NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.616/2021

(Arising out of Judgement dated 02.08.2021 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench IV, Mumbai in CP (IB)No.1393/MB-IV/2020).

In the matter of:

Amit Wadhwani,
Flat No.B 6, Gurukrupa Tarrace,
CHS, Opp New Police Station,
Chembur,
Naka, Mumbai 400092 Appellant

Vs

1. M/s Global Advertisers,
   6th Floor,
   Shree Ram Trade Centre SVP Road,
   Borivali West
   Mumbai 400092

2. Mr UVG Nayak,
   Interim Resolution Professional
   303/305,
   Rajmata CHS Ltd,
   Near RTO, Four Bungalows, Andheri (W),
   Mumbai 400053

For Appellant: Mr. Ramji Srinivasan, Sr. Advocate, Mr Kush Chaturvedi, Mr Dharam Jumani, Mr. Suraj Iyer, Ms Priyashree Sharma, Ms Gauri Joshi, Advocates.
For Respondent: Mr. Mohit Chaudhary, Mr. Girishi B Kedia, Advocates for R1.

JUDGEMENT
VIRTUAL MODE

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

The present Appeal has been preferred by one of the suspended Board of Directors and shareholder of M/s Sai Estate Consultants Chembur Pvt Ltd

('Corporate Debtor'). The Appeal has been preferred against an order dated 2nd August, 2021 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench IV, Mumbai (hereinafter referred to as 'Adjudicating Authority') in CP(IB)No.1393/MB-IV/2020. By the said order the Adjudicating Authority acting upon petition filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC') has initiated Corporate Insolvency Resolution Process (CIRP) and appointed Interim Resolution Professional namely Mr. UVG Nayak by M/s Global Advertisers, a Sole Proprietary Firm-Operational Creditor.

2. The Operational Creditor on the basis of outstanding dues had issued Notice under Section 8 of the IBC against Respondent No.1. As allegedly since no tangible dispute was raised by the Respondent No.1 an application under Section 9 of IBC was filed and thereafter impugned order was passed.

3. One of the Member of the suspended Board of Directors and a shareholder of Sai Estate Consultants Chembur Pvt Ltd, Corporate Debtor, has filed the present Appeal. Initially in the Appeal the IRP was not arrayed as Respondent. On 18.08.2021, a Coordinate Bench of this Tribunal directed for impleading IRP as Respondent, besides issuing necessary directions. The order dated 18.08.2021 is quoted hereinbelow:

"Heard Learned Sr. Counsel for the Appellant

2. Learned Sr. Counsel vehemently argued and submitted that there is a preexisting dispute. The Learned Sr. Counsel referred to Letter at Page 178 of the Appeal Paper Book which was sent in the context of Letter dated 11th March, 2020 to point out that there is a pre-existing dispute.

Ld. Sr. Counsel is trying to show that both the parties did agree that reconciliation was required. Ld. Sr. Counsel submitted that the CIRP needs to be stayed and Interim Relief to that effect may be ordered.

3. We have gone through the Record and Impugned Order. The Impugned Order in Paragraphs 48 to 52 has discussed the respective cases of the parties.

4. Whether or not, a Letter communicating requirement of reconciliation can be said to be raising of a dispute is matter to be decided. We do not find any reason to grant any Interim Relief as procedure under IBC are time bound and delay would defeat the objective of IBC.

5. The Corporate Debtor through IRP has not been made Respondent. Appellant to array the Corporate Debtor through IRP as Respondent No. 2. Notice be served on Respondent No. 2. Learned Counsel for Respondent No. 1 is present.

6. The Appellant/Promoters/Directors of the 'Corporate Debtor' are directed to handover the assets and records of the 'Corporate Debtor' to the 'Interim Resolution Professional' immediately (if not yet handed over). The 'Interim Resolution Professional'/ RP will make effort that the Company remains a going concern and will take assistance of the (suspended) Board of Directors and the officers/Director/Employees. The persons who are working will, at present continue to perform their duties, including the paid Directors. The person who is authorized to sign the bank cheques may sign cheques only after authorization of the 'Interim

Resolution Professional' with counter signature of the 'Interim Resolution Professional'/ RP at the back side of the cheques.

Only in such case, the Bank shall release the payment. The 'Interim Resolution Professional' will place this order before the Banks, in which accounts of 'Corporate Debtor' are maintained. The Bank Account(s) of the 'Corporate Debtor' be allowed to be operated through IRP/RP for day-to-day functioning of the Company such as for payment of Current Bills of the Suppliers, Salaries and Wages of the employees'/workmen, electricity bills etc.

7. Respondents on service to file Reply-Affidavits within two weeks. Rejoinder, if any, may be filed within a week, thereafter. Parties to file brief 'Written-Submissions' not more than three pages along with 'Copies of Judgments' they want to refer or rely on, within three weeks.

8. List the Appeal 'For Admission (After Notice)' Hearing on 07th October, 2021."

4. In the Appeal filed before this Tribunal which was numbered as Company Appeal (AT)(Insolvency) No.616/2021, the Appellant besides making prayer for setting aside of the impugned order dated 2nd August, 2021 also prayed for stay of operation of the impugned order during the pendency of the Appeal. Since while issuing notice and directing to implead IRP as 2nd Respondent no 'Stay order' was passed by the Coordinate Bench' of this Tribunal. The Appellant preferred an Appeal before the Hon'ble Supreme Court which was number as Civil Appeal No.4967/2021. The Hon'ble Supreme Court vide its order dated 31st August, 2021 disposed off the Civil

Appeal primarily observing for passing suitable orders on 'Stay Application' of the Appellant. It is better to reproduce the order dated 31st August, 2021 passed in Civil Appeal No.4967/2021 as follows:-

"Heard learned counsel for the appellant and perused the record.

Considering the fact that the matter relates to non-grant of interim order by the Tribunal for which 07.10.2021 has been fixed and also keeping in view that in the meantime if certain actions are taken, the appellant would suffer irreparably, we direct that the matter be taken up by the NCLAT on 07.09.2021 instead of 07.10.2021 for passing suitable orders on stay application of the appellant. We further direct that any action taken in the meanwhile, will be subject to further orders passed by the NCLAT while considering the application for interim order.

The appellant is at liberty to inform the other side about the preponement of the date before the NCLAT.

The appeal is disposed of accordingly.

Copy of this order be sent by the Registry to NCLAT through e-mail within 24 hours."

5. In view of the order dated 31st August, 2021 of the Hon'ble Supreme Court, this Tribunal on 07.09.2021 while fixing the case for orders on 'Stay Application', directed IRP not to take any steps in CIRP till next date of hearing. On 24.09.2021, Learned Counsel for the parties were heard on 'Stay Application' and 'Order' was reserved. Thereafter on 28th September, 2021 the Coordinate Bench of this Tribunal instead of granting a 'Stay' disposed of

the Appeal in view of the inclination shown by the Learned Counsel for Appellant and fixed the Appeal for final hearing to 9th November, 2021. Again against the order dated 28th September, 2021 passed by this Tribunal, the Appellant moved before the Hon'ble Supreme Court of India by filing a Civil Appeal which was numbered as Civil Appeal No.907/2022. In the said Appeal the Hon'ble Supreme Court passed some interim order and finally disposed off the said Appeal vide its order dated 19th May, 2022. The operative portion of the order dated 19th May, 2022 of the Hon'ble Supreme Court is quoted hereinbelow:

"The appeal stands disposed of.

It goes without saying that we have not made any comments on the merits of the case either way and even the observations occurring in the impugned order dated 24.09.2021 shall also not be decisive of the consideration of the appeal on its 4 merits.

As the matter is already fixed before the Appellate Tribunal and the parties are before us, to avoid any ambiguity, we also make it clear that the parties through their respective counsel shall stand at notice to appear before the Appellate Tribunal on 23.05.2022. The interim arrangement, as indicated above, shall continue until final disposal of the appeal.

We would also request the Appellate Tribunal to assign a reasonable priority to the appeal for expeditious consideration."

6. Thereafter the present Appeal was listed on 26.05.2022. Since there was paucity of time the Appeal could not be taken up and was directed to listed on 30th May, 2022 on which date after hearing Learned Counsel for the parties, the 'Order' was 'Reserved'.

7. The case of the Appellant is in its Memo of Appeal has been described as follows:-

> "*7.1 The Respondent carries on the business of display of advertisements on hoardings within the area of Mumbai, Thane and rest of Maharashtra for several years.*
>
> *7.2 Since the inception of the Respondent's commercial relationship with the Corporate Debtor, on account of a close friendship between the Respondent's representative Mr. Vicky Gupta and the Corporate Debtor's representative Mr. Amit Wadhwani i.e. the Appellant and the Corporate Debtor's Managing Director, it had always been the understanding that in respect of the services being provided by the Respondent, the Corporate Debtor would only pay on a "payable when able" basis.*
>
> *7.3 Apart from the friendly relations between the Respondent and the Corporate Debtor, the reason for such an understanding was also the nature of the services being provided by the Respondent. Given the peculiar nature of the services that were to be provided by the Respondent to the Corporate Debtor, for a meaningful scrutiny of invoices and release of payment, the Corporate Debtor would have to reconcile its accounts and also verify the supporting materials evidencing the actual provision of services, which would demonstrate the proof of services*

being rendered and the accounts between the parties. Hence, despite invoices being raised, the same did not stipulate a time limit for payment, since accounts were to be reconciled and the supporting materials were to be verified prior to making of payment.

7.4 Further, this was also necessitated since the invoices raised by the Respondent were in fact vague, devoid of basic particulars of the services actually provided such as period, specifications, locations, rates, etc. and hence the provision of services were required to be verified / reconciled prior to making of payments. According to the Respondent, it was pursuant to written confirmation letters issued by the Respondent from time to time that the Respondent carried out display of advertisements and hoarding on various sites between the period commencing from 10th March 2017 to 29th June 2019 and after displaying the said advertisements, the Respondent raised 30 invoices aggregating to Rs. 4,74,55,683/- (Rupees Four Crores Seventy Four Lakhs Fifty Five Thousand Only). A perusal of the Petition demonstrates that although the Respondent claims that the invoices were issued pursuant to written confirmations (which are annexed after each invoice in the Petition), in fact, the invoices do not even refer to the date or number of the written confirmation and the same are ex-facie not corelatable. Many of the invoices in fact bear an endorsement that they had been received for verification and/or had not been checked. Even some of the tabulated statements which were received bear a similar endorsement. Some

invoices were raised almost 1.5 years after the alleged provision of services.

