NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1290 of 2022

[Arising out of order dated 14.10.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-II in C.P. (IB) 1374 (MB) /2019]

IN THE MATTER OF:

Siraj Ali Patel
Suspended Director,
Swiss Entertainment Pvt. Ltd.
2, Patel Palace CHS,
Near Jeevan Vikas Kendra Marg,
Koldongri, Sahar Road, Andheri (East),
Mumbai – 400 069 **....Appellant**

Vs.

Epigram
Through its Sole Proprietor Nabeel Abbas,
Having its registered office at
Roop Mangal, 3rd Floor,
Near Rajesh Khanna Garden, 16th Road,
Santacruz (West), Mumbai – 400 054 **....Respondent No.1**

Swiss Entertainment Pvt. Ltd.,
Having its registered office at
2, Patel Palace CHS,
Near Jeevan Vikas Kendra Marg,
Koldongri, Sahar Road, Andheri (East),
Mumbai – 400 069 **....Respondent No.2**

Present:

For Appellant: **Mr. Prakhar Tandon and Mr. Nikhil Mishra, Advocates.**

For Respondents: Mr. Kushagra Bansal, Advocates

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed under section 61 of the Insolvency and Bankruptcy code, 2016 ('**IBC**' in short) by the appellant arises out of order dated 14.10.2022 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-II) in C.P.(IB)-1374(MB)/2019. By the impugned order, the Adjudicating Authority admitted the Section 9 application under IBC filed by the Operational Creditor and initiated Corporate Insolvency Resolution Process ('**CIRP**' in short) against the Corporate Debtor with immediate effect. Aggrieved by this impugned order, the present appeal has been preferred by the suspended director of the Corporate Debtor.

2. The brief facts of the case as brought out by the Learned Counsel for the Appellant is that Swiss Entertainment Private Limited, the Corporate Debtor was in the business of producing and making movies which entered into a business engagement with Epigram, the Operational Creditor which was into integrated marketing and creative communication. The agreement was entered into on 28.08.2017 by which the Operational Creditor was to provide digital marketing services and carry out printing job of publicity material for the Corporate Debtor for a film named "Haseena Parker" produced by them.

3. Elaborating further on the terms and conditions of the engagement letter and emphasising that these terms and conditions had been

unconditionally accepted by the Operational Creditor, the Learned Counsel for the Appellant submitted that the Operational Creditor was to receive an amount aggregating Rs.66,00,000/-for executing this job and that if the work done was not satisfactory, the Operational Creditor was liable to pay the Corporate Debtor an amount of Rs.70,00,000/-. It has been further stated that the Operational Creditor was reminded on several occasions about the shortcomings in the service delivered by them which included quality of printing job and lethargy in delivery of material which hampered the marketing of their film. That the Operational Creditor had illegally hijacked the login ID and password of the digital account of the Corporate Debtor was yet another cause of dispute with the Operational Creditor. Despite providing unsatisfactory services, the Operational Creditor continued to raise invoices and sought payments from the Corporate Debtor. The Learned Counsel for the Appellant submitted that the Corporate Debtor had contended that they were not liable to pay the claims made by the Operational Creditor.

4. The Learned Counsel for the Appellant also submitted that to begin with a Legal Notice dated 07.03.2018 was received from the Operational Creditor seeking payment of Rs.36,85,680.18. A reply was sent thereto by the Corporate Debtor on 17.03.2018 denying each and every allegation contained in the said Legal Notice and a counter claim was made against the Operational Creditor seeking payment of an amount of Rs.70,00,000/- for having failed to provide satisfactory services to the Corporate Debtor. It was asserted that this Legal Notice pre-dated the issue of statutory demand notice under Section 8 of IBC which therefore clearly indicates the presence of pre-existing dispute.

5. It has been further submitted that the Operational Creditor subsequently sent a demand notice on 02.08.2018 to which a reply was sent on 09.08.2018 disputing the claims of the Operational Creditor. The Operational Creditor thereafter filed a Section 9 petition to which the Corporate Debtor filed a reply on 16.11.2019.

