

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT)(Insolvency) No. 413 of 2022**

[Arising out of order dated 08.04.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench in CP(IB) No. 100/KB/2019]

**IN THE MATTER OF:**

**SPBP Holding Pvt. Ltd.  
Shareholder of Wearit Global Limited  
Crescent Tower, 229, AJC Bose Road,  
Kolkata – 700 020**

**...Appellant**

**Versus**

**Lomat International NV  
Through its Director  
Henri Lebbestraat 190,  
Waregem 8790, Belgium**

**...Respondent No.1**

**Wearit Global Limited  
Through its Director  
Crescent Tower, 5<sup>th</sup> Floor, 229, AJC Bose Road,  
Kolkata – 700 020**

**...Respondent No.2**

**Present:**

**Appellant: Mr. Sanjeev Sen, Sr. Advocate with Mr. Mayank Bughani, Ms. Anjali Singh, Ms. Radha Gupta, Mr. Bhavesh Sharma, Ms. Aastha Mehta, Ms. Prerana Mohapatra, Ms. Yasha Goyal, Advocates.**

**For Respondents: Mr. Pranay Agarwal, Mr. Abhishek Jain, Mr. Shivansh Bhatt, Advocates for IRP.  
Mr. Vivek Sibal, Sr. Advocate, Mr. Preetpal Singh, Mr. Saurabh Sharma, Advocate for R-1.  
Ms. Malvika Trivedi, Sr. Advocate with Mr. Santosh Kumar Ray, Mr. Ashish Choudhury, Advocates for Indian Bank. Mr. Sujal Gupta, Advocate.**

## J U D G M E N T

**[Per: Barun Mitra, Member (Technical)]**

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 08.04.2022 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) in CP (IB) No.100/KB/2019. By the impugned order, the Adjudicating Authority has admitted the application under Section 9 of the IBC filed by Lomat International NV-present Respondent No.1 and initiated Corporate Insolvency Resolution Process (“**CIRP**” in short) of the Corporate Debtor – M/s Wearit Global Limited. Aggrieved by this impugned order, the present appeal has been filed by SPBP Holding Pvt. Ltd., shareholder of the Corporate Debtor.

2. The brief facts of the case which are necessary for deciding this appeal are as outlined below: -

- The Operational Creditor – Lomat International NV supplied and delivered raw material to the Corporate Debtor for which invoices were raised from time to time.
- The Operational Creditor claimed that payment against 4 invoices had fallen due of which the fourth invoice dated 02.11.2017 fell due for payment on 01.03.2018.
- The Operational Creditor issued Section 8 demand notice on 21.09.2018.
- The Section 8 demand notice was replied by the Corporate Debtor on 03.10.2018 raising disputes.

- A Civil Suit was filed by the Corporate Debtor on 01.12.2018 before the Hon'ble Calcutta High Court vide Title Suit No. 1256/2018. A counter-claim was also filed by the Operational Creditor in this Title Suit.
- The Operational Creditor filed a Section 9 application in January 2019 claiming an operational debt of USD 2,933,869/- and Euro 8423 against 4 invoices.
- The Adjudicating Authority allowed the Section 9 application on 08.04.2022 admitting the Corporate Debtor into CIRP. This appeal has been preferred against the impugned order.

3. The Learned Senior Counsel for the Appellant, assailing the impugned order, submitted that the Adjudicating Authority while admitting the Section 9 application had erroneously disregarded the pre-existing dispute raised by the Corporate Debtor-Appellant in their emails of 15.06.2018 and 30.07.2018 which preceded the Section 8 notice of 21.09.2018.

4. It was contended that the Corporate Debtor in their email dated 15.06.2018 had highlighted the existence of cyclical business arrangement as well as the failure on the part of the Operational Creditor to honour their obligation of buying yarn from the Corporate Debtor which had brought this cyclical arrangement to a limbo. Reference has also been made to another email of 30.07.2018 wherein the Corporate Debtor requested the Operational Creditor to sort out the business roadblock by having a discussion across the table. These emails centering around the proposition to amicably settle disputes between the Corporate Debtor and the Operational Creditor were sufficient proof of pre-existing disputes.

5. It was also mentioned that in their email of 15.06.2018 there is clear reference to resolution of their disputes through arbitration to avoid litigation which amounted to clear admission of existence of disputes. It was also emphasized that these disputes having arisen prior to issue of demand notice by the Operational Creditor including the request made for arbitration, Section 9 application could not have been admitted.