7.5 The Respondent also sought to rely upon certain tabulated statements in the Petition an impression is sought to be created as if the same were part of the invoices/ written confirmation. That was not the case. The said statements were not provided with the invoices / written confirmations and most of them do not even co-relate to the invoices. There is / are no tabulated statements in support of some of the invoices / written confirmations. There is no acceptance shown of the details shown in the tabulated statements. Some of the tabulated statements do not even bear the acknowledgement of receipt by the Corporate Debtor and may not have been provided to it prior of the filing of the Petition.

7.6 In fact, pursuant to the receipt of some of the tabulated statements at different / random points in time, the Corporate Debtor vide correspondence issued by it in February and March 2020 (i.e. much prior to the issuance of Section 8 Notice in June 2020) sought reconciliation of accounts and verification of material evidencing the actual provision of services, the specifications thereof, locations, etc. and listed out the specific information and documents that were needed for the same. The Respondent, however, avoided the same by not providing the specific information / documents sought and rushed to issue the Section 8 Notice on 12th June 2020 and then filed the present Petition to try to coerce the Corporate Debtor to pay amounts which are disputed and not payable, which speaks volumes in itself.

7.7 Further, this was also in line with the understanding between the Corporate Debtor and the Respondent. The payments were to be made on a "payable when able" basis, and hence the Corporate Debtor was not liable to pay the Respondent any monies unless it was able to undertake and complete a reconciliation of accounts and verification exercise. This is borne out from the conduct of parties and the understanding which has been accepted in correspondence.

7.8 The process of reconciliation involved not just proof of delivery of an invoice but also, furnishing of supporting documents along with the invoice which would mean, furnishing the prior email confirmation from the Corporate Debtor which was the basis on which the advertisement and promotional material was published; the actual proof that the advertisement was published / put up on hoardings as per the agreed specifications and locations; proof that the Respondent had made the necessary payment to the publisher, etc. and the confirmation of estimates, if any.

7.9 The reason why the aforesaid process and practice was followed is to avoid a situation in which advertisements were published without the go ahead from the Corporate Debtor and to avoid the Corporate Debtor being wrongly billed for the same without the Respondent actually putting up the hoardings as per the agreed specifications and/or at the agreed locations. Another reason why the reconciliation was important is to ensure that the Corporate Debtor is not billed or made liable for

advertisements which it had not consented to or which in fact had not been published/put up.

7.10 This is a standard practice followed by all clients of agencies such as the Respondent because it is a known business hazard that unless these minimum supportings and documents are required and furnished, a client must not be held liable for advertisements even if published because it is often that agencies such as the Respondent indulge in rampant publication of advertisements so as to show that they are internally adding and growing their business. It could be that overenthusiastic employees of the Respondent may proceed and publish / put up advertisements to meet their internal targets within the Respondent's organization. That, however, cannot lead to the Corporate Debtor paying for advertisements which it had not permitted; not given a go ahead or in respect of which either invoices were never raised or sufficient proof has not been furnished of actual publication/ putting up on hoardings as per agreed specifications and at agreed locations. For all these reasons the Corporate Debtor had raised issues disputing debt, quality of service so provided and even breach of fundamental obligations and sought a reconciliation/ verification exercise by specifying the details / documents required much prior to the issuance of the Section 8 notice.

7.11 The Respondent had however sought to avoid the reconciliation / verification exercise and instead sought to invoke the provisions of the Code in a mala fide attempt to coerce the Corporate Debtor to make

payments to the Respondent, which are not due to it and avoid the verification exercise.

7.12 It was an undisputed in the Application that the Respondent despite being in custody of 10 postdated cheques, returned to the Corporate Debtor 8 cheques (aggregating to Rs. 40 lakhs). It was the Corporate Debtor's case that it is inconceivable commercial conduct that when the Respondent claims to be entitled to an alleged debt of Rs.1,98,47,520/-, and after two out of the 10 postdated cheques were dishonored, the Respondent would return 8 cheques aggregating to Rs.40 lakhs. In this regard, the Corporate Debtor had in its Reply to the Application, pointed out that the Respondent had made a false statement in the Application by alleging that 8 postdated cheques were returned back to the Corporate Debtor on an alleged assurance that the Corporate Debtor would discharge its alleged liability (which is denied) by making payment through RTGS or pay order. There was no material whatsoever to support the allegation made by the Respondent in this regard. In fact, even the correspondence (prior to the Section 8 notice) addressed by the Respondent does not even state this allegation about return of the cheques on the basis of the alleged assurance provided by the Corporate Debtor about payment by RTGS. The Corporate Debtor had totally denied this allegation in its pleading before the NCLT-4. In view of the above, the provision of the cheques was of no assistance to the Respondent in light of the subsequent return thereof (without reservation of any rights) to the Corporate Debtor. The Corporate Debtor had in fact pleaded and

submitted that the cheques were returned since the Respondent acknowledged that the amounts due had to be reconciled / verified and hence there was no occasion for the Respondent to present those cheques for payment. That is also the reason why the Respondent did not initiate proceedings under Section 138 of the Negotiable Instruments Act, 1881 and did not even send a legal demand notice thereunder in respect of the two dishonoured cheques.

7.13 It was because of the accounts reconciliation exercise that was necessary to be undertaken that the Corporate Debtor had refused any further payment to the Respondent and had demanded that the 8 cheques be returned. The Respondent was conscious of the position and hence agreed to return the cheques without any protest or reservation of rights or subject to any condition. They were not returned on any assurance of payment to RTGS.. Ordinarily, in day to day commercial activities, no creditor would return postdated cheques if amounts were due to it. The return would only happen once payment has been received through other modes. The Corporate Debtor had (in pleadings) pointed this out as a crucial instance of falsehood which the Respondent had indulged in whilst justifying its false claim.

7.14 The fact that an account reconciliation had been demanded and discrepancies had been pointed out was apparent from the fact that in response to the Respondent's wrongful letters dated 2nd August 2019 and 8th February 2020, the Corporate Debtor vide its Reply dated 20th February 2020 clearly stated that there were no supporting documents

provided for the bills raised and the supporting documents were pending even in respect of the on account of payment of Rs.1.25 Crores. It was in this letter, reiterated that the Corporate Debtor through its representatives Mr. Amit Wadhwani and the Respondent's representative Mr. Vicky Gupta always had an understanding that money would only be payable by the Corporate Debtor when it was able to do so. Integral to this understanding was the requirement of reconciliation of records and accounts. The Corporate Debtor vide its reply dated 20th February 2020 correctly asserted that the understanding that was always followed was that the liability to make payment was on a "payable when able basis".

7.15 It is significant to note that in response to the Corporate Debtor's letter dated 20th February 2020, the Respondent in its letter dated 11th March 2020, did not deny the assertion made by the Corporate Debtor that the understanding between the Parties was always that payment would be made on "payable when able" basis. Moreover, if there was no need for reconciliation of accounts and records and the understanding of "payable when able" was not the understanding between the parties, then no occasion would have arisen for the Respondent to agree to the exercise of reconciliation of accounts which it did by fixing an appointment on 14th March 2020 and/ or for returning the cheques.

7.16 Owing to the threat of covid-19 a physical meeting for reconciliation of records and accounts could not take place on 14th March 2020.

7.17 Subsequently by its letter dated 14th March 2020 (wrongly dated 14th March 2019), the Corporate Debtor set out in detail, the documents which were necessary for the purpose of an effective exercise of reconciliation of accounts and records. There has been no response to the Corporate Debtor's detailed requisitions vis-à-vis the necessary documents in order to carry out a reconciliation exercise. There is no explanation in the Petition as to why the requisition raised in the Corporate Debtor's letter dated 14th March 2020 was not provided and/ or as to why it is not necessary or relevant. There was no denial in the Petition of the correctness of the contents of the Corporate Debtor's letter dated 14th March 2020. As such, the contents of the Corporate Debtor's letter dated 14th March 2020 were accepted.

7.18 Thereafter, the Respondent simply proceeded to issue the demand notice dated 12th June 2020. Hence, the Respondent has proceeded to institute the insolvency petition without completing an important exercise of reconciliation of accounts and records. Furthermore, the demand for reconciliation of accounts and records was coupled with an assertion of the understanding between the Parties that monies are to be paid on a "payable when able" basis. The understanding of payable when able is intrinsically linked with a need to reconcile accounts and records. This is simply because one ought not to pay for services being provided by the Respondent unless one is able to reconcile the monetary demands made in respect of thereof with the proof of services provide. It is for this reason that an ad-hoc payment was only made on an account basis and the

balance was to be made post reconciliation of accounts and verification of supporting information/ documents.

7.19 It is in the aforesaid background that the Application was filed on 28th July, 2020.

A copy of the Application filed before the Ld. National Company Law Tribunal, Mumbai Bench is annexed hereto and marked as Annexure "C".

7.20 The Corporate Debtor filed its Affidavit in Reply dated 6th July 2021. A perusal of the Affidavit in Reply demonstrates that the following was the broad stand taken:

(i) since the understanding between the parties was that the Corporate Debtor would make payments on a "payable when able" basis which meant that liability accrued upon completion of a reconciliation of accounts and verification exercise (which was yet to be carried out), there was an existence of a dispute between the Corporate Debtor and the Respondent and the Corporate Debtor was not liable to make any payment to the Respondent until that exercise was completed;

(ii) The Corporate Debtor had specifically stated that the postdated cheques aggregating to Rs.40 lakhs had been returned by the Respondent to the Corporate Debtor since the Corporate Debtor had refused to make any payments to the Respondent unless the exercise of reconciliation and verification had been completed.

(iii) The invoices did not stipulate any date of default.

(iv) The application was not maintainable as each invoice pertained to different and distinct transactions/ contracts.

A copy of the Affidavit in Reply dated 6th July 2021 is annexed hereto and marked as Annexure "D". 7.21 The application was heard on 7th July 2021.

