleared all the dues until the second last purchase which was made vide invoice no. SNTL/JDR/107 Dt. 25.05.2016 amounting to Rs. 2,13,188/- and invoice no. SNTL/JDR/108 dt. 25.05.2016 amounting to Rs. 2,13,188/- which was received by my client and as such the payment was made on 02.06.2016 of both the invoices together.

6. That my client again placed an order for purchase to you which was received by my client vide invoice no. SMPL/JDR/129 dt. 02.06.2016 amount to Rs. 4,21,633/- on which my client raised dispute that you have flouted the oral understanding and MOU and have again supplied poor/deteriorated quality products and as such my client requested you to take

> *back the same on which you requested my client that if purchase are return back in entirely the image/goodwill of yourself in the market shall be put to stake and your business shall be adversely affected and as such you requested my client you shall take back the product in piecemeal."*

17. The reply further refers to Email dated 3rd June, 2016 which was sent by Operational Creditor in para 7. Paragraph 7 is as follows:

> *"7. That as the accounts were settled until 31.03.2016 and you are very well aware about the same and as you had a oblique motive, you have sent a E-mail dated 03.06.2016 mentioning the interest @18% with invoice value of the next payment to be done by my client and with that E-mail you have attach a debt note dated 31.05.2016 in which you have only mention about the interest and delay charges for the month of April, 2016, which makes it very clear that if the accounts until 31.03.2016 were not settled between you and my client then in the above mentioned debt note you would have mentioned about the previous dues but as there was no due you have not mentioned anything over the said debt note."*

18. The email dated 3rd June, 2016 has been annexed with the Reply Notice which email was sent by Operational Creditor which is to the following effect:

> *"-----Forwarded message----*
> *From: shree maru <shreemaru2002@yahoo.co.in>*
> *To:Agarwalpolysacks agarwalpolysacks@yahoo.com>*

Sent: Friday, 3 June, 2016, 11:57:35am IST

Subject: DEBIT NOTE

Respected Sir

*We enclosed Delay Payment *interest charges up to April 2016 Rs. 8170/-Plz. Make chq. this amount you are discuss our director Mr. S. sethia*

Also, you are requested to issue interest amount @18% with invoice value of next payment done by you.

Regards

RG Kasliwal"

19. The averments of the Corporate Debtor are that the accounts till 31st March, 2016 were settled hence interest charges upto April, 2016 of Rs. 8,170/- were asked for by email dated 03.06.2016 which also said that subsequent payment has to be made with 18% interest. Paragraph 9 further gives a details of happening where the Operational Creditor denied to collect the goods and settlement was entered there between the parties that Operational Creditor shall not raise any demand of payment. Paragraph 9 and 12 of the Reply is as follows:

"9. That your business affairs were managed by Sh Sajjan Sethiya who is very well aware about the above mentioned facts and the business affairs of my client was handled by the managing director Sh. Sushil Agarwal son of Sh. P.K. Agarwal who expired on 27.09.2016 and until 27.09.2016 you never approached my client to take back the products and

after the death of Sh. Sushil Agarwla the other director of my client Sh. Abhilove Agarwal son of Sh. Sushil Agarwal again requested you in the month of October, 2016 to take back the products lying with my client so purchased on 02.06.2016 and it was then that you denied to take back the products and in turn you made an offer to my client to dispose of the entire purchase made on 02.06.2016 as it is very difficult for you to again collect the goods and it was settled between you and my client that you shall not raise any demand of payment and as such after the final communication between you and my client in October, 2016 the business relationship between you and my client came to an end and the entire accounts between you and my client were settled and since then no demand of any south was raised by you thereafter.

12. That you since the settlement of account you had oblique motive and as such sent the Email dated 06.04.2018 just to keep the issue pending in eyes of law and to cheat my client have dishonestly and in fraudulent manner have raised the dispute after more than three years which clearly speak volume about your dishonest conduct and as such my client shall initiated necessary legal action against you for the breach of trust and fraud committed by you over my client.