6. It is also the contention of the Corporate Debtor that in this business arrangement, there were multiple parties involved which included Chimtex SA, a sister concern of the Operational Creditor, Globaltex BV, an associate concern and Credendo, a credit insurance company and Indo-Rama amongst others. This cyclical business arrangement with multiple parties had crystallized on 22.08.2017. Because of multiple parties being involved and interlinked adhoc payments, there was a need for reconciliation of accounts both in terms of quantity of goods and value thereof. However, the Operational Creditor mischievously cherry picked four isolated invoices to claim outstanding payments. It is also the contention of the Appellant that the Operational Creditor, being a foreign corporate entity, was interested more in the recovery of dues from the Corporate Debtor rather than seeking resolution of the Corporate Debtor thereby violating the objectives of the IBC.

7. It has also been contended that Civil Suit which had been filed arose out of communications dated 15.06.2018 and 21.06.2018. Since these communications were all prior to the issue of demand notice and constituted the basis of the Civil Suit, it validates that disputes were pre-existing. Moreover, the Operational Creditor having filed a counter-claim in the Civil Suit, also shows that there was a dispute between the parties. The

Adjudicating Authority thus committed a mistake in concluding that the filing of Civil Suit was an after-thought though it clearly signified a pre-existing dispute.

8. Making rival submissions, the Learned Senior Counsel for the Operational Creditor denied that there was any oral agreement to have a cyclical business arrangement between the Corporate Debtor and the Operational Creditor. It was stated that this story of cyclical arrangement has been contrived as an after-thought with the mala-fide intention to avoid payment of admitted debts. The only arrangement which was discussed between the two parties was in the context of a repayment and recycling plan with the provision of supply of additional raw material under the LC with credit period of 120 days. This arrangement was premised upon timely payment of debt-due but the Corporate Debtor had processed the payment only up to first milestone of the repayment. From 30.11.2017 onwards, they released only some part payments and thus breached the arrangement towards repayment of outstanding debt as per payment schedule and recycling plan with 120 days LC. It was contended that this was a clear case wherein the Corporate Debtor had admitted the debt but defaulted in making payments and now raising the spurious ground of disputes to evade payment.

9. It was emphatically asserted that of the four invoices for payment raised by the Operational Creditor, the last invoice was dated 02.11.2017 which fell due on 01.03.2018. As on that date, no dispute had been raised by the Corporate Debtor with regard to quantity or quality of the goods supplied. Moreover, the Corporate Debtor had acknowledged the debt vide email dated 29.06.2017. In another mail dated 12.07.2017, the Corporate Debtor had

expressed several difficulties faced in making payments on account of implementation of GST, demonetization, etc. Having admitted their outstanding debt on several occasions in the past and not being sufficiently capacitated to pay the same, the Corporate Debtor raised the bogey of pre-existing disputes to avoid the wrath of insolvency proceedings.

10. It has also been pointed out that there was no Arbitration Agreement between the parties nor any clause for reference to arbitration in the business agreement between the two parties. The Corporate Debtor devoid of financial capability to run the business operations tried to wriggle out of IBC by requesting for arbitration in their email of 15.06.2018. Furthermore, even the Civil Suit TS No.1265 of 2015 which had been filed by the Corporate Debtor was so done with a mala-fide intention and was clearly an after-thought as it was filed after receipt of statutory demand notice.

11. IA No. 4295 of 2022 has been filed by Vijay Cotton and Fibre Company LLP (hereinafter referred to as “**Applicant**”) seeking to be impleaded as intervenor and for issue of directions to the Resolution Professional (‘**RP**’ in short) to collate the claim of the applicant as financial creditor. It has been submitted that the applicant filed its proof of claim as financial creditor with the RP on 17.05.2022. However, the RP transgressed his powers and held the claim to be an operational debt and not a financial debt. The IA has been opposed by the Appellant on the ground that the claim of the applicant as a financial creditor having already been rejected by the RP, this application may not be allowed.