7.22 The Respondent filed its Written Submissions on 8th July 2021. The Corporate Debtor filed its Written Submissions on 9th July 2021. The Corporate Debtor also filed Supplemental Written Submissions dated 9th July 2021.

A copy of the Written Submissions filed by the Operational Creditor dated 08.07.2021 is annexed hereto and marked as Annexure "E" A copy of the Written Submissions filed by the Corporate Debtor dated 09.07.2021 is annexed hereto and marked as Annexure "F" A copy of the Supplemental Written Submissions filed by the Corporate Debtor dated 07.07.2021 is annexed hereto and marked as Annexure "G".

7.23 It appears that on 2nd August 2021, the matter was listed in the cause list of NCLT-4 under the caption, "for pronouncement of judgment" and the Impugned Order was passed. However, the Corporate Debtor and/or its Advocates were unaware of the matter being on board since the name of the Corporate Debtor's Advocate was omitted to be mentioned in the cause list. The Corporate Debtor has suffered a procedural unfairness on account of this. The Corporate Debtor was therefore not present when the Impugned Order was being pronounced. The Impugned Order was eventually communicated to the Corporate

Debtor / Appellant on 4th August 2021 and accordingly, the Appellant has with utmost speed and dispatch, approached this Hon'ble Appellate Tribunal.

7.24 The impugned Order is essentially an unreasoned order which fails to appreciate the Corporate Debtor's contentions and renders findings contrary to the record and shockingly, disregards the binding judicial precedents of the Hon'ble Bombay High Court that were placed before the NCLT. The impugned Order gravely prejudices the Appellant and the Corporate Debtor since it has admitted the Section 9 Petition and appointed an IRP over the Corporate Debtor.

8. In the present case initially the IRP after receipt of the Notice has submitted 'Status Report dated 6th September, 2021 wherein he described as to what steps he had taken after the order dated 2nd August, 2021 passed under Section of the IBC by the Adjudicating Authority. The Respondent No.1/Operational Creditor has also filed detailed reply dealing with averments made in the Memo of Appeal. The Respondent in its reply has stated as under:-

"*1. The present reply is being filed by M/s Global Advertisers through its proprietor Mr. Sanjiv Gupta (hereinafter referred to -as the "Original Petitioner" for the convenience of this Hon'ble Appellate Tribunal) for the purpose of opposing the present Appeal as well as Interlocutory Application No. 1649 of 2021 filed by the Appellant seeking a stay of the order dated the 2nd of August, 2021, passed by the Adjudicating Authority in Company Petition No. (IB) 1393 of 2020 (hereinafter referred*

to as the "impugned order" for the convenience of this Hon'ble Appellate Tribunal). Through the impugned order, the company by the name of Sai Estate Consultants Chembur Private Limited (hereinafter referred to as the "Corporate Debtor" for the convenience of this Hon'ble Appellate Tribunal) was ordered to undergo Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP" for the convenience of this Hon'ble Appellate Tribunal).

2. The Appellant abovenamed has filed the present appeal under section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as the "IBC" for the convenience of this Hon'ble Appellate Tribunal) seeking to challenge the impugned order on the ground better set out therein. The impugned order arose out of Company Petition No. (18) 1393 of 2020 which had been filed by the Original Petitioner under section 9 of the IBC (hereinafter referred to as the "said petition" for the convenience of this Hon'ble Appellate Tribunal). At the very outset, the Original Petitioner repeats and reiterates the contents of the said petition and denies anything contained in the present appeal which is contrary thereto. The Original Petitioner is filing the present reply for the limited purpose of putting on record certain objections to the present appeal as well as to Interlocutory Application No. 1649 of 2021. To that extent,· the Original Petitioner shall not be dealing with the individual assertions and allegations set out in the appeal and the same ought to be denied to the extent they are contrary to what is contained in the said petition. Nothing

contained in the present appeal ought to be considered to have been admitted merely for the lack of a specific denial.

3. The Appellant has purported to set out the facts of the case in paragraph 7 of the memorandum of appeal. I deny the same to the extent there are contrary to what had been set out in the said petition.

4. With respect to paragraph 7.2 and 7.3 of the memorandum of appeal, the Original Petitioner denies that it had agreed that the services were being provided on the basis that consideration for the same would be on "payable when able" basis. This assertion was taken up by the Corporate Debtor for the first time in a letter dated the 20th of February 2020, which was sent in response to reminder letters dated the 2nd of August, 2019, and the 5th of February 2020, sent by the Original Petitioner seeking payment towards the outstanding invoices. As was set out in the said petition, the unpaid invoices raised by the Original Petitioner were issued between the 28th of February 2018, and the 29th of June, 2019. There was no correspondence between the parties during this time, or even after the invoices were sent, suggesting that the modus operandi agreed to between the parties was that the invoices would be on "payable when able" basis. It is only after almost a year of following up by the Original Petitioner that the Corporate Debtor asserted that the arrangement between the parties was on a "payable when able" basis.

5. At any rate, even assuming that such was the arrangement between the parties, the interpretation which is now sought to be put on the phrase "payable when able" by the Appellant is clearly facetious and erroneous.

As per its literal interpretation, the phrase "payable when able" suggest that the Corporate Debtor sought to make payment only when it is financially capable of doing so. In other words, the very usage of the defence of "payable when able" shows that the Corporate Debtor is an insolvent entity. It is only now that the Appellant seeks to suggest that this phrase means that payment was to be made by the Corporate Debtor to the Original Petitioner after reconciliation of accounts. This could not possibly be the true meaning behind the arrangement of "payable when able".

6. Furthermore, in the paragraphs under reply, the Appellant also seeks to suggest that the invoices raised by the Original Petitioner did not specify any due date. However, a perusal of the chart at pages 73-74 of the memorandum of appeal (which forms part of the ~ Form V filed by the Original Petitioner with the Adjudicating Authority) sets out the date of defaults with respect to each of the unpaid invoices. As per the Confirmation Letters issued by the Original Petitioner and countersigned by the Corporate Debtor (which formed the agreement between the parties) payments were either to be made in advance of the services being rendered or within 60 days of raising of the invoices. Considering the cordial relationship with existed between the parties, the Original Petitioner did not insist on advance payment prior to rendering the services. At any rate, even if it is assumed that the Confirmation Letters and the Invoices did not specify a due date of payment, the provisions of the Contract Act, 1972, make it clear that payment would have to be

made within a reasonable period of time. In the present case, invoices between the 28th of February 2018, and the 29th of June, 2018, are outstanding. It is therefore clear that the Corporate Debtor had committed a default in making payments towards the same.

7. With respect to paragraph 7.4 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. The Appellant seeks to contend that the invoices raised by the Original Petitioner were vague and/or devoid of basic particulars. What the Appellant is conveniently omitting to state is that there would detailed charts along with each and every Confirmation Letter countersigned by both the parties containing details of the locations, durations, and rates of the advertisement services being provided by the Original Petitioner to the Corporate Debtor. These detailed charts were prepared jointly by the parties, which is clear from the fact that they were countersigned by both of them. Thus, the Corporate Debtor was, at all points of time, fully aware of the extent of the services being provided by the Original Petitioner. In fact, the locations and durations of the advertisements put up by the Original Petitioner on behalf of the Corporate Debtor were as specifically agreed beforehand, as is clear from a perusal of the documents on record. The Appellant seeks to contend that the invoices had no correlation with the written confirmation letters, which is demonstrated false upon a bare perusal of the invoices and the confirmation letters themselves. Even otherwise, it is important to note that each of the invoices stipulates that any objections to their contents

ought to be taken within a period of 7 days of the receipt. Admittedly, the Corporate Debtor has never raised any objections to any of the invoices. It is certainly a moonshine defence to seek to cast doubt upon the invoices years after they are raised and only after receiving notices for payment. The Appellant has admitted that the Corporate Debtor had received all of the invoices which is clear from the fact that each of them also contains an endorsement to that effect along with the seal on stamp of the Corporate Debtor. Notably, the invoices have not been denied.

8. With respect to paragraph 7.5 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. The falseness of the assertion of the Appellant is clear from the fact that each of the tabular statements containing details of the services rendered bears the stamp and seal of the Corporate Debtor. Furthermore, these tabular charts can easily be co-related b with the confirmation letters insofar as the total amounts payable under both match. It is clear that these are baseless assertions being put forth by the Appellant with the sole intention of avoiding the admitted liability owed by the Corporate Debtor to the Original Petitioner.

9. With respect to paragraph 7.6 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. The letters dated the 20th of February, 2020, and the 19th of March, 2020, sent by the Corporate Debtor to the Original Petitioner were in response to notices sent to it demanding payment. In fact, neither of the 2 letters relied upon by the Appellant make any reference tothe

tabular charts which had been shared with the Corporate Debtor much prior to the issuance.

10. It is further submitted that a perusal of the letters dated the 20th of February 2020, and the 14th of March, 2020, sent by the Corporate Debtor show that it had not raised any "dispute" with respect to the services provided by the Original Petitioner per se. The Corporate Debtor merely sought to avoid making payment on the flimsy ground that it seeks to conduct the exercise of reconciliation of accounts. However, the definition of the phrase "dispute" under section 5 (6) of the IBC specifies that the dispute must relate to either (A) the existence of the amount of debt, or (B) the quality of goods or services, or (C) the breach of a representation or warranty. Neither of the 2 letters dated the 20th of February 2020, or the 14th of March, 2020, reason any "dispute" falling in either of the 3 categories. In fact, a perusal of these letters would show that it is not the case of .the Corporate Debtor or the Appellant tha;:r. services were not rendered or that the services were insufficient or defective; instead, an assertion is made that a reconciliation of a counsel is required before the Corporate Debtor could make payments. There is no positive assertion from the side of the Corporate Debtor that no payment is required to be made to the Original Petitioner. Similarly, there is no assertion that services were not rendered to the Corporate Debtor. In fact, neither the Corporate Debtor nor the Appellant have anywhere in their pleadings stipulated what is the position of the accounts between the parties. The Corporate Debtor never produced its own ledger account

before the Adjudicating Authority, and neither has the Appellant in the memorandum of appeal. Neither the Corporate Debtor nor the Appellant have stated how much according to them is due and payable to the Original Petitioner. It is submitted that merely seeking reconciliation of accounts without putting forward any actual "dispute" cannot amount to a pre-existing dispute as understood under the provisions of the IBC.