Therefore by way of this reply notice you are hereby directed to withdraw you above subject notice as you are very well aware that no such debt is due of my client towards you as all the accounts has been settled between you and my client, failure to

> *withdraw the notice my client shall take necessary legal action against you and you shall be liable for all consequence thereto."*

20. When we look into the contents of allegations made in the Reply Notice, it is clear that Reply notice raises substantial and genuine issues to oppose the claim of the Operational Creditor's amount due. The email dated 3rd June, 2016 as extracted above clearly indicates that Appellant was demanding only for an amount of Rs. 8,170/- towards interest charged up to April, 2016 as the amount due of the Operational Creditor. The email dated 03rd June, 2016 sent by the Operational Creditor fully support the averments made in the Reply notice which is a notice of dispute given by the Corporate Debtor to the Operational Creditor. Present is a case where it cannot be said that defence taken by the Corporate Debtor in Reply Notice is a moonshine defence unsupported by any evidence. With regard to the issues raised in the Reply-Notice, the Adjudicating Authority in paragraph 23,24 and 25 has made following observations for rejecting the defence:

> "23. *Concerning the pre-existence of dispute with respect to quality of goods, it is observed that the Respondent has raised this issue for the first time via its Reply to the Demand Notice dated 03.05.2019. This makes it a superfluous contention raised as an afterthought to escape the liability of payment.*
>
> *24. Further, the Respondent in its Reply to the Demand Notice had claimed that a settlement of account had been done between both the parties in July, 2016 and October, 2016. However, no*

> *document to substantiate the same has been placed on record by the Corporate Debtor.*
>
> *25. It is also evident from the above that the Corporate Debtor has defaulted in payment of the debt to the Operational Creditor. Further, he has raised the contention of the dispute just to flout the principle of law which states that if there is a pre-existing dispute between the parties, an Application filed under Section 9 if not maintainable."*

21. It is well settled that in Section 9 Proceeding, the Adjudicating Authority is not to enter into final adjudication with regard to existing of dispute between the parties regarding the Operational Debt, what has to be looked into as to whether the defence raises a dispute which need further adjudication by competent court. The nature of dispute raised in Reply Notice required adjudication by Competent Court for finding out the validity of the claim of Operational Creditor.

22. The Adjudicating Authority in its Order although has referred to the Judgement of the Hon'ble Supreme Court in the matter of **"Mobilox Innovations Pvt. Ltd."** (Supra) but failed to apply the ratio of the Judgement in the facts of the present case. In the entire discussion, the Adjudicating Authority has not referred to email dated 3rd June, 2016 which was sent by the Operational Creditor to the Corporate Debtor much prior to Demand Notice dated 18th April, 2019.

23. The fact is that last invoice was issued on 2nd June, 2016 which was not paid by the Corporate Debtor. There is no material on record to indicate that any further demand, emails and letters were sent asking for payment of amount of Rs. 4,21,633/- of the last invoice till 06th April, 2018. Admittedly there have been no transactions between the parties after 31st May, 2016. Issuing the email for the first time in the year 2018 on 06th April, 2018 and thereafter issued a Demand Notice on 18th April, 2019 gives credence to the plea taken by the Corporate Debtor that accounts between the parties were settled in 2016 itself. No reasons have been given by the Operational Creditor as to why no demand was made for payment of last invoice dated 2nd June, 2016 for more than 22 months.

24. Learned Counsel for the Appellant has also placed reliance on judgment of this Tribunal in **Company Appeal (AT) Ins. No. 540 of 2020 in the matter of "M/s. Amsons Communication Pvt. Ltd. Vs. M/s. ATS Estates Pvt. Ltd."** where dealing with a proceeding under Section 9 and after noticing the judgement of the Hon'ble Supreme Court, we laid down following in Paragraph 14:

> *"14. In the present case, when the Corporate Debtor in its reply to Section 9 Application has clearly and categorically denied it liability to pay any interest, there was case of payment of any agreed interest."*

25. In view of the foregoing discussions, we are satisfied that Corporate Debtor having raised genuine disputes by sending a Reply Notice to the Demand Notice, the Adjudicating Authority ought not to have admitted the Section 9 Application. We thus allow this Appeal, set aside the Order dated 16th September, 2022 of Adjudicating Authority and dismiss Section 9 Application filed by the Operational Creditor. It shall however be open for the Operational Creditor to take such proceeding in law for its dues, if any, in appropriate forum as permissible in law. The amount deposited by the Appellant under Orders of this Court be refunded to the Appellant.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Mr. Barun Mitra]
Member (Technical)

NEW DELHI
12th December, 2022

Basant