12. I.A. No. 4930 of 2022 has been filed by the Interim Resolution Professional in which it has been submitted that due to stay on the

constitution of the Committee of Creditors (“CoC” in short) as per interim orders of this Tribunal dated 19.04.2022, the fees of IRP have not been confirmed. Further, the expenses incurred having exceeded the amount of Rs. 5 lakhs which was deposited by the Operational Creditor to run the Corporate Debtor as a growing concern, further expenses would be necessitated which would require the approval of the CoC. The IRP has claimed to have admitted claims exceeding Rs.500 crore and prayed that CIRP fund be set up to enable the IRP to conduct CIRP smoothly. The Appellant has contended that the IRP has mis-represented the financial position of the Corporate Debtor and inflated their expenses.

13. I.A. No. 3395 of 2022 has been filed by the Indian Bank seeking to be admitted as intervenor in the present matter which has been allowed on 20.07.2022. It has been submitted that the Corporate Debtor became NPA on 20.09.2019 and outstanding dues of the Corporate Debtor qua them is Rs. 144 crores. The IA has been opposed by the Corporate Debtor on the ground that the applicant is not a financial creditor.

14. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully. The short point for consideration is whether the Corporate Debtor created a moonshine defence on frivolous grounds or there were genuine pre-existing disputes which escaped the attention of the Adjudicating Authority while passing the impugned order.

15. Much emphasis has been laid by the Learned Senior Counsel for the Appellant to explain the long-term cyclical business arrangement entered between the Corporate Debtor and the Operational Creditor. It has been

contended that there are several correspondences, documents and emails on record dated 28.06.2017, 12.07.2017, 26.07.2017, 28.07.2017 and 22.08.2017 which evidence cyclical business arrangement. The disruption of this business arrangement by the Operational Creditor provides basis to pre-existing disputes but these have all been erroneously ignored by the Adjudicating Authority.

16. Explaining the business arrangement, it was stated that the Operational Creditor was to export raw material in the form of Mono Ethylene Glycol ("**MEG**" in short) to the Corporate Debtor and for this purpose the Corporate Debtor had purchased machinery and provided to the Operational Creditor. The MEG received by the Corporate Debtor was to be utilized for producing of yarn which in turn would be imported/purchased by the Operational Creditor thereby completing the business cycle. It was also stated that the Operational Creditor, as part of this arrangement was to also supply MEG to Indo Rama, which would convert the same into an intermediate product – Fibre - and sell to the Corporate Debtor for manufacturing yarn.

17. However, this business cycle was disrupted by the Operational Creditor by not buying yarn from the Corporate Debtor. It was pointed out that as against export of MEG material worth Rs.413 crore by the Operational Creditor during 2012-18, the import of yarn from the Corporate Debtor was only for Rs.130 crore. This disturbed the financial flow as envisaged in the buy-back arrangement and had become a bone of contention between the parties before the issue of demand notice.

18. The Learned Senior Counsel for the Respondent No.1 refuted the above contention of the Corporate Debtor and denied the existence of any cyclical business arrangement. In support of their contention, it was contended that

the Appellant in their email of 15.06.2018 as placed at pages 35-39 of the Additional Affidavit (hereinafter referred to as “AA”) and in their reply affidavit to the Section 9 application at pages 67-81 of the AA, have themselves clearly admitted that no formal written agreement was entered into between them with regard to any cyclical business arrangement. It was contended that the first time such a cyclical arrangement was referred to by the Corporate Debtor was on 15.06.2018. Prior to this email of 15.06.2018, none of the correspondences made reference to any such business arrangement. It is also asserted that the Operational Creditor had specifically denied the existence of any such business arrangement vide their email dated 21.06.2018 which was followed by a detailed reply on 09.07.2018.

19. At this stage it may be useful to take notice of both the aforesaid replies furnished by the Operational Creditor which is to the effect:

*“From: Thomas Dewaele [mailto:[thomas@chimtex.lu](mailto:thomas@chimtex.lu)]  
Sent: Thursday, **June 21, 2018 2:00 PM**  
To: Sandeep Agarwal; [manishkumar@wearitgroup.com](mailto:manishkumar@wearitgroup.com); 'S Bardhan'  
Cc: Mathias Hostens; Noël Van Driessche; COPPENS Benoit; Cindy Blancke; Marc Dewaele; LOMAT, Tony Taillieu; Sofie Dewaele; Jan Catry; Christophe Ghyselinc  
Subject: FW: Our ongoing discussion on cyclical agreement / arrangement*