11. The falsity in the case of the Appellant is further clear from the fact that the Original Petitioner agreed to meet with the Corporate Debtor on the 14th of March, 2020, for the purpose of reconciliation of accounts. However, instead of meeting the Original Petitioner, the Corporate Debtor sent a letter to him on the 14th of March, 2020, (i.e., the date upon which reconciliation was to take place) seeking to stall the meeting by calling for documents which were already available with it. In fact, a perusal of this letter dated the 14th of March, 2020, itself shows that the Corporate Debtor could not put up any case beyond making bare denials. Even through this letter, the Corporate Debtor has not raised any "dispute" in terms of section 5 (6) of the IBC but has simply denied its liability in toto and called for documents. If the Corporate Debtor were genuinely interested in a reconciliation of accounts, then it would have participated in the meeting proposed by the Original Petitioner to do so. It is clear from a perusal of the documents on record that the Corporate Debtor only sought to scuttle its liability by attempting to frustrate the Original Petitioner by making bare denials devoid of any substance. The same

could not possibly be construed to be a "pre-existing dispute" in terms of the provisions of the IBC.

12. With respect to paragraph 7.7 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. The Appellant is seeking to misconstrue the simple phrase "payable when able". The literal interpretation of that phrase would suggest that it is the case of the Corporate Debtor that it would only make payments when it has the financial ability to do so. By no stretch of imagination can the phrase "payable when able" suggest that reconciliation exercise was a condition prior to payment. At any rate, it is clear from the record that the Corporate Debtor did not even seek reconciliation of accounts until after receiving reminder notices for payment from the Original Petitioner. It is clear that this defence taken by the Corporate Debtor was a moonshine defence devoid of any substance or merit. Furthermore, by stating that the invoices raised on "payable when able" basis, the Corporate Debtor only acknowledge that it lacks the financial capability to service its debts. It is therefore clear that the Corporate Debtor is an insolvent entity which ought to undergo CIRP in l accordance with the provisions of the IBC.

13. With respect to paragraph 7.8 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. As has already been set out above, the Corporate Debtor had acknowledged receipt of the confirmation letters, the details of the services provided, the tabulation charts of the same, as well as the

invoices. It is also pertinent to note that despite having received the invoices which are now claimed to be incomplete, the Corporate Debtor remained silent for more than 18 months and did not raise any allegation that the services were not actually rendered. In fact, even today it is not the case of either the Corporate Debtor or the Appellant that services were not rendered by the Original Petitioner. Rather, the Corporate Debtor seeks to avoid making payment on the frivolous ground that it wants to review all of the correspondence and documents relating to the amounts sought without raising any concrete dispute about the same.

14. With respect to paragraphs 7.9 and 7.10 of the memorandum of ·appeal, the Original Petitioner denies the contents therein as they are false and misleading. The Appellant is seeking to raise this case for the first time in the present appeal. A perusal of the documents on record will go to show that there was no such practice between the parties as is now sought to be alleged in the paragraph under reply. Rather, the documents on record show that detailed confirmation letters were issued by the Original Petitioner and were countersigned by the Corporate Debtor. It is also clear that details of the services which are being provided by the Original Petitioner were contained in the form of tabular charts which were countersigned by the Corporate Debtor. At no point of time as the Corporate Debtor raised an allegation that services claim to have been rendered were not actually done so. Even today, this is not the case of the Appellant. The Appellant is merely stating that it seeks to conduct the exercise of reconciliation to ascertain whether or not there is any

deficiency in .the services rendered by the Original Petitioner. This cannot be a means of thwarting an admitted and legitimate debt. In fact, the contents of paragraph 7.10 proceed on the basis of nothing but conjecture. The Appellant is resorting to alluding to hypothetical scenarios in order to justify its baseless demand for reconciliation of accounts. It is important to note that while the Appellant has portrayed several different imaginary cases in which a dispute could be said to have been raised, he has not raised any such dispute in the facts of the present case. The Appellant states that the Original Petitioner could not charge for advertisements which were not actually published but fails to make any allegation that the Original Petitioner has actually done so. This is clear from a perusal of the documents on record.

15. With respect to paragraph 7.11 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. A perusal of the record would go to show that the Original Petitioner had in fact agreed to meet with the Corporate Debtor on the 14th of March, 2020, to discuss the reconciliation of the accounts. It is in fact the Corporate Debtor which avoided doing such a reconciliation as it was fully cognizant of the fact that it has no dispute against the Original Petitioner in relation to the services// rendered by him. With respect to paragraph 7.12 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. As has been set out in the said petition, the post-dated cheques were returned to the Corporate Debtor at its request. It is pertinent to note that the Appellant

has himself stated that he as well as other promoters/directors of the Corporate Debtor shared cordial relations with the Original Petitioner. It is certainly not inconceivable that the Original Petitioner agreed to return the postdated cheques as a result of this cordial relationship on the basis that the dues would be transferred through wire transfer at a subsequent point of time. At any rate, even if what is stated in the paragraph under reply is considered to be true, the same does not absolve the Corporate Debtor of its default to make payment towards the admitted operational debt owed by it to the Original Petitioner. Nothing contained in the paragraph under reply would amount to a pre-existing dispute as understood by the provisions of the IBC.

17. With respect to paragraph 7.13 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. The Appellant has not been able to produce any document corroborating his baseless assertion set out in the paragraph under reply. This assertion is nothing but an afterthought on the part of the Corporate Debtor with the intention of scuttling/avoiding the initiation of its CIRP.

18. With respect to paragraph 7.14 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are false and misleading. As has been stated above, the Corporate Debtor was in receipt of invoices, confirmation letters, and tabular charts of services rendered, and had not raised any dispute upon the same for more than a year. In fact, even in its letters dated the 20th of February 2020, and the 14th of March, 2020, the Corporate Debtor did not raise any dispute

or deficiency with respect to the documents which had admittedly been received by it. It only sought reconciliation for the purpose of stalling its liability to make payment. There was no positive denial of the debt owed by the Corporate Debtor to the Original Petitioner. The so-called preexisting disputes sought to be urged by the Appellant are nothing but a moonshine defence devoid of any substance or merit. It is also pertinent to note that the Original Petitioner had also issued various work completion reports which were also countersigned by the Corporate Debtor. These work completion reports are also on record and were considered by the Adjudicating Authority at the 1 time of passing the impugned order. What is pertinent to note is that the Corporate Debtor received these work completion reports on the 20th of January, 2018, (page: 116), the 12th of July, 2018, (page: 126) and the 30th of August, 2018, (page: 130) but has not, at any point of time, raised any dispute that the same are incorrect or false. In fact, the Corporate Debtor has not done so till date and neither has the Appellant done so in his memorandum of appeal. With respect to the assertion of the Appellant that the payments were to be made by the Corporate Debtor on "payable when able" basis, the same has already been dealt with extensively above.

19. With respect to paragraph 7.15 of the memorandum of appeal, the Original Petitioner denies the contents therein as they false and misleading. The Original Petitioner has already extensively dealt with the purport of the phrase "payable when able" above. Further, as has been

set out by the Original Petitioner above, the Corporate Debtor sought to take this moonshine and baseless defence (if it all it can be considered as a defence) only after receiving multiple reminders for payment. The Original Petitioner repeats and reiterates what has been set out in the present counter-affidavit in this regard.

20. With respect to paragraph 7.16 of the memorandum of appeal, the contents therein are expressly contrary to the letter of the Corporate Debtor dated the 14th of March, 2020, as is clear from a bare · perusal thereof. Nowhere in the letter dated the 14th of March, 2020, has the Corporate Debtor even mentioned the pandemic or COVID19. The falsity of the contentions of the Appellant are laid bare through the paragraph under reply.

21. With respect to paragraph 7.17 of the memorandum of appeal, the Original Petitioner denies the contents therein as they false and misleading. The assertions of the Appellant in the paragraph under reply are please false in light of the documents on record and what has been stated by the Original Petitioner above. It is clear that the bogeyman of reconciliation was raised by the Corporate Debtor for the sole purpose of delaying and avoiding the payments admittedly due and payable by it. Rather than accepting the request of the Original Petitioner to meet on the 14th of March, 2020, for the purpose of discussing reconciliation of accounts, the Corporate Debtor are sought to further obfuscate the matter by calling upon the Original Petitioner to submit documents which were admittedly in its possession. It is pertinent to note that the Corporate

Debtor did not raise any "dispute" with respect to the services rendered by the Original Petitioner but only sought reconciliation of accounts. The Corporate Debtor did not deny its liability nor did it make any positive assertion as to its lack of liability to make payment to the Original Petitioner. In fact, as were set out in the said petition, the Corporate Debtor had paid TDS upon the outstanding invoices thereby acknowledging and admitting that it was liable to the Original Petitioner. The Appellant has no explanation as to why TDS was paid to the revenue on account of the invoices raised by the Original Petitioner if the Corporate Debtor had a grievance with respect to those very invoices. It is clear that the Appellant, much like the Corporate Debtor before it, is only indulging in making baseless and frivolous claims and allegations in order to avoid CIRP of the Corporate Debtor. It is also important to note that the Corporate Debtor did not send any substantive response to the demand notice issued by the Original Petitioner under section 8 of the IBC. This itself shows that the Corporate Debtor does not have any difference to the said petition and cannot avoid undergoing CIRP.

22. With respect to paragraph 7.18 of the memorandum of appeal, the Original Petitioner denies the contents therein as they are full misleading. The Original Petitioner craves the leave of this Hon'ble Appellate Tribunal to refer to and rely upon the demand notice dated the 12th of June, 2020, for its true and correct interpretation. The allegations made by the Appellant in the paragraph under reply are a repetition is of what has already been dealt with earlier in the present counter-affidavit.

23. With respect to paragraphs 7.19 to 7.22 of the memorandum of appeal, the Original Petitioner craves the leave of this Hon'ble Appellate Tribunal to refer to the pleadings before the Adjudicating Authority for the true and correct interpretation.

24. With respect to paragraph 7.23 of the memorandum of appeal, the Original Petitioner denies that any injustice has been caused to the Corporate Debtor or the Appellant as has been alleged or otherwise. The Appellant is merely grasping at straws in order to justify the present appeal.