6. The Learned Counsel for the Appellant has contended that the Section 9 application was wrongly admitted by the Adjudicating Authority on the sole ground that there was no ground for pre-existing dispute between the parties though there was strict evidence proving the contrary and that aggrieved by the impugned order, this appeal has been preferred.

7. Refuting the above submissions, the Learned Counsel for the Respondent No.1/Operational Creditor submitted that the Corporate Debtor had agreed to pay a sum of Rs.35,00,000/- towards digital media marketing and another sum of Rs.31,00,000/- towards printing job besides additional liability arising from additional printing job. The Operational Creditor claimed that the total outstanding payment due from the Corporate Debtor amounted to Rs.55,38,347/- which was reflected in Part IV of Form-5 submitted along with the Section 9 application. Submitting that in terms of the engagement letter of 28.08.2017, all printing job was to be done as per requirement of AA Films which was the distributor of the film Haseena Parker, it was added that they had delivered quality service and their work was appreciated by the Director of the movie Haseena Parker which is on record. The movie was released on 22.09.2017. It has been vehemently claimed that no defects or

disputes were ever raised by the Corporate Debtor in the services offered by them and that the Corporate Debtor in order to evade the outstanding payment to the Operational Creditor has created the false pretext of lack of quality in the material printed.

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

9. The issue before us for our consideration is whether the operational debt claimed by the Operational Creditor was admitted by the Corporate Debtor as due and payable and not surrounded by pre-existing disputes.

10. We find that the Operational Creditor has raised the issue of outstanding payment from the Corporate Debtor both in the Legal Notice dated 07.03.2018 and the Demand Notice dated 02.08.2018. In the Legal Notice, the demand raised is Rs. 36,75,680.18 while in the Demand Notice the demand raised is Rs. 55,38,347/-. On the additional expenditure incurred beyond the engagement terms of 28.08.2017, the Operational Creditor has claimed to have met all additional requirements placed by the Distributor after obtaining confirmation from the Corporate Debtor about the additional costs and expenditure thereto. It was also pointed out that the distributor of AA Films on 22.09.2017 had acknowledged receipt of all publicity materials as placed on record at Page 98 of Appeal Paper Book (“**APB**” in short). The Learned Counsel for the Respondent No.1 submitted that the Operational Creditor had raised invoices for supply of different printing material to the

Corporate Debtor and that there were outstanding payments due from them. On the contention raised by the Corporate Debtor that the demand notice under Section 8 of the IBC was defective in that it does not specify the date of default and does not provide detailed explanation of how the alleged debt became due and payable, the Learned Counsel for the Respondent No.1 submitted that there was no defect in the demand notice issued by the Operational Creditor as the date of default was clearly indicated on each of the invoices which was incorporated in Part IV of Form 5. The Corporate Debtor had however failed to repay the outstanding amount due and payable by raising baseless and unsubstantiated grounds.

11. The Learned Counsel for the Appellant, however, pointed out that the Corporate Debtor in their reply to the Legal Notice as well as Demand Notice had categorically denied any dues outstanding or payable to the Operational Creditor. It has been argued that the Operational Creditor owed them a sum of Rs. 70,00,000/- for inefficient, defective and poor quality of services and that this claim was raised in their reply to the Legal Notice and Demand Notice.

12. We find from material on record that the Corporate Debtor had denied the liability to pay any outstanding amount to the Operational Creditor in their reply to the Legal Notice which predates the Demand Notice. The relevant excerpts from the reply to the Legal Notice which has been placed on record by the Appellant at Page 112-113 of APB is reproduced below: -

"3. At the outset, it is vehemently denied that my Clients owe your Client a sum of Rs.36,75,680.18/- (Rupees Thirty Six Lakhs Seventy

Five Thousand Six Hundred And Eight Rupees and Eighteen Paise Only) along with interest at the rate of 18% per annum. Your Client has failed to appraise you of the fact that he had failed to live up to my Client's expectations with respect to the Digital Marketing of the movie Haseena. That my Clients are not liable to pay your Client any monies, on the contrary, your Client is liable to pay my Clients Rs.70 Lakhs as per the engagement letter dated 28.08.2016 which your Client has agreed to and signed upon."