*Dear Sir,*

*We acknowledge receipt of your message below.*

*We are extremely surprised and disappointed with your message, which is no more than a false and **vain attempt to escape the fact that you have a substantial debt towards us**, a debt which is long overdue and which you have expressly acknowledged on several occasions.*

*We **completely disagree with the contents of your message** and will revert with a substantiated response shortly.*

*Yours sincerely,*

*Thomas Dewaele”*

**(Emphasis supplied)**

*"From: Marc Dewaele [Marc@Lomat.be](mailto:Marc@Lomat.be)  
Sent: Monday, July 09, 2018 2:49 PM  
To: Sandeep Agarwal; [manishkumar@wearitgroup.com](mailto:manishkumar@wearitgroup.com)  
Cc: 'Mathias Hostens'; 'COPPENS Benoit'; Cindy Blancke; Tony Taillieu;  
'Sofie Dewaele'; Dewaele Thomas Chimtex SA  
Subject: RE: Our ongoing discussion on cyclical agreement / arrangement*

*Dear Mr. Agarwal*

*At the **outset the contents of your mail dated June 15, 2018 are totally wrong, baseless and are thus vehemently denied** unless specifically admitted in this response. It is clear that at this belated stage you have concocted frivolous allegations solely in order to deny payment of the legitimate dues of EUR 8,423.70 and USD 2,933,869.00 owed by you to Lomat and dues of USD 4,159,309.00 owed to Chimtex.*

***We specifically deny of having any agreed arrangement with you as regards the 'Cyclical Business Agreement'.** Though from time to time we have been purchasing yarns from you as and when we have a requirement, however there was never any commitment from us for purchasing yarns from you or any commitment for purchase of any minimum quantity of yarns from you. Further sale of raw materials and purchasing of yarns from you are two different nature of transactions and cannot be clubbed together and moreover you cannot use this as an excuse for non payment of our dues on account of supply of raw materials you.*

*Further we vehemently deny your allegations that you have requested for execution of written agreement for alleged 'Cyclical Business Arrangement', in this regard we state that **there was never any understanding as regards the alleged 'Cyclical Business Agreement' and therefore there was never any discussion as regards execution of any written agreement.***

*We further deny having received from you an advance sum of appx. USD 468000, in this regard we submit that the said payment was paid by you as regards payment of our invoices towards supply of raw materials to you. We remind you that further payments by you were also a pre-condition to releasing a new delivery of raw materials by Lomat under the repayment scheme which was agreed between Credendo/Lomat and yourselves and which you failed to comply with as from November 2017.*

*It is wrong and thus we specifically deny having introduced the credit insurers viz. Credendo/Coface to you with a representation that they will assist you in finding new buyers for your yarns. Credit insurers got involved as they have an interest in this matter as the underlying transaction was insured by them.*

***We suggest that you resolve this matter amicably without further delay which will be in your larger business interest considering the involvement of credit insurers in this matter and we further suggest that you must immediately start to make the payments towards the outstanding dues of EUR 8,423.70 and USD 2,933,869.00 owed by you to Lomat and dues of USD 4,159,309.00 owed to Chimtex.***

*Yours sincerely,*

*Marc Dewaele  
Thomas Dewaele”*

***(Emphasis supplied)***

20. From the material facts available on record and in particular the email dated 15.06.2018, we have taken cognizance that it has been categorically admitted by the Corporate Debtor that this cyclical business arrangement was not supported by any written document. We also take notice that the first reference to a cyclical business arrangement was admittedly made by the Corporate Debtor in their email sent to the Operational Creditor on 15.06.2018. It is also an undisputed fact that the contents of this email of 15.06.2018 was specifically denied by the Operational Creditor on 21.06.2018 and 09.07.2018. Both the above emails bear ample testimony to the fact that the Operational Creditor had denied any cyclical business arrangement having been agreed between them at any stage.

21. That being so, we may now dwell upon the argument advanced by the Corporate Debtor that emails on record dated 28.06.2017, 12.07.2017, 26.07.2017, 28.07.2017 and 22.08.2017 also evidence cyclical business arrangement. A close look at this clutch of emails/correspondence placed at pages 147-152 of AA however show that these emails had no nexus with any cyclical business arrangement but relate primarily to payment schedules including the provision of supply of additional raw material under the LC with the credit period of 120 days. The only arrangement which was discussed in all these emails was about payment plans and recycling LC with no whisper about the cyclical arrangement.