25. With respect to paragraph 7.24 of the memorandum of appeal, the Original Petitioner denies that the impugned order is liable to be set aside."

9. Shri Ramji Srinivasan, Learned Senior Counsel during the course of hearing has argued that since there was pre-existing dispute, the Learned Adjudicating Authority has incorrectly and illegally passed the impugned order. The Learned Senior Counsel has taken the Court to number of documents brought on record in the present Appeal, which were according to the Learned Senior Counsel for the Appellant were produced before the Adjudicating Authority, vividly shows that there was pre-existing dispute between the parties. He has referred to number of documents which were in existence much prior to issuance of Notice under Section 8 of the IBC by the Operational Creditor/Respondent No.1. According to Learned Counsel for the Appellant if there were pre-existing dispute, there was no reason for the Adjudicating Authority to entertain the Application under Section 9 of the IBC

filed by the Operational Creditor/Respondent No.1. He submits that the Learned Adjudicating Authority ignoring those documents and also overlooking the pre-existing dispute has passed the impugned order. According to the Learned Counsel for the Appellant the order impugned is in the teeth of judgement of Hon'ble Supreme Court passed in *Mobilox Innovations Pvt Ltd V Kirusa Software Pvt Ltd (2018) 1 SCC 353.* Besides making oral submissions the Learned Counsel for the Appellant has also filed Notes of Written Submissions which is reproduced hereinbelow:-

> "*1.1 The Operational Creditor was to provide advertisement services through outdoor hoardings to the Corporate Debtor.*
>
> *1.2 Given the nature of these services, prior to payment being made under an invoice raised by the Operational Creditor, the Corporate Debtor would have to be convinced that the Operational Creditor had put up the hoarding advertisements (i) as per the agreed size / specifications of the hoardings, (ii) as per the creative / design provided, (iii) for the agreed time / tenure for each hoarding, and (iv) at the agreed location/s of the hoardings, etc.*
>
> *1.3 Therefore, the Operational Creditor was required to provide appropriate documentary proof such as photographs of the hoardings on the relevant dates and proofs of creatives, etc. to demonstrate the provision of the hoarding advertisements and to justify the invoices raised. Such proof goes to the root of the matter i.e. in relation to the quantity and quality of the services provided, and was required to be provided and verified prior to the Corporate Debtor being liable to pay*

any amounts to the Operational Creditor. This is the nature of the reconciliation and verification exercise that would be required to be carried out.

1.4 The Corporate Debtor admittedly sought for such a reconciliation and verification exercise almost 4 months prior to the issuance of the Section 8 notice (see letters dated 20th February, 2020, and 14th March, 2020). As was pointed out during the hearing held on 30th May, 2022, the Operational Creditor itself agreed to the carrying out of a such reconciliation and verification exercise vide its letter dated 11th March, 2020 (pg nos. 144 – 147)

1.5 Hence, given the nature of the services being provided, merely on the basis of receiving invoices, it cannot be assumed that the Corporate Debtor was liable to pay the amounts of the invoices and it could not be expected that the Corporate Debtor was to make payment under the invoices, which had not been verified and reconciled in the aforesaid manner. A reconciliation exercise of the nature described above, was absolutely necessary and mandatory.

1.6 It is also pertinent to point out that no such proof is to be found in the Section 8 Notice and/ or in the Section 9 Petition. Even today, the requisite proof has not been placed on record by the Operational Creditor before the Learned NCLT and/ or this Hon'ble Tribunal and/ or the Hon'ble Supreme Court of India.

2. The pre-existing dispute:

2.1 The Section 8 Notice in the present case was issued on 12th June 2020 (pg.149).

2.2 The conduct of the Parties and stand taken in correspondence exchanged prior to 12th June 2020 plainly demonstrates the existence of a pre-existing dispute: (Pg. 174 para-viii)

2.2.1 The Corporate Debtor specifically took the stand in its letter dated 20th February 2020 (Pg.144- 145) that the alleged liability / claim was disputed / not admitted and that the supporting documents had not been provided despite repeated requests and reminders. Hence, it had not been able to verify whether the services had actually been provided or not, and there was a need for reconciliation/ verification (paras 2 to 4). The same are reproduced hereinbelow for ease of reference:

"2. At the outset, we state and submit that the amount of debt sought to be claimed by you is denied by us in toto, even the debit note raised by your goodselfs are been denied. Infact you have sought to miss-appropriate the amounts paid by us as per your own whims and fancies, thereby causing a huge challenge for reconciliation of accounts, for this reasons alone the alleged claims raised by you along with interest is disputed.

3. At the further this is to place on record that there are no supporting documents provided for the bills raise and in good faith we have paid to you a on account payments to the tune of Rs.1,25,00,000/- for which the supporting documents are still awaited in spite of several verbal promises and reminders are not yet received by us which you may kindly note.

4. We further deny that there was any understanding with Vicky Gupta and our Mr. Amit B Wadhwani sought to be alleged infact meeting could have occurred between both as they are friend and have cordial relationship, but there was never any discussion in respect of the alleged claims raised by you or the promises for payment as sought to be alleged. Infact the claims raised by you need to be reconciled." \

2.2.2 In this letter (paragraph 5), the Corporate Debtor has specifically demanded a reconciliation exercise. For ease of reference, para 5 is set out hereinbelow:

> *"5. We deny the contents of the debit note in toto and state that there is no any debt or liability payable by us. Infact we along with your Vicky Gupta always had an understanding of "payable when able" because our Amit B Wadhwani and Vicky Gupta shared and presently still share a cordial relationship with each other, this fact is also corroborative the invoices raised by you as the invoices never mentioned any dude date or period by when the given amounts were required to be paid. For this reason also if you are inclined to demand payment, we would have to first reconcile the accounts posy which if anything is due would be paid."*

i) From the Operational Creditor's response letter dated 11th March 2020 (pgs.146 and 147), it is most pertinent to note that the Operational Creditor itself agreed to the reconciliation exercise and fixed an appointment on 14th March 2020 for the same. Once the Operational Creditor agreed to the reconciliation exercise, it is inconceivable as to how

it could have filed the Section 9 petition, without first completing the reconciliation and verification exercise. Reliance in this regard is placed on the judgement of the Hon'ble High Court of Bombay in the case of Tata Advanced Materials Ltd. v. Tool tech Global Engineering (P) Ltd. (2012) SCC Online Bom 1566 – Paragraphs 12 to 16.

2.2.3 In its letter dated 14th March 2020 (Pg. No. 148-149 of Appeal), the Corporate Debtor specifically took the stand that the Operational Creditor had excessively billed the Corporate Debtor and specifically listed out the documents/ information that was required for the reconciliation / verification exercise (see para 4). Para 4 of this letter is set out hereinbelow for ease of reference:

> *"4. From the aforesaid circumstances it appears that you have excessively billed us we will be only be in a position to a way forward only after the below mentioned are provided to us.*
>
> *i. Details ledger of global Advertisers.*
>
> *ii. Copies of all hoardings and supporting documents as a part of monitoring activities including dates on which hoardings were live*
>
> *iii. copy of creative used for every hoarding.*
>
> *iv. Signed hard copes of all invoices that need to be reconciled*
>
> *v. PO/Confirmation emails for all orders sent across from our side to Global Advertisers*

vi. Also allocation of 1.25 Crore which has already been paid to you."

2.2.4 It is most important to note that there was NO response whatsoever to the 14th March, 2020 letter from the Operational Creditor. No supporting documents were provided post 14th March, 2020 till date by the Operational Creditor to the Corporate Debtor in support of its alleged claim. The meeting fixed for reconciliation on 14th March, 2020 could not be held in view of the COVID 19 pandemic (see para 5(xv) at Pg.175 of Reply) that had started and also because the Corporate Debtor first asked for the documentary material to verify the provision of services prior to meeting physically (see para 5 of 14th March, 2020 letter at Pg. No. 178-179).

2.2.5 The Operational Creditor respectfully submits that the aforesaid correspondence dated 20th February 2020, 11th March 2020 and 14th March 2020 (all much prior to the Section 8 Notice dated 12th June 2020) clearly reflect the existence of a pre-existing dispute vis-à-vis the Operational Creditor's claim. This pre-existing dispute is in relation to both the quantum of services provided as well as quality. It is therefore, as fundamental a pre-existing dispute as one can be, given the nature of the services provided.

2.2.6 In the face of the aforesaid pre-existing dispute, the Operational Creditor in fact rushed to issue the Section 8 Notice in June, 2020, without providing the documents or carrying out the reconciliation. Clearly, this was done with a view to avoid/ circumvent the legitimate

demand for reconciliation and verification sought for by the Corporate Debtor.

2.2.7 No documents are annexed to the Section 9 Petition also to evidence that the services were actually provided. This ought to be have annexed, in view of the dispute / denial raised by the Corporate Debtor in its letters prior to the Section 8 notice.

2.2.8 In any case, it is inconceivable that an OC can seek initiation of the CIRP without placing on record documents to prima facie demonstrate the actual provision of services, especially when a dispute was raised in relation thereto prior to invocation of the provisions of the Code.

2.2.9 It is the pleaded case of the Corporate Debtor (see para 5 of Reply @Pg. 168- 177) that given the nature of the advertisement services, reconciliation of accounts and more particularly verification of documentary materials evidencing the actual provision of services was a prerequisite prior to making of payments. This was also necessitated in view of the fact that the invoices were vague and devoid of basic particulars (see para 5 (iii) of Reply @ Pg. 169-170). The Operational Creditor chose not to file a rejoinder. None of these contentions are denied.

2.3 Case Law:

ii) Mobilox Innovations Private Limited v Kirusa Software Private Limited (2018) 1 SCC 353 – Paragraph 51 - (Pg. No. 222 Vol-II)

"40. 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."

2.4 The Corporate Debtor respectfully submits that the record clearly reflects a dispute between the Operational Creditor and the Corporate Debtor vis-à-vis both quantum and quality of services provided. An exercise of reconciliation of accounts and verification is always to ascertain this position and until it is completed, the Parties have all along

agreed that there is no liability which can be stated to be due and payable from the Corporate Debtor to the Operational Creditor. Hence, this is dispute which in the Corporate Debtor's respectful submission, exists prior to the Section 8 Notice. This dispute truly exists and cannot be stated to be spurious, hypothetical or illusory. The Application is therefore required to be rejected.

2.5 Post-dated cheques:

2.5.1 Firstly, the reliance sought to be placed by the Operational Creditor on the post dated cheques is misconceived, since the Operational Creditor returned 10 (ten) cheques to the Corporate Debtor without any qualification or caveat and without initiating any legal proceedings on the basis of those cheques against the Corporate Debtor. The previous 10 (ten) cheques are of no assistance, since they were towards payment of the previous invoices (which are not the subject matter of the Section 9 petition filed by the Operational Creditor).

2.5.2 Secondly, in the Affidavit in Reply (para 5 (xi) / Pg. No. 173) to the Appeal, the Corporate Debtor has specifically stated that this was done because the Operational Creditor had agreed that a reconciliation was to be done and had therefore returned the cheques. There is no denial of this position since no rejoinder has been filed. Moreover, the Corporate Debtor's stand visà-vis the cheques is also contained in paragraph 6 of its letter dated 20th February 2020 (pg.144@145). Hence, this is not a new stand taken for the first time after issuance of the Section 8 Notice.

2.5.3 Thirdly and in any event, it is inconceivable commercial conduct

that the Operational Creditor would return post-dated cheques if it truly believed the Corporate Debtor owed its monies.

2.5.4 Hence, on every count, the Corporate Debtor respectfully submits that no case is made out for any admission of liability on the basis of the post-dated cheques and in fact, the conduct of the Parties' is a relevant indicator vis-à-vis these cheques.

3. Reliance on Invoices / Written Confirmations is misplaced:

3.1 The written confirmation / purchase orders were necessarily issued prior to the provision of the services and hence are of no assistance to the Operational Creditor to prove whether services were actually provided or not.

3.2 As for the invoices, they are vague, devoid of basic particulars of the services actually provided such as period, specifications, locations, rates, etc. Some of the invoices were raised several months after the alleged provision of services. Hence, the issuance of the invoices by itself does not demonstrate that the services were provided. In any case, all the invoices in fact bear an endorsement that they had been received without being checked and / or bear an endorsement that they had been received for verification (see the handwritten endorsements at the bottom of pgs. 88, 94, 97,101,104,109,113,117,121,123,131,133,135). This further substantiates the stand of the Corporate Debtor that verification was mandatory and in the absence thereof, the Operation Creditor cannot claim monies to be due or the Corporate Debtor to be in default. (see para 5(iii) at Pg. No. 169).

3.3 Though the Petitioner claims that the invoices were issued pursuant to certain written confirmations (which are annexed after each invoice in the Petition), the fact is that the invoices do not even refer to the date or number of the written confirmation and hence the same are ex facie not co relatable (see para 5(iii) at Pg.169).

3.4 The Petitioner has sought to rely upon certain tabulated statements in the Petition and an impression is portrayed as if the same were part of the invoices / written confirmations. That was not the case. The said statements were not provided with the invoices / written confirmations and most of them do not even co-relate to the invoices. There is / are no tabulated statements in support of some of the invoices / written confirmations, which are at pgs. 94 and 121. There is no acceptance shown of the details shown in the tabulated statements. Some of the tabulated statements do not even bear acknowledgement of receipt by the Corporate Debtor (see pgs. 90 and 125) and have not been provided to it prior to the filing of the Petition. As for the others, they merely bear an acknowledgement of receipt and most of them bear an endorsement that they are received for verification (see para 5(iv) at pp. 5-6 of Reply).

3.5 It is in the aforesaid context that this Hon'ble Tribunal must appreciate that pursuant to the receipt of some of the tabulated statements at different / random points in time, the Corporate Debtor vide correspondence issued by it on 20th February, 2020 and 14th March, 2020 (i.e. much prior to the issuance of the Section 8 Notice in June, 2020) sought reconciliation of accounts and verification of material evidencing

the actual provision of the services, the specifications thereof, locations, etc. and listed out the specific information and documents that were needed for the same (see para 5(v) at Pg. No. 170 of Appeal). The Petitioner however avoided the same by not providing the specific information/ documents sought and rushed to issue the Section 8 Notice (see para 5(x) at Pg. No. 172 of Appeal). Hence, these tabulated statements are of no consequence / assistance.

3.6 Lastly, the purported work completion reports (Pg. Nos. 116, 126, 130) can in no manner take the Applicant's case any further. This is because: (a) these work completion certificates by themselves do not indicate the value of the services which they claim to have been provided; (b) these have also been only received by the Corporate Debtor subject to verification and do not constitute an acceptance of liability; and (c) in any event, it is post these purported certificates that parties agreed to carry out the exercise of accounts reconciliation and verification.

4. Re: Deposit of TDS does not amount of acknowledgment of liability:

4.1 The Operational Creditor has relied upon the fact that the Corporate Debtor has deposited TDS amounting to Rs.3,96,540/- in respect of the Operational Creditor. According to the Operational Creditor, this constitutes an acknowledgment of liability. In the Corporate Debtor's respectful submission, this, neither in fact nor in law can be stated to be an acknowledgement of liability in favour of the Operational Creditor.

4.2 Factually, the aforesaid chain of correspondence and stand taken therein clearly reflects that the Corporate Debtor had denied its liability

towards the Operational Creditor, whilst seeking an accounts reconciliation and verification exercise. Moreover, no TDS certificate has been produced by the Operational Creditor. Apart from a bare statement in the Application, there is no document which indicates what this TDS is towards.

4.3 Legally also, it has been consistently held by various binding judicial precedents that deposit of TDS is at best an acknowledgment of an expected liability and by itself, it does not give any basis for claiming recovery of dues / monies.

4.4 Case Law:

i) S.P. Brothers v Biren Ramesh Kadakia 2008 SCC Online Bom 1599 – Para 8 – (Pg. No. 276)

ii) ACTAL Vs. India Infoline Limited: MANU/MH/1768/2012 – Judgment dated 9th October 2012 – Bombay High Court – (Pg. No. 285)

iii) N.N. Valecha v I.G. Petrochemicals Ltd. 2006 SCC Online Bom 1289 – Para 11 - (Pg. No. 297)

iv) Bluesquare Travel Pvt. Ltd. v Pricewaterhouse Coopers Services Delivery Centre (Kolkata) Pvt. Ltd. (2019 SCC OnLine NCLT 5851 – Paragraphs 18-20 and 36-44 - (Pg. No. 304)

5. For all of the above reasons, it is respectfully submitted that the Appeal is liable to be allowed with costs."

10. Mr Mohit Chaudhary, Learned Counsel for Respondent No.1 supporting the impugned order submits that the Corporate Debtor has never raised any

dispute regarding claim raised by the Respondent No.1. He submits that in terms of oral agreement entered in between the parties the Operational Creditor has rendered its services by way of fixing Signs Board etc and from time to time submitting working completion report. The Appellant was repeatedly asked to make payment of Rs.2,54,40,604/- Rs.516027/- and overdue interest of Rs.5359186/- plus further interest from August, 2019 to 1st January, 2020 of Rs.2656596/-. Since the payment was not made even vide letter dated 06.02.2020 the Appellant was intimated that if outstanding payment including interest is not paid within a specified time the Respondent No.2 may take appropriate legal action. He further submits that various communications were made to make payments. He further submits that outstanding dues has not been disputed by the Appellant considering the fact that the Operational Creditor received Rs.35 lakhs and there was a shortfall of Rs.95 lakhs. Earlier 20 cheques of Rs.5 lacs each were also issued by the Appellant. However, some of the cheques were dishonoured. According to the Learned Counsel for the Respondent there was no genuine dispute rather outstanding dues were without any dispute but once Operational Creditor intimated the Appellant regarding the legal action as an afterthought insignificant dispute was raised by the Appellant. The Learned Adjudicating Authority considering the fact that there was no pre-existing genuine dispute, has rightly entertained the petition filed under Section 9 of the IBC and initiated CIRP. According to him the impugned order warrants no interference. The Learned Counsel for the Respondent has also filed Notes of Written Submissions in the present Appeal. Its written submissions is reproduced hereinbelow:

"1. OC [M/s Global Advertisers] occupied in the work of putting up billboards and Hoardings. CD [M/s Sai Estate Consultants Chembur Pvt. Ltd.} is a real estate agent. OC and the CD are in business relationship regarding carrying out Display and Mounting of advertisements for the projects provided by the CD.

2.As per the written confirmation letters issued by the OC and duly signed by the CD, OC carried out display of advertisements on hoardings at various sites BETWEEN THE PERIOD COMMENCING FROM 10.03.2017 to 29.06.2019, and after displaying the advertisements, the OC raised 30 Invoices for the services rendered aggregating to a sum of Rs.4,74.55,683/- and against receipt of the same invoice, CD made part payment of Rs.2,72,02,520/- and have paid TDS on all outstanding bills amounting to Rs.3,96,540/- (except last 3 invoices thus leaving behind an outstanding principle sum of Rs.1,98,47,520/- and interest there on at the rate of 18% pa.

NOTE: At the back side of the invoices there are photographs of the execution of work. Acceptance of invoices from time to time is admitted by the CD.

As per the terms of invoices, dispute if any was to be raised within 7 days and, payment was to be made by CD within 60 days from the date of invoices, failing which CD was liable to pay interest @ 18% p.a. After the last invoice was raised, the CD paid 43,75,000/- from 26.02.2019 to 11.09.2019.

02.08.2019, in view of the non-payment, letter was written by the OC calling upon the CD to pay outstanding payment [Letter dated 02.08.2019@Page 141 of Appeal]

After receipt of letter dated 02.08.2019, the CD issued 20 cheques of 5 lakhs each for discharge of their liability aggregating to Rs.1,00,00,000/- here also no dispute was ever raised

Out of 20 cheques, 10 cheques amounting to Rs.50,00,000/- were honoured and 2 cheques of Rs.5,00,000/- each were dishonoured with the remark FUNDS INSUFFICIENT. And even after dishonour of cheque, no dispute was raised.

06.02.2020 OC raised a demand to clear outstanding dues or legal action would be initiated [Letter dated 02.08.2019 @Page 142-143 of Appeal]

20.02.2020 First time CD after completion of transaction since long back, called upon, for reconciliation of accounts Here for the first time he says as per the arrangement, CD will pay the amount "PAYABLE WHEN ABLE" which means liability is not disputed.*

11.03.2020 OC responded, that the outstanding amount claimed is as per the confirmation letter and all details are with CD but OC in good faith said that the CD can attend on 14.03.2020 for reconciliation of account. [Letter dated 11.03.2020 @Page 146-147 of Appeal]

14.03.2020 The CD failed to attend the meeting, and asked for his own documents which were already in his possession. [Letter dated 14.03.2020 @Page 178 of Appeal]

12.06.2020 The OC issued Demand Notice forwarding along with the notice, photocopies of all the documents as called for by the CD in their

letter dated 14.03.2020. [Letter dated 12.06.2020@ Page 149- 156 of Appeal]

23.06.2020 The CD inspite of receipt of all the documents as called by him, never disputed, nor denied the contents/authenticity of documents, contending there is a pre-existing dispute. [Letter dated 23.06.2020@ Page 157-158 of Appeal]

NOTE: Till date no dispute of any nature in respect of the display of the advertisement carried out, amount claimed in the petition or about the payment of TDS admitted paid by the CD on all the invoices, or denied or disputed the claim made by the CD in the petition save and except false and frivolous contention, with regard to any specific invoice or work mentioned therein is raised. Chart of page numbers of Invoices with dates and that of Confirmation with dates is at APPENDIX-1.

3. *Statement of Account from 01.04.2020 to 30.06.2020 reflecting the total display of advertisements carried out by the OC (as per invoices raised) on behalf of the CD amounting to Rs. 4,74,55,683/-. [Statement of Account- Pg. 81} [Statement reflecting the payment made by the CD- Pg. 82-83}*

NOTE: That the statement of accounts has been verified and accepted by the RP and report to that effect is filed before NCLAT [@Pg. 87 (agenda 5) of the Status Report by RP dated 04.09.2021] The RP in terms after verifying the books of accounts of the CD has in terms confirmed a sum of Rs. 3,32,52,188/- as claimed by the OC is reflected in the books of accounts of the CD.[Ref: Status report filed by the RP @Page 71)

4. *Accepting the liability under the invoices so generated CD issued 20 Cheques (of Rs. 5L each) to OC and deducted applicable TDS. In so far as TDS is concerned it is duly paid and reflected in 26AS. While 10 cheques were honoured and 2 cheques were dishonoured on presentation due to "insufficient funds" the remaining 8 cheques were returned to the CD on the assurance that the CD will discharge its liability by making remaining payment through RTGS or Pay Order. {Copy of 10 honoured cheques issued by CD@ Page 137-140 of Appeal]*

NOTE: This formed part of pleadings before Ld. NCLT@ Page. 76 bottom and is mentioned in Para 8 of the impugned order. Till date there is no explanation with regard to the non-payment under the said cheques.

5.CORRESPONDENCE BETWEEN PARTIES

i. On 02.08.2019, OC sent a letter to the CD, reminding of the assurance of payment and requesting it to make the payment for entire overdue outstanding amount. [@Pg.141of Appeal].

ii. In addition to above, more letters are written by OC to CD asking for payments on 03.08.2019,20.08.20219, 04.09.2019, 30.09.2019.

iii. On 06.02.2020, OC issued 6th letter to the CD requesting to make the payment for the entire overdue outstanding amount within 15 days failing which proceedings will be filed before NCLT. [@Pg.142-143 of Appeal]

iv. iv. After threat of NCLT filing, it is for the first time i.e. on 20.02.2020, CD responded to all the 6 letters of OC, where at Para 5 it is mentioned by the CD itself that the understanding between

the parties was 'PAYABLE WHEN ABLE'. It is further noteworthy that even in this letter of CD no performance issue is raised, no quality issue is raised, no quantity issues is raised, moreover there is no dispute raised with regard to any specific invoice or specific work ofOC. [@Pg. 144-145}

NOTE: In law, vague denials cannot be construed as 'dispute', it must be substantive. In other words, there is nothing substantial in this letter, which CD could have met.

v. *On 11.03.2020, OC issued 7th Communication to CD placing that: Each display was carried out as per the confirmation letter executed by the CD and all invoices were duly submitted after execution of work as detailed in the confirmation letters. [@Page 146-147 of Appeal]. However, as a good gesture an appointment was also fixed on 14th of March.*

NOTE- CD never attended any the meeting. (Ld. Counsel verbally mentioned reason for non-meeting as 'COVID' during arguments, which otherwise is dehors the pleadings.)

vi. *On 14.03.2020, in order to avoid meeting, CD wrote a communication to OC, without raising any substantial dispute but by making a vague statement(s). CD sought certain documents from OC, which documents were in fact already available with the CD.[@ Page 178-179].*

NOTE- Till this date there is no dispute of any nature raised by the CD.

vii. On 12.06.2020, CD served Demand Notice to OC. [@Page 151-156 of Appeal].

NOTE: All documents being Statements, Invoices, Confirmation Letters, Xerox of cheques, Out-standing sheets, letters etc. were attached with the demand notice. [Ref: S. No. 7 on Page 155].

viii. After having received all relevant documents as attachment to Demand Notice and the Demand Notice under the IB Code. CD failed to point out any dispute of substantial nature. Reply to Demand Notice was issued by CD on 23.06.2020. No performance issue is raised, no quality issue is raised, no quantity issues is raised, moreover there is no dispute raised with regard to any specific invoice or specific work of OC. [@pg. 157-158].

NOTE- Test in Mobilox Innovations Vs. Kirusa Softwares (2018) 1 SCC 353, by Apex court is that: Following conditions are satisfied:

(i) the defence of the debtor company is genuine, substantial and in good faith;

(ii) the defence is likely to succeed on a point of law; and

(iii) the debtor company adduces prima facie proof of the facts on which the defence depends.

Tested on above parameters case of CD falls under the category of defence being sham, spurious, hypothetical, illusory and misconceived.

6.IMPUGNED ORDER[@Page 39-56 of Appeal]

While admitting the petition, NCLT has found [Ref: from Page 51 onwards] that:

Paragraphs 48-50 –

Cheques were given against the invoices raised. –

TDS was deducted and deposited on the invoices before issuing cheques. –

Issue of reconciliation without anything specific is a 'lame excuse'.

At Paragraphs 51-53 –

CD has not raised any 'pre-existing dispute even after receipt of the Demand Notice'.

7. RESPONSE TO ARGUMENTS IN APPEAL

i. No substantial ground is raised by the Appellant to seek interference.

ii. It is a chance litigation, in view of the fact that the RP has verified the claims and found it to be correct.

iii. Issue as raised during arguments i.e. the place/time of hoardings are required is a 'bogey' a non-existent issue for various reasons, viz.

- Admittedly the confirmation letter issued by the OC, duly acknowledged by the CD for allocating the work.

Admittedly all the invoices, including the outstanding invoices were received by the CD in their office by endorsing the acknowledgment.

Admittedly no dispute in respect of the display work, display of advertisement, amount claimed in the invoices, were ever raised

within 7 days from the receipt of invoices, till filing of the present appeal.

Admittedly the CD made part payment of Rs.2,72,02,520/- against total invoice amounting to Rs.4,74,55,683/- leaving behind principle sum of Rs.1,98,47,520/- along with interest at 18% pa. For the delayed period.

As there was outstanding due, in respect of last 3 invoices, cash payment is made.

After 2-8-19, in response to the OC letter, CD issued 20 post-dated cheques of Rs.S,OO,OOO/- each, out of which 10 cheques were honoured and 2 dishonoured for FUNDS INSUFFICIENT, and 8 cheques were returned on the assurance that the same will replaced by pay order /RTGS and still no dispute raised. - 20.02.2020 - Without disputing the liability, the CD contended PAYABLE WHEN ABLE and failed to explain the said contention despite the honourable court repeated asked to explain the same.

- Frivolous dispute is sought to be raised that the documents sought vide letter dated 14.03.2020 are not supplied, which is incorrect on record in as much as everything supposed to be supplied as per the understanding between the parties were duly furnished along with the 'demand notice' dated 12.06.2020.

- The amount claimed in the Petition by the OC is duly reflected in the COs Books of Accounts as confirmed by the RP is due and payable in COs audited books of accounts.

- The liability of the CD far exceeds its Assets and CD is unable to discharge its liabilities in the normal and ordinary course of business and several others petitions have already been filed by various claimants before NCLT, Mumbai, against the CD and the claim thereof is also confirmed by the RP.

- The Bank Account of CD is already declared NPA. Thus, no case is warranted for interfering with the order passed by the Honourable NCLT, Mumbai and appeal needs to be dismissed. - Despite being in possession of all the documents and record (as provided again under the Demand Notice dated 12.06.2020) no substantial defence is raised which merit trial.

iv. If vague denials without any specifics are treated to be pre-existing dispute, then no case would be able to qualify Sec. 9 IBC. It is necessary to note that in a given case there must be an "existence of a dispute" not a "contemplation of dispute" or 'imagination of dispute'. Letter dated 14.03.2020 and reply to Demand Notice dated 23.06.20202 by CD fail to identify any "existence of a dispute" which is substantial and real. Thus, present appeal must fail with cost."

11. The Learned Counsel for the Respondent has also taken us to some invoices at Page 88 to 94. We have also examined the same and at least in one of the invoice which was shown by the Learned Counsel for the Respondent, which is at Page 94, in the bottom itself an endorsement has

been made "Received (not checked)". This indicates that though invoice was raised but unless it was checked it cannot be inferred that the amount of invoice was admitted.

12. Besides hearing the Learned Counsel for the parties, we have minutely perused the materials available on record and after going through the same we are of the opinion that the Corporate Debtor has made out a case that there were pre-existing disputes between the parties. Without going in detail, it can be held that the documents reflect regarding pre-existence of dispute between the parties. As claimed by the Operational Creditor outstanding was lying since the year 2019 and vide letter dated 06.02.2020 issued by the Respondent No.1 addressed to the Appellant, it appears that Respondent No.1 admitted that he had received payment of Rs.35 lakhs till 1st August, 2019. In the said letter the Respondent has given detail regarding outstanding dues. The letter dated 06.02.2020 which is at running page 142 and 143 is reproduced herein below:

> *"Pursuant to our written Confirmation letter issued by our Office duly accepted by you, for providing Billboards for the various displays approved by you, wherein we had carried out the Display and Mounting of advertisement on your behalf at various location in Mumbai, Thana, Mira-Bhayandar & Virat as set out in the Work Completion report and had submitted the necessary invoices issued to you and these invoices were duly accepted and acknowledged by you, without raising any objection as to the contents of display till date.*

In our previous meeting in May, 2019, at your office you had committed to Pay us Rs.1.30 cr by July, 2019 but out of this, we received only Rs.35 lacs till 1st August, 2019, thereby a shortfall of 95 lacs which was required to be paid till the 10th August, 2019.

After a lot of follow-up, meetings and calls, and since no payments were forthcoming we wrote a letter dated 02.08.2019 (send by speed post) which was received by you.

On receipt of our letter dated 02.08.2019, you called Mr.Vicky Gupta for a meeting to discuss and finalise the interest rate @ 18% p.a. which was levied on the total outstanding from the start till date of realisation or payment till 2nd August, 2019. The interest Debit note was accepted by you. Since the interest figure as per the debit Note attached had crossed Rs. One Crore mark, you have issued One Crore PDC as part payment towards the interest so that the interest burden would be reduced, this was accepted by Mr. Vicky Gupta. Also it was accepted by you that further interest shall be paid by you @ 18% from 3rd Aug till date of realisation of the principal amount but due to financial constraints you requested us to meet again after 15th Dec once your brother's marriage would be over by then.

Against the interest overdues you gave us 20 PDC cheques of Rs.5 lacs each (list annexed) of which 10 cheques of Rs.5 lacs each worth i.e. Rs.50 lacs were exchanged to your Mumbai Dist Central Bank and then were cleared by you and 2 more cheques from his list got exchanged to

Mumbai Dist Central bank but when deposited in the Bank to our shock both cheques were stopped payment for reasons not known to us.

You then called us for a meet again at your office wherein Mr. Sanjiv Gupta, Mr. Amit Gupta, and Mr. Vicky Gupta had come together in Jan 2020 and you promised to release the balance 10 cheques of 5 lacs each which were originally issued towards interest from the Mumbai Dist Central Bank account by the 25th Jan 2020 and requested to send the old cheques back (2 stop payment and 8 undeposited). In good faith we have returned these 10 cheques to you, but till date were have not received these new cheques.

You had also promised to pay part principal amount of Rs.50 lacs till Feb 2020 by issuing two cheques of Rs.25 lacs each but nothing has been done on that front till date.

We now call upon you to immediately pay us Rs.254,40,604/- plus Rs.5,16,027/- and overdue interest of Rs.53,59,186/- plus further interest from 3rd August, 2019 to 31st Jan 2020 of Rs.27,56,595/-

We hereby call upon you to make the entire outstanding payment including the overdue interest within the next 15 days failing which, necessary legal action against you company for realization of the Dues under rules and regulation of NCLT and failure to comply with the requisite contained herein, it shall be deemed and mean that you are unable to discharge your liability in the normal and ordinary course of business and your company is commercially insolvent and you will have to bear the consequences for this legal suit, which please note.

We hope that you will cooperate with us and clear the entire overdue outstanding against your account at the earliest. We would appreciate your prompt action and would be pleased to receive your payment as this amount is long overdue from your end.

We look forward to a better and cordial business relationship with you organisation in all our future business endeavour.

Yours faithfully,

For Global Advertisers

Sd/- Rajiv Gupta

CA to Proprietor."

13. The Appellant's letter dated 20th February, 2020 which was addressed to Respondent No.1 reflects regarding pre-existing dispute. In its letter dated 20th February, 2020 while referring to letters of Respondent No.1 dated 2nd August, 3rd August, 2019, 20th August, 2019, 4th September, 2019 30th September, 2019 and 6th February, 2020, the Appellant in categorical term had denied regarding demand raised by Respondent No.1. The letter dated 20th February, 2020 at Page 144 and 145 of the Memo of Appeal is reproduced herein below: -

"We the undersigned address you as under:

1. *At the outset we deny each and every insinuations set out in the said letters and state and submit that the averments and insinuations are untenable and invalid.*

2. *At the outset, we state and submit that the amount of debt sought to be claimed by you is denied by us in toto, ever the debit note raised by your goodselfs are been denied. In fact you have sought to miss-appropriate the amounts paid by us as per your own whims and fences, thereby causing a huge challenge for reconciliation of accounts, for this reasons alone the alleged claims raised by you alongwith interest is disputed.*
3. *At the further this is to place on record that there are no supporting documents provided for the bills raise and in good faith we have paid to you a on account payments to the tune of Rs.1,25,00,000/- to which the supporting documents are still awaited in spite of several verbal promises and reminders are not yet received by us which you may kindly note.*
4. *We further deny that there was any understanding with Vicky Gupta and our Mr. Amit B Wadhwani sought to be alleged infact meeting could have occurred between both as they are friend and have cordial relationship, but there was never any discussion in respect of the alleged claims raised by you or the promises for payment as sought to be alleged, infact the claims raised by you need to be reconciled.*
5. *We deny the contents of the debit note in toto and state that there is no any debt or liability payable by us. In fact we alongwith your Vicky Gupta always had an understanding of "payable when able" because our Amit B Wadhwani and Vicky Gupta shared and presently still share a cordial relationship with each other. This fact is also corroborated in the invoices raised by you as the invoices never*

mentioned any due date or period by when the given amounts were required to be paid. For this reason also if you are inclined to demand payment, we would have to first reconcile the accounts post which if at all anything is due would be paid.

6. *With regards to replacement of cheques and honouring of certain cheques were nothing but payment made due to friendly relationship which our client shared with your client and later it was realized that such huge payment cannot be made without proper reconciliation of accounts. It would be legally incorrect and impermissible to make any payments to you.*
7. *In view of the aforesaid, we deny that the amount of Rs.3,54,40,604/- plus Rs.5,16,027/- overdue interest plus Rs.53,59,186/- plus further interest of Rs.27,56,595/- is due and payable. These amount per-se are contrary to the understanding and as such the demand of these amounts are premature and therefore the demand raised under the said letters are illegal and incorrect.*
8. *Without prejudice to our rights and contents and as we have had a friendly understanding, we forthwith invite you to meet the undersigned and resolve the difference, if any, hope better sense shall prevail.*

Yours Truly,

For Sai Estate Consultants Chembur Private Ltd

Sd/- Vicky Wadhwani

Director

14. Besides other documents letter dated 11th March, 2020 addressed to the Corporate Debtor issued on behalf of the Operational Creditor makes it clear that for reconciliation of account date was fixed to 14th March, 2020. However, record shows that thereafter no reconciliation of accounts had taken place in between the parties. It goes without saying that in accounting, reconciliation is the process of ensuring that two sets of records are in agreement. Accordingly it can be inferred that in absence of reconciliation of accounts there was pre-existing dispute between the parties. At this juncture it is necessary to reproduce the letter dated 11th March, 2020 issued by the 'Operational Creditor' to the Appellant.

> *"We are in receipt of your Reply dated 20th February, 2020 in response to our letters addressed by the undersigned from time to time and after going through your reply under reference, we have to reply the same as under:*
>
> 1. *At the outset, we repeat and confirm that the amount claimed in our letters dated 02.08.2019 and 6.02.2020 is due and payable by you to us in respect of the display of advertisement boardings carried out by us pursuant to the instructions issued by you from time to time.*
> 2. *It is a matter of record that each display was carried out as per the confirmation letters executed by you and we have submitted all the invoices alongwith the copy f the confirmation leters forwarded to you and also submitted details of the outstanding Dues submitted by us from time to time.*

Therefore we failed to understand the grievance regarding non-supporting of documents as alleged by you.

3. *In any event, to avoid any controversy, as requested you you we hereby fix an appointment on 14th day of March, 2020 for reconciliation of the accounts and accordingly you are requested to remain present in our office or depute your representative along with the necessary statement of account for reconciliation of the accounts.*
4. *Please note that if the aforesaid exercise is not done within 7 days from the receipt of this letter, we will be constrained to proceed legally for recovery of outstanding.*
5. *In view of the above, all the allegations contained in your letter under reference are denied in toto."*

15. On perusal of paragraph 3 of letter dated 11th March, 2020 it is evident that date for reconciliation of account was fixed by the Operational Creditor to 14th March, 2020. It goes without saying that since there was no settlement of account in between the parties and there were some disputes, the Respondent No.1 had agreed for fixing a date for reconciliation of the account. This fact is itself enough to infer that demand raised by the Operational Creditor/Respondent No.1 was not undisputed rather there was some dispute. Once under the provisions of Section 9 of the IBC, a Corporate Debtor is in a position to satisfy that there was pre-existing dispute, there is no requirement for initiation of CIRP. The Hon'ble Supreme Court in *Mobilox Innovations Private Limited v Kirusa Software Private Limited (2018) 1 SCC 353*

has already set the present position at rest. It would be profitable to quote para 40 of the said Judgement, which is as follows:-

> *"40. 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."*

16. Admittedly before the Adjudicating Authority, Application under Section 9 of the IBC was filed on 28.07.2020 whereas there are materials on record which we have discussed hereinabove suggests that dispute was

continuing in between the parties regarding outstanding claim and this was the reason that the Respondent No.1 had fixed the date as 14.03.2020 for reconciliation of the account and reconciliation had never been done.

17. In view of the facts and circumstances of the case as well as in view of law laid down by the Hon'ble Supreme Court in *Mobilox Innovations Pvt Ltd (Supra)*, we are of the opinion that the Learned Adjudicating Authority has incorrectly allowed the application filed under Section 9 of the IBC on behalf of the Operational Creditor/Respondent No.1 which requires interference. Accordingly, order dated 2nd August, 2021 passed by learned National Company Law Tribunal, Mumbai Bench IV in CP(IB)/1393/MB-IV/2020 is hereby set aside. It goes without saying that the setting aside of the impugned order may not be treated as a hurdle for the Operational Creditor to take other action in accordance with law, if any. The Appeal is allowed. The order impugned dated 2nd August, 2021 is set aside.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

5th July, 2022

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