We also note that the Corporate Debtor in their reply dated 09.08.2018 (as placed at Page 168 of APB) to the Section 8 Demand Notice had reiterated that they do not owe any money with regard to invoices specified by them in their demand notice and made a counter claim of Rs.70,00,000/- from the Operational Creditor for their inefficient and defective work.

13. That the Corporate Debtor had categorically denied the liability for payment of any outstanding amount due to the Operational Creditor has also been taken note of by the Adjudicating Authority and the relevant excerpts of the impugned order is as extracted hereunder: -

"7. ....After perusal of all the relevant documents, it is evident that the primary issue for consideration is whether a dispute existed prior to the issuance of the Demand Notice by the Operational Creditor. To examine this issue, the following communications are relevant. The Operational Creditor wrote to the Corporate Debtor on 7th March 2018 demanding payment of the amounts due against the 9 invoices raised totalling to a principal amount of Rs.36,75,680/- including interest at

the rate of 18% per annum. The Corporate Debtor replied to this Notice vide Letter dated 17th March 2018 raising disputes regarding the quality of the work performed and other contentions relating to withholding of social media accounts belonging to the Corporate Debtor leading to financial losses and vehemently denied any obligation to pay pending dues to the Operational Creditor. On perusal of the e-mail communications between the parties, it is observed that there was no reference to any form of dispute regarding quality of the work and in fact, the Operational Creditor sought necessary approvals from those representing the Corporate Debtor before sending or finalizing the posters and other publicity material to which the Corporate Debtor responded positively. Later, the movie was released and even at this stage there was no indication of any dispute.

8. It is therefore evident that the disputes raised by the Corporate Debtor vide letter dated 17th March 2018 were an afterthought and there is no evidence presented to demonstrate their dissatisfaction with the work done by the Operational Creditor before the Legal Notice dated 7th March 2018 was issued."

14. From the above extracted paragraphs of the impugned order, we find that the Adjudicating Authority while noting that the Corporate Debtor has denied their obligation to pay pending dues to the Operational Creditor, it has further held that the disputes raised by the Corporate Debtor in denying the claims is an after-thought and that there is no evidence presented to

demonstrate their dissatisfaction with the work done by the Operational Creditor.

15. We therefore, now come down to examine whether there was any pre-existing dispute between the two parties which was more than a patently feeble legal argument.

16. It is a well settled that the guiding principles on treatment of Section 9 application have been laid down by the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353** ('**Mobilox**' in short). It is relevant to refer to paras 51 and 56 of the said Judgment which is extracted as hereunder:

> *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."

17. It is the case of the Operational Creditor that the Corporate Debtor had raised a false and concocted story of not being satisfied with the work of the Operational Creditor only to evade payments. In terms of the engagement letter of 28.08.2017 all the printing jobs were to be done as per the requirement from AA Films and since the Director of the film of Haseena

Parker had appreciated their work, that would suffice to establish that they had discharged their services without any shortcomings. Furthermore, prior permission was obtained by the Operational Creditor from the Corporate Debtor before finalising the posters or sending publicity material. It has been further submitted that if their work was not satisfactory then the Corporate Debtor would not have awarded contract for the next film, "Omerta".

18. Challenging the findings recorded in the Impugned Order that there were no disputes regarding quality of work, it has been contended by the Corporate Debtor that the engagement letter of 28.08.2017 clearly provided that the work had to be performed to the satisfaction of the Producer and not to any third party. It will be useful at this juncture to note the contents of the said engagement letter which is as below.

> *"Dt:- 28.08.2017*
>
> *To,*
> *Epigram,*
> *Roop Mangal Bldg, 3RD Floor,*
> *Near Rajesh Khanna Garden,*
> *16TH Road, Santacruz-West,*
> *Mumbai – 400 054.*
>
> *Sub: -Your engagement for social media marketing and printing job for the film "HASEENA PARKAR"*
>
> *Dear Sir,*
>
> *Towards the performance of your services for digital media marketing and printing job for our film as needed by us we agree to pay Rs.35.00 Lakhs (Thirty Five Lakhs Only) including applicable GST for digital marketing and Rs.31.00 Lakhs (Thirty One Lakhs Only) including applicable GST for overall printing job towards our upcoming movie HASEENA PARKAR.*
>
> *<u>All printing job will be done as per the requirement from AA FILMS.</u>*

Above mentioned amount will be inclusive for all your digital marketing services and professional charges and printing job and no extra amount will be paid other than the agreed amount towards the services for the whole movie.

