

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

**Company Appeal (AT) (Ins.) No. 1470 of 2022**

**[Arising out of order dated 18.10.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench in CP (IB) No. 1801/KB/2019]**

**IN THE MATTER OF:**

**Talbot & Company,  
(Partnership Firm)  
“Tower House”, 2A, Chowringhee Square,  
Kolkata – 700 063, West Bengal  
Through its Authorised Representative  
Shri Ajay Kumar Mandal**

**...Appellant**

**Versus**

**Austin Distributers Pvