NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1170 of 2022

[Arising out of order dated 25.08.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Indore Special Single Bench at Ahmedabad in TP No.259/2019 [CP (IB) No. 203/9/NCLT/AHM/2018]

IN THE MATTER OF:

Writers and Publishers Pvt. Ltd.
6, Dwarka Sadan, Press Complex,
MP Nagar Zone 1,
Bhopal – 462 011 **...Appellant**

Versus

1. **M/s Oriental Coal Corporation,**
   65, East High Court Road,
   Ramdaspeth,
   Nagpur – 220 010 **...Respondent No. 1**

2. **Bhaskar Foods Pvt. Ltd.**
   Through CA Shri Shambhulal Agrawal,
   Interim Resolution Professional,
   Sambhu & Associates,
   2nd Floor, Kolkata Bazaar Building,
   Nayapara, Sambalpur,
   Odisha – 768001 **...Respondent No. 2**

Present:

For Appellant: **Mr. Ashish Dholakia, Sr. Advocate, Ms. Fareha Ahmad Khan, Mr. Arpit Kr. Singh, Advocates**
For Respondents: **Mr. Bharat Gupta, Mr. Varun Tyagi, Advocates for R-1.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal is filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arising out of the Order dated 25.08.2022 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Indore Special Single Bench at Ahmedabad) in TP No.259/2019 in CP (IB) No. 203/9/NCLT/AHM/2018. By the Impugned Order, the Adjudicating Authority admitted the application filed under Section 9 of the IBC by the Operational Creditor, present Respondent No. 1. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. The brief facts of the case necessary to be noticed for deciding the appeal are: -

- The present Appellant is the parent entity of Bhaskar Foods Private Limited, the present Respondent No. 2 which was into manufacture of certain products for which Steam Coal was required for use in their plants. Purchase orders were issued by Respondent No.2 to M/s Oriental Coal Corporation, Operational Creditor/Respondent No.1 for supply of 500 MT of Steam Coal.
- The material was delivered from time to time by the Operational Creditor /Respondent No.1 with corresponding invoices. The purchase orders contained certain terms and conditions including quality parameters.

- For reasons of not having received payment for the materials supplied, Respondent No.2 was served a demand notice by Operational Creditor/Respondent No.1 on 12.03.2018 for Rs.46,95,033/- including interest amount of Rs 28,63,389/-. The demand notice was followed by filing of a Section 9 application before the Adjudicating Authority in May 2018.
- The matter was first heard by a two member Bench of the National Company Law Tribunal, Ahmedabad Bench-I. As the two members on the Bench gave two separate dissenting final orders, the matter was assigned to a third Member for disposal.
- The Adjudicating Authority on 25.08.2022 held that debt is established, having been acknowledged by the Corporate Debtor, and default having occurred, it admitted the Section 9 application after holding that that defence of pre-existing dispute raised by the Corporate Debtor is moonshine defence.
- Aggrieved by the above impugned order, the Appellant has preferred this appeal praying for setting aside the impugned order.

3. Making his submissions, the Learned Counsel for the Appellant stated that purchase orders was issued by Respondent No. 2 to Respondent No.1/Operational Creditor on 17.12.2013 and 20.01.2014 for supply of Steam Coal. The purchase orders clearly indicated the need to adhere to prescribed quality parameters. While admitting that the coal supplies were received from Respondent No.1, it was mentioned that part of the coal supplied was of substandard quality as brought out by Coal Quality Assessment Laboratory

Reports. Submitting that the Respondent No.2 had got coal analysis done by Coal Quality Assessment Laboratory which found that the calorific value stipulated in the purchase orders was not met.

4. It has been further submitted by the Learned Counsel for the Appellant that the Respondent No.2 made payments only for that part of the coal consignment which was of acceptable quality while debit note was issued to reduce the payment with respect to deficient quality of coal supply. The debit note was issued in terms of the purchase orders which made a specific mention that the cargo supply should meet the quality parameters failing which the cargo shall be rejected or rebate shall be adjusted.

5. It was further claimed that payment of Rs.42,50,000/- was made by Respondent No.2 between January 2014 to March 2015 to the Respondent No.1. Further Debit note amounting Rs.17,59,286/- was raised against Respondent No.1 on 16.11.2015 as no efforts were made to resolve the dispute relating to supply of substandard quality of coal. The total balance of payments to be made for the coal supply was Rs.28,31,644 on 14.11.2015 and that after adjusting the debit note amounting to Rs.17,59,286/-, only a total amount of Rs.10,72,359/- became payable. It has also been claimed that the Respondent No.2 made full and final payment of Rs.10,00,000/- on 12.01.2016 to Respondent No.1. It has been further submitted that the Adjudicating Authority had failed to appreciate that the Respondent No.2 had made regular payments throughout the period of dispute against consignments that met the quality standards set out in the purchase orders.

6. Harping on the coal quality test reports, the Learned Counsel for the Appellant has therefore contended that there was pre-existing dispute with respect to inferior quality of steam coal supplied by the Operational Creditor under Purchase Orders in question which had led to issue of debit note. It is also submitted that the Adjudicating Authority failed to appreciate that Respondent No.2 had justifiably raised the defence of pre-existing dispute but by ignoring the Coal Standards Laboratory Test Reports the defence has been erroneously viewed as "moonshine defence". It has also been submitted that the Adjudicating Authority should have appreciated that these disputed questions of facts between the parties can only be adjudicated through trial in terms of the judgement of the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** (hereinafter referred to as **'Mobilox'**).

7. It was also added that the Adjudicating Authority had failed to appreciate the binding precedent of this Tribunal's decision dated 26.10.2021 upholding the order of the National Company Law Tribunal, Ahmedabad Bench in an identical matter where the issue of debit note and lab reports was held as constituting pre-existing disputes. It has been further stated that the Adjudicating Authority had passed the impugned order without giving them an opportunity of hearing as on two occasions they were unable to join the hearing due to connectivity glitches.

8. The Learned Counsel for the Respondent No. 1 while refuting the submissions made by the Appellant stated that debit note dated 16.11.2015

was never issued to them and that the issuance of debit note had actually been brought up for the first time by Respondent No. 2 only at the time of filing objections before the Adjudicating Authority in October 2018. It has been contended that Respondent No.2 did not indicate in the objections filed before the Adjudicating Authority as to how and by which mode the alleged debit note was serviced upon Respondent No.1. No proof has either been given to establish that the debit note was received by Respondent No.1. It has been further pointed out that the alleged debit note suffers from several discrepancies. It does not specifically refer to those invoices under which coal supplied was found to be of inferior quality for which debit note was issued. The debit note also makes mention of "details attached" but no details were found attached. Moreover, the debit note mentions supply of coal from January 2014 to February 2014 while no coal was supplied in February 2014. The debit note also fails to indicate and bifurcate the tax amount. The alleged debit note had been issued on 16.11.2015 which was more than 21 months after the last supply was made. Thus it was asserted that the debit note had been manufactured and was fabricated later on as an after-thought.

9. It has been vehemently contended that Respondent No.2 had never raised any dispute with regard to quality of coal supply earlier. As regards Coal Test Analysis Report, it has been contended that the reports are fake as it does not indicate the name of the lab where test was done nor indicates the date and time when the coal was tested and that the report was not filed or annexed with objections when filed before the Adjudicating Authority. The details of the invoice qua which the coal was tested is also absent. No proof

has either been submitted by the Respondent No.2 to show that the alleged lab reports were communicated to Respondent No.1. No document has also been placed on record by Respondent No.2 raising quality issues of the coal supplied with Respondent No.1. It was asserted that the coal test reports are concocted and were manufactured later on and were submitted for the first time only as additional documents before the Adjudicating Authority and not when the demand notice was issued in March 2018. The Learned Counsel for the Respondent No.1 placed reliance on the judgment of Hon'ble Supreme Court in Mobilox supra to assert that dispute, if any, has to be in existence prior to the demand notice and should have been brought to the notice of the Operational Creditor which has not happened in the instant case. The Learned Counsel for the Respondent No. 1 has also mentioned that if the alleged issue of debit note and the story of defect in goods was genuine, it is in-explicable as to why payments were made even after January 2014 without first resolving the alleged dispute. The fact that payment continued to be made shows that the story of defect in goods was concocted and improbable.

10. On the issue of debt due and outstanding, it has been submitted by Learned Counsel for Respondent No. 1 that Respondent No.2 by their own admission in the objections filed have admitted the principal outstanding amount for the financial year 2013-14 and 2014-15. Moreover, it was submitted that Respondent No.2 has admitted the debt of Rs 28,31,644/- in their email dated 05.08.2015 as placed at page 90 of their reply affidavit and that this email has not been disputed by Respondent No.2 either before the Adjudicating Authority or before this Tribunal. The total amount of debt in

Part IV filed under Section 9 application is Rs. 46,95,033/- of which the amount receivable towards invoice issued was Rs.18,31,644/- and amount receivable towards interest on delayed payments outstanding on invoice issued was Rs.28,63,389/-. It has been also submitted by the Learned Counsel for the Respondent No.1 that the supplies were made pursuant to purchase orders issued by Respondent No.2 and the terms of the purchase order clearly stated that payment was to be made within 20 days of the invoice and that if the amount is not paid within the due period, interest @ 2% per month was to be levied. No payments have however been received from Respondent No.2 pursuant to demand notice issued on 12.03.2018. Thus the debt having been acknowledged and no payment has been made even after issue of demand notice the default in payment subsists.

11. Stating that the outstanding amount was not barred by limitation, it was submitted that Respondent No.2 has been making part payments from time to time with the last such payment having been made on 13.01.2016 for a sum of Rs. 10,00,000/-. Since the last payment was made on 13.01.2016, the Section 9 application filed on 09.05.2018 was well within the stipulated period of limitation of 3 years. Furthermore, the admission and acknowledgement of debt by Respondent No.2 in their email dated 05.08.2015 provides a fresh period of limitation of 3 years and hence the Section 9 application filed on 19.05.2018 was well within the period of limitation.

12. On the ground raised by the Appellant that the decision of this Tribunal in CA(AT)(Insl) No.1015 of 2020 in the matter of Oriental Coal Corporation Vs.

Decore Exxoils Pvt. Ltd dated 26.10.2021 should have been held by the Adjudicating Authority as binding precedent, it has been contended that as the facts of the two cases relate to separate transactions and the entities involved are not identical, the two cannot be inter-twined and hence the ratio is not binding on the Adjudicating Authority.

13. It is further submitted that demand notice was sent on 12.03.2018 and the receipt of the same not been denied or challenged by Respondent No. 2. Respondent No.2 has also not denied that no reply was sent to the said demand notice. Section 9 application was filed by Respondent No.1 before the Adjudicating Authority in May 2018. However, during hearings, the Respondent No.2 chose to remain absent on three consecutive days i.e. 13.05.2018, 09.07.2018, 01.08.2018 and finally filed its objection only in October 2018. Moreover, the reasons for their absence on 3 consecutive dates of hearing before the Adjudicating Authority has also not been explained. Yet again, when the matter came up for hearing before the third member, after a detailed hearing on 28.04.2022, the Respondent No.2 again did not appear on 01.06.2022 and 27.06.2022 on the grounds that there were technical glitches and could not join the hearing. This was merely an excuse manufactured to drag and delay the proceedings as others did not find any connectivity impediments during the date of hearing.

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

15. The short point for our consideration is whether payment of operational debt above the threshold limit to the Operational Creditor/Respondent No.1 had become due and payable and whether pre-existing dispute is discernible or not. In this regard, the Hon'ble Supreme Court in Mobilox at Para 34 has laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows:-

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
>
> *(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*
>
> *If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*

16. Coming to the question of whether operational debt being due and payable has remained unpaid or not, we find in the present case, the total amount of debt in Part IV filed under Section 9 application by Respondent No.1 is Rs. 46,95,033/- of which the amount receivable towards invoice issued was Rs.18,31,644/- and amount receivable towards interest on delayed payments was Rs.28,63,389/-. We find that the Adjudicating Authority has also taken note that the invoice raised by Respondent No.1 stipulated interest @ 2% per month if invoices were not paid up by the due period. This factum has not been controverted by Respondent No. 2 in their submissions or pleadings. It has therefore been correctly held by the Adjudicating Authority that the amount of interest for delayed payment has become a part of contractual debt as per invoice and hence an operational debt.

17. We also note that Respondent No.2 has admitted the debt of Rs. 28,31,644/- in their email dated 05.08.2015 as placed at page 90 of reply affidavit of Respondent No. 1. This email has not been disputed by Respondent No.2 either before the Adjudicating Authority or before this Tribunal. The Adjudicating Authority in the impugned order has therefore committed no error in holding that an amount of Rs.28,31,644/- as debt stands acknowledged by the Corporate Debtor in their email dated 05.08.2015. That no payments have been received from Respondent No.2 pursuant to demand notice issued on 12.03.2018 is also not disputed. On the issue whether the debt is time-barred, the Adjudicating Authority has duly considered the matter and held that since the Corporate Debtor made the last

payment of Rs.10 lakhs on 13.01.2016 and Section 9 application was filed on 09.05.2018, the application was within limitation and not barred by law. As it is well settled that any part payment shall trigger fresh period of limitation from such date, we do not find any error in the findings of the Adjudicating Authority in this regard and agree that the debt was not barred by limitation.

18. The Appellant's case on the other hand is that against the total balance of outstanding payments of Rs.28,31,644/- on 14.11.2015, adjustment of Debit note amounting Rs.17,59,286/- was raised against Respondent No.1 on 16.11.2015 in view of the dispute relating to supply of substandard quality of coal merits appropriate attention. It has also been claimed that after adjusting the debit note amounting Rs.17,59,286/-, only an amount of Rs.10,72,359/- became payable against which full and final payment of Rs.10,00,000/- was made on 12.01.2016 and thus there was no operational debt above Rs.1 lakh due to Respondent No.1.

19. The issue of debit note raised by the Appellant brings for our consideration as to whether there was a pre-existing dispute when Notice under Section 8 was issued. It will be useful to have a look at the provisions of Section 8 IBC which is as follows :-

> ***"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 payment of the operational debt in respect of which the default has occurred."

20. A plain reading of the above provision reveals that sub-section (2) of Section 8 obligates the Corporate Debtor who has been delivered a Demand Notice under Section 8(1) by Operational Creditor to bring to the notice of the Operational Creditor the "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". There is a statutory purpose for requiring a Corporate Debtor for bringing into notice of the Operational

Creditor about the existence of a dispute in its reply to Section 8(1) notice. The purpose is that if there is a dispute in existence, the same be immediately communicated to the Operational Creditor so that he charts out his next actionable step. If no mention of existence of dispute is made by the Corporate Debtor, the Operational Creditor can go ahead and file an application under Section 9(1). In the present case the demand notice has been served on Respondent No.2 on 12.03.2018 to which no reply has been furnished by Respondent No.2 and therefore the Respondent No.1 was well within its rights to file the Section 9 application.

21. It is well settled that existence of dispute when the Demand Notice was issued is a mandatory condition for exercising jurisdiction to reject the application by the Adjudicating Authority as is envisaged in Section 9(5) of IBC which reads as follows:-

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

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(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."

22. We now come down to examine whether there was any pre-existing dispute raised during the stage of notice or whether there was any dispute on the date of filing the application under Section 9 of the IBC in light of the

guiding principles laid down by the Hon'ble Supreme Court in Mobilox. It is relevant to refer to paras 33, 51 and 56 of the said Judgment which is extracted as hereunder:

> *"33.....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 maybe. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days sent and 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 an operational creditor has encashed a cheque or otherwise received payment from the corporate debt [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)....."*
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> ****** ***** *****
>
> *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."

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"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."

23. Further, the Hon'ble Supreme Court in ***(2021) 10 SCC 483, Kay Bouvet Engineering Ltd. vs. Overseas Infrastructure Alliance (India) (P) Ltd.*** in para 21 has reiterated the same proposition in the following words:-

"21. .....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."

24. It is a well settled proposition that for a pre-existing dispute to be a ground to thwart an application under Section 9, the dispute raised must be truly existing at the time of filing a reply to notice of demand as contemplated by Section 8(2) or at the time of filing the Section 9 application. In the present case, we notice that no reply was framed in response to the demand notice at

all. In such circumstances the Adjudicating Authority is only required to look into the substance of the pleadings to find out whether a real dispute is discernible from the stated facts.

25. The Adjudicating Authority in its findings has noted that there was a provision in the Purchase order which stipulated compensation against the supply of inferior quality of goods. It also took note of the fact that the Corporate Debtor had raised a debit note dated 16.11.2015 for an amount of Rs.17,59,286/- towards inferior quality of coal supplied. However, whether this dispute was in the nature of pre-existing dispute, it has held:

> *"The Corporate Debtor has not brought on record any communication/evidence establishing pre-existing dispute prior to issuance of the demand notice on 13.03.2018. There is no acknowledgement of debit note by Operational Creditor neither any proof is placed for service of debit note on Operational Creditor by Corporate Debtor. No correspondence or any document about any dispute between the parties. Thus, defence raised by the Corporate Debtor that there is pre-existing dispute is moonshine defence and an afterthought debate by the Corporate Debtor".*

26. Coming to the present case, we may now examine from the material on record and related facts, as to whether the defence of debit note on account of inferior quality of coal supply raised by the Respondent No. 2 as pre-existing dispute is supportable or not. It is an undisputed fact that the notice of demand was issued on 12.03.2018. Hence, we proceed to examine from

the material on the record to find out was to whether there was any dispute raised by the Corporate Debtor regarding inferior quality of coal supplied by Respondent No.1 prior to 12.03.2018 being the date on which Demand Notice was issued. We find that the Coal Quality Assessment Reports have been placed on record by Appellant in the Appeal Paper Book from pages 45-108. As regards, Coal Test Analysis Report, no substantive proof has been submitted by the Respondent No.2 to show that the lab reports were actually communicated to Respondent No.1 before the issue of demand notice. No document/correspondence has also been placed on record by Respondent No.2 to establish that coal-quality issues were taken up with Respondent No.1 prior to issue of demand notice. Dispute, if any, has to be in existence prior to the issue of demand notice and should have been brought to the notice of the Operational Creditor which has clearly not happened in the instant case. This lends credulity to the stand taken by the Learned Counsel for Respondent No.1 that had genuine disputes been in existence, the Respondent No.2 would have articulated these disputes by responding to the demand notice and not remained silent. We are inclined to agree with the Respondent No.1 that the coal test reports appear to be an after-thought which is validated by the fact that these reports were submitted as additional documents before the Adjudicating Authority by Respondent No.2 only after the Section 9 application had been filed by Respondent No.1.

27. The absence of proof of delivery of the debit note to operational creditor is yet another pertinent point raised by Respondent No.1 and lends credibility to the contention that debit note dated 16.11.2015 was never issued to

Respondent No.1 on that date. The explanation of the Appellant that since the Respondent No. 2 had sold its business hence postal receipts of debit notice delivery are not available is not a cogent or persuasive explanation. We also note that Respondent No.2 has not indicated in the objections filed before the Adjudicating Authority as to how and by which mode the debit note was actually serviced upon Respondent No.1. No proof has either been given while filing their objections before the Adjudicating Authority to establish that the debit note was received by Respondent No.1. It has been stated in the rejoinder filed by the Appellant that the issue of supply of sub-standard coal was raised during personal meetings but fails to explain why such a serious matter was never followed-up in writing even once. It has also been pointed out that the alleged debit note suffers from the discrepancy that it does not specifically refer to those invoices under which coal supplied was found to be of inferior quality. Moreover, the debit note suffers from a gross infirmity that it mentions supply of inferior coal during the month of February 2014 while no coal was supplied in February 2014. While disputes pertaining to contractual issues are not to be resolved in Section 9 proceedings, we find it intriguing that the debit note was issued on 16.11.2015 surpassing a period of 21 months since the last supply was made.

28. In the light of the above, we are of the considered view that the findings of the Adjudicating Authority that the defence raised by the Respondent No. 2 is an after-thought and a moonshine defence do not appear to be misplaced. We find that the Adjudicating Authority in the present case has carefully considered the reply and submissions made by the Respondent No.2 and has

correctly come to the conclusion that there is no ground to establish any real and substantial pre-existing dispute. We also find no convincing reasons to be persuaded that there was any pre-existing dispute.

29. Finally coming to the plea raised by the Appellant that the Respondent No.2 was denied the opportunity of hearing before the Adjudicating Authority on account of connectivity problems, we are of the view that had Respondent No.2 been vigilant about protecting its own interests, they had ample opportunity to approach the Adjudicating Authority to seek a hearing as there was a long intervening gap between the last date of hearing and date of pronouncement of order. We therefore find this plea to be superfluous and do not attach any weight thereto.

30. In view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in admitting the Section 9 application filed by Respondent No.1. There is no merit in the Appeal. Appeal dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 15.12.2022

PKM