Epigram will pay Rs.70.00 Lakhs (Seventy Lakhs Only) to the producer if the promotion is not done to the satisfaction of the Producer.

With this new agreement all previous related agreement of Epigram and Epigram digital will stand null and void and Rs. 8.50 Lakhs (Eight Lakhs Fifty Thousand Only) previous paid amount will be deducted from this above mentioned agreed amount.

Thanking you,

For Swiss Entertainment Pvt. Ltd. *I Hereby agree to the above*
Authorised Signatory *For Epigram*

Place:- Mumbai
Date: -28.08.2017

*(**Emphasis supplied)***

19. It has been further contended by the Corporate Debtor that when the authorised signatories of the engagement letter were the Operational Creditor and the Corporate Debtor and there was no third party, it is absurd on the part of the Operational Creditor to rely on an appreciation letter from a third party to substitute the satisfaction of the Corporate Debtor. It was strenuously argued by the Learned Counsel for the Appellant that any comment made by the Distributor of A.A. Films, not being the signatory to the engagement agreement, therefore, needs to be disregarded. It is further pointed out that the appreciation letter from the third party also contain statements which reflect that there was heated exchange of words between the Producer and the Operational Creditor as well as between the Operational Creditor and Corporate Debtor. It was submitted that the heated exchange

centred around the issue of payments as well as the digital campaign which therefore clearly establish that there were pre-existing disputes. Further, it was submitted that the Adjudicating Authority had ignored the fact that quality of posters was also to be kept in mind and not merely the quantity of posters supplied.

20. It is the case of the Corporate Debtor that disputes had been raised by the Corporate Debtor with regard to the services performed by the Operational Creditor in their reply to the Legal Notice and Demand Notice in terms of extremely unprofessional work and being extremely lethargic in deliveries. The Corporate Debtor had also raised the issue of the illegal act of hijacking of the User ID and Password of their social media accounts on YouTube, Twitter and Facebook by the Operational Creditor and that this had come in the way of promoting their movie thus causing financial loss. It would be useful to extract relevant paragraphs from the reply to the Legal Notice dated 17.03.2018 as below: -

> *"5. I have to also bring to your notice that it is extremely preposterous that your Client had changed and with held the YouTube channel and Twitter account password of my Clients which has caused immense loss to them. Your Client was in charge of the digital marketing of the movie Haseena Parker and this illegal act of hijacking my Clients social media accounts was completely despicable. That the said accounts were under the name of my Clients, Swiss Entertainment. That your Client has been extremely unprofessional in his work and moreover extremely lethargic with his deliveries. My Clients sent*

repeated requests to your Client via several e-mails to release the passwords as my Clients were suffering from financial losses due to the same and were unable to promote their upcoming movies. However, your Client refused to do so thereby committing offences punishable under the Indian Penal Code, 1860 and the Information Technology Act, 2000".

(Emphasis supplied)

21. Similar disputes with regard to poor services and hijacking of social media accounts have been articulated by the Corporate Debtor in their reply to the Demand Notice dated 09.08.2018, relevant excerpts of which is as extracted below: -

"2….. My Clients state that the quality of work handed over by you was extremely poor and not to the satisfaction of my Clients. It is emphasized that the said Engagement Letter requires the Producers i.e my Clients to be satisfied with the promotional work done by you. Thus, the present dispute, being based on the poor services provided by you, the present notice is not tenable.