22. Given this backdrop, we are reasonably convinced that both parties were never at ad idem on the existence of any cyclical business arrangement. Hence, we are of the considered opinion that cyclical business arrangement cannot be construed to form the basis of any pre-existing dispute either in terms of the email dated 15.06.2018 or the preceding clutch of emails which have been referred to at para 16 above.

23. We may now look into the tenability of the contention of the Operational Creditor that the Appellant had defaulted in making payment for the goods supplied against the invoices raised. We notice that in their emails of 21.06.2018 and 09.07.2018 which has been reproduced at para 19 above, the Operational Creditor has taken a consistent stand that the Corporate Debtor has failed to clear their outstanding debts and that sale of raw

materials and purchase of yarn being separate transactions cannot be clubbed together.

24. The present facts on record clearly show that the Operational Creditor supplied and delivered raw material to the Corporate Debtor and raised corresponding invoices. No dispute has been raised by the Corporate Debtor with respect to quantity and quality of goods received by them. Corporate Debtor admittedly had made several part-payments against invoices from 01.03.2017 till 28.02.2018. We notice that the Corporate Debtor acknowledged their debt in their email dated 29.06.2017 and had transferred Euro 75,000 as at page 240 of AA. Further vide email dated 31.07.2017, the Corporate Debtor in acknowledgment of their debt had transferred Euro 1,00,000 to the Operational Creditor as at page 242 of AA. The Corporate Debtor has failed to produce any proof to show that it had made full and final payments to the Operational Creditor.

25. This brings us to the contention of the Operational Creditor that the Corporate Debtor had failed to clear their debts due to their financial incapacity and not for any other credible reason. To examine this contention, we have scanned through the emails exchanged between the two parties. Perusal of the email addressed to the Operational Creditor by the Corporate Debtor on 12.07.2017 as placed at page 148-149 of AA, for instance, clearly shows that they admitted to their own financial difficulties which prevented them from clearing the payments due. The said email has attributed these difficulties to strike in the textile mills on account of GST implementation; technical glitches in Custom Department due to GST implementation and cyber hacking in Mumbai Port. The Corporate Debtor

citing these reasons had made a proposal for recycling LC of 120 days. We also notice that the Operational Creditor while agreeing to making changes in the payment schedule and recycling plan owing to the difficulties faced by the Corporate Debtor had made this subject to priority clearance of old debts as conveyed by their email of 28.06.2017. The email communication of 28.06.2017 and 12.07.2017 are reproduced below: -

*“From: Mathias Hostens [mailto:M.Hostens@credendo.com]  
Sent: **28 June 2017** 20:00  
To: 'Manish Kumar' <manishkumar@wearitgroup.com>; Sandeep Agarwal <sandeep@wearitgroup.com>  
Cc: Noël Van Driessche <N.VanDriessche@credendo.com>; Karin Deesen <K.Deusen@credendo.com>; Jeroen Van Diesen J.VanBiesen@credendo.com>; Marc@lomat.be;  
Cindy@Lomat.be  
Subject: RE: pour file 25866 weart it global vs Lomat*

*Dear Mr. Kumar, dear Mr. Agarwal,*

*Thank you for the below message.*

*First of all, Mr. Kumar, we would like to take the opportunity to thank you again for inviting us for a constructive meeting in your offices and for your hospitality.*

*The recycling proposal you made during our meeting (attached) was discussed at the level of our executive committee. They are willing to participate in a recycling scheme between you and Lomat. However, they also believe that some of the terms of your proposal can be improved.*

*Firstly, we propose that the new deliveries under the recycling scheme are payable on 120 days Instead of 180 days. **Also, while we appreciate the uncertainties you are currently facing with the implementation of the GST, we believe that an extra effort can be made as soon as this turmoil is expected to be over and therefore would like to see higher monthly payments by the end of 2017. This would allow the old debt to be cleared sooner than proposed.***

*We hope this is acceptable to you and would kindly ask you to send us an amended proposal reflecting our expectations.*

*In the meantime, **we look forward to receiving your payment of 75,000 EUR, which we definitely perceive as a confirmation of your willingness to settle this debt**, as you confirmed several times during our meeting.*

*We look forward to hearing from you.*

*Best regards.*

*Mathias Hostens”*

**(Emphasis supplied)**

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“From: Sandeep Agarwal [mailto:sandeep@wearitgroup.com]  
Sent: woensdag **12 jull 2017** 15:21  
To: Mathias Hostens; 'Manish Kumar'  
CC: Noël Van Driessche; Karin Deesen; Jeroen Van Biesen;  
Marc@lomat.be; [Cindy@Lomat.be](mailto:Cindy@Lomat.be); sandeep@wearitgroup.com;  
tony@lomat.be; [sandeep@wearitgroup.com](mailto:sandeep@wearitgroup.com)

Subject: RE: pour file 25866 wearit global vs Lomat 12.7.2017

Dear Mr. Hostens,

We are sorry for the delay in the reply.

We have discussed with our Bankers and worked out from all angles, however, **we regret to share that situation in India has gone from bad to worse with biggest tax reform (GST) implementation** wef 1<sup>st</sup> July 2017. **All textile mills are on strike** due to the anomaly between Man made fibre and Cotton textiles, moreover our exports are also hit due to **technical glitch in customs department** due to the implementation of GST. In one of **the ports In Mumbai cyber hacking has aggravated the situation.**

**We agree for your proposal of recycling LC of 120 Days. We request you to please accept our proposal** which we have sent to you and we are reconfirming of commitment of honouring as proposed by us.

Look forward to your reply.

Thanks and Regards,

Sandeep Agarwal  
Chief Executive Officer  
Wearit Global Limited”

**(Emphasis supplied)**

26. It is the case of the Operational Creditor that the Corporate Debtor failed to adhere to their own proposed payment schedule post acceptance of

repayment and recycling plan despite several extensions having been allowed including fresh repayment and recycling plans. There is substance in this contention as it seems that the financial problems of the Corporate Debtor had persisted which came in the way for clearing the outstanding debt as is evident from their email of 15.06.2018 wherein they again admitted that demonetization and introduction of GST had sapped their financial strength which had affected their financial flow.

27. The existence of debt due and payable by the Corporate Debtor has also not been controverted by the Corporate Debtor. No material has been placed on record by the Corporate Debtor to show that they had categorically rejected the outstanding dues claimed by the Operational Creditor prior to issue of demand notice. From a plain reading of the emails of the Corporate Debtor at pages 147-152 of AA, there arises no doubt in our minds that the Corporate Debtor had acknowledged that there was debt due and payable to the Operational Creditor. Not only was the outstanding amount acknowledged but an assurance had also been given by Corporate Debtor to clear the said amount. That the Corporate Debtor had on their own volition proposed a solution in several of their email suggesting recycling LC and repayment schedule to the Operational Creditor to resolve their outstanding liabilities also clearly establishes admission of debt which was due and payable.

28. The Corporate Debtor having also failed to furnish any proof or record to show how they had discharged the liability of admitted due amounts, we are inclined to believe that the Corporate Debtor defaulted in clearing the outstanding operational debt of USD 2,933,869/- and Euro 8423 which aggregated above the prescribed threshold limit.

29. This brings us to the next limb of argument raised by the Learned Senior Counsel for the Appellant that the very fact that the parties had made reference to arbitration shows existence of disputes. It was mentioned that the disputes between the two parties were outlined in their email of 15.06.2018 alongwith a request to settle them in an amicable manner or refer the same for resolution through arbitration to avoid litigation. It was also argued that even the Operational Creditor in their reply dated 09.07.2018 had requested the Corporate Debtor to resolve the matter amicably which amounted to clear admission of existence of disputes by the Operational Creditor. Further the Corporate Debtor contended that a civil suit had been filed by them which is pending adjudication and the grounds raised therein clearly shows pre-existing disputes. While admitting that the civil suit was filed subsequent to the issue of notice under Section 8 of IBC, it has been contended that there is no need in every case for a civil suit or an arbitration to be pending before Section 8 notice and that a dispute as understood by the IBC is not limited to a pending suit or an arbitration but includes a real dispute as to payment between the parties.