***** ***** ******

3. ……. That you had miserably failed to promote the said movie on the digital platform which was one of the services you were to provide to my Client as per the Engagement Letter dated 28.08.2017. Thereafter, my Clients sent repeated requests to you via several e-mails to release the passwords as my Clients were suffering from *financial losses due to the same and were unable to promote their upcoming movies. However, you refused to do so.”*

(Emphasis supplied)

22. We find that the very fact that the Operational Creditor had issued a Legal Notice is suggestive of a pre-existing dispute between the two parties. That the contentions raised in the Legal Notice were countered by the Corporate Debtor reinforces the existence of dispute between the parties. It is also pertinent to note that the Legal Notice was issued much before the issue of Demand Notice. That the reply to Legal Notice clearly predates the Section 8 Demand Notice by nearly five months has somehow managed to escape the attention of the Adjudicating Authority. Thus to hold that the disputes raised in the reply to the Legal Notice is an ‘after-thought’ is fallacious and hopelessly misplaced on the part of the Adjudicating Authority.

23. The Learned Counsel for the Appellant has filed IA No. 4032 of 2022 seeking permission of this Tribunal to place on record certain emails exchanged between the Corporate Debtor and Respondent No.1 as additional documents to show that there was pre-existing dispute in regard to quality of services provided by the Operational Creditor. This was contested by the Learned Counsel for the Respondent No.1 stating that these documents were never filed before the Adjudicating Authority and therefore cannot be raised at this stage. The Learned Counsel for the Appellant countered this by stating that these additional documents have an important bearing on the present matter since they partake same objections as had been raised before the Adjudicating Authority and therefore should be admitted in the interests of

justice. In support of their contention, reliance was placed on the orders of this Tribunal in Company Appeal (AT) (Ins) 592 of 2020 dated 20.10.2020 wherein it was held that *"the placing of letters/communications as additional documents in an appeal squarely depend upon whether the same are required to a Tribunal to enable it to deliver a judgment"*. Having perused the emails, we find that they are linked to the controversy between the two parties which had been raised before the Adjudicating Authority and therefore find them relevant to decide whether there was a dispute between the two parties in the facts of the present case. Since no extraneous issues or considerations have been raised in these emails other than what was mentioned before the Adjudicating Authority, we find no reasons to agree with the Respondent No.1 for not taking cognisance of these emails contained in IA No. 4032 of 2022.

24. Now, coming to the material on record placed in I.A. No. 4032 of 2022, it has been pointed out by the Learned Counsel for the Appellant that there are several email communications from the Corporate Debtor which show dispute relating to the quality of services performed by the Operational Creditor which were sent much before receipt of Demand Notice. It has been brought to our knowledge that on 19.09.2017 there is an email communication from the Corporate Debtor to the Operational Creditor stating that the printing material for the movie Haseena Parker has not been delivered on time thereby affecting movie publicity as at Page 31 of APB. It was also submitted that on 27.02.2018 the Corporate Debtor had requested the Operational Creditor to hand over the User ID and password of their YouTube/Twitter account to which the Operational Creditor replied on

28.02.2018 seeking clearance of their due payment. The Corporate Debtor on the same date has sent a reply denying any payment due from them in terms of their ledger accounts and reiterated their request for release of the User ID and password to which the Operational Creditor again replied that it would be released only on receipt of payments due to them. The entire set of related email communications relating to release of user ID and password of YouTube Channel, Twitter and Facebook account of the Corporate Debtor by the Operational Creditor have been placed at page 32-36 of the APB. The email dated 02.03.2018 therein also show that the Corporate Debtor had threatened to lodge a police complaint against the Operational Creditor for having hijacked their social media accounts. Having perused these communications, we are convinced that there were genuine pre-existing disputes between the parties which is more than a moonshine defence.

25. It is well settled that in Section 9 proceeding, there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent court. If we apply the above cited test laid down in Mobilox by the Hon'ble Supreme Court to the facts of the present case, it becomes clear that the defence raised by the Corporate Debtor is not illusory or a sham and that the nature of dispute raised is such that it requires adjudication by the competent court.

26. In view of the foregoing discussions, we are satisfied that the Corporate Debtor having raised genuine disputes in their detailed replies to the Legal

Notice and the Demand Notice, the Adjudicating Authority ought not to have admitted the Section 9 application. The Order dated 14.10.2022 passed by the Adjudicating Authority initiating CIRP of the Corporate Debtor and appointing Interim Resolution Professional and all other orders pursuant to impugned order are set aside. The Corporate Debtor is released from the rigours of CIRP with immediate effect. This appeal is allowed with the above observations. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi

Dated: 25.01.2023

PKM