30. It is the case of the Operational Creditor that the Corporate Debtor lacked the financial wherewithal to make good their outstanding dues, they have tried to wriggle out of making payments by requesting for arbitration in their email of 15.06.2018. It was also added that in their reply of 09.07.2018, the Operational Creditor had at no stage agreed to take recourse to any arbitration but had only reminded the Corporate Debtor to pay the outstanding amounts before release of further raw material and resolve the matter amicably in larger business interest. We find force in the contention

of the Operational Creditor that there was no Arbitration Agreement between the parties nor any understanding between the two parties for making references to arbitration. The request proposal for arbitration was never acceded to by the Operational Creditor. As regards the Civil Suit TS No.1265 of 2015 which had been filed by the Corporate Debtor, it is stoutly contended by the Operational Creditor that it was done as an after-thought with the mala-fide intention to escape the clutches of IBC. In any case, the civil suit having been filed after receipt of statutory demand notice, we are inclined to discount this to be a credible ground to establish pre-existing dispute.

31. At this juncture we may glance through the relevant portions of the impugned order to see how the matter has been dealt by the Adjudicating Authority which is to the following effect:

*“9. The Corporate Debtor has taken plea of pre-existing dispute as there is:-*

- a. Request for Arbitration by the Corporate Debtor; and*
- b. Filing of a Civil Suit by the Corporate Debtor against the Operational Creditor.*

*10. From the documents before us we do not find there was any 'Cyclical Business Agreement' between the parties. We also do not find any arbitration agreement between the parties to refer the alleged dispute to arbitration.*

*11. Merely a request for arbitration sent by a person to another and specifically not agreed to by the other person cannot constitute an Arbitration Agreement.*

*12. Though there was a request for the arbitration by the Corporate Debtor, but the same was categorically declined by the Operational Creditor.*

*13. It is also very clear that Civil Suit for specific performance valued at Rs.1 Crore was filed subsequent to issuance of notice under section 8 of Insolvency and Bankruptcy Code, 2016. There was no mention of this Civil Suit in the reply of the Corporate Debtor. Further, apart from this, on perusal of the plaint filed in the Affidavit in Reply by the Corporate Debtor, no date has been given as to when the said plaint*

*had been verified, but at page 33 of the Affidavit in Reply (internal page 22 of the plaint), gives the list of documents that have been relied on by the plaintiff and the documents annexed by the plaintiff. The Corporate Debtor in its plaint has relied on a notice dated 26.11.2018.*

*14. Suffice it to say that the plea of the Corporate Debtor, there was/is a "pre-existing" dispute between the parties, sought to be raised on the basis of its pleadings and documents annexed, when tested on the basis of the law laid down as by the Hon'ble Supreme Court in Mobilox Innovations supra.*

*15. The Hon'ble NCLAT in Amit Wadhvani v. Global Advertisers, 2021 SCC OnLine NCLAT 325 held that a spurious dispute cannot come in the way of a section 9 petition. We find that there was/is no pre-existing dispute within the meaning of Section 8(2)(a) of the Insolvency and Bankruptcy Code.*

*16. We find that there was a demand duly raised and there is a debt due and the Corporate Debtor is in default for not clearing its dues to the Operational Creditor. To substantiate the dues, the Operational Creditor has placed on record the invoices raised to the Corporate Debtor.”*

32. We find that the Adjudicating Authority in the present case has carefully considered the reply and submissions made by the Corporate Debtor 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 genuine pre-existing dispute. In the light of the above, we are of the considered view that the findings of the Adjudicating Authority are in order and that the defence raised by the Corporate Debtor is an after-thought and a moonshine which deserves scant regard.

33. For the foregoing reasons, we are of the view that the Adjudicating Authority did not commit any mistake in admitting the Section 9 application of the Operational Creditor. We are satisfied that the impugned order does not warrant any interference. There being no merit in the appeal, the same is dismissed. The interim stay on the constitution of CoC stands vacated. IRP

to take action forthwith to constitute the CoC and proceed with CIRP of the Corporate Debtor as per law. I.A. No. 4295 of 2022 is disposed of with the directions that the applicant therein shall have the liberty to seek their remedy before the appropriate adjudicating forum in accordance with law. I.A. No. 4930 of 2022 is disposed of with the directions that IRP may take up the matter of CIRP costs including their fees with the CoC. I.A. No. 3395 of 2022 is disposed of by giving liberty to Indian Bank to approach the IRP to pursue their claims. All I.A.s stands disposed of with the above observations. No costs.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Barun Mitra]**  
**Member (Technical)**

Place: New Delhi

Date: 04.10.2023

**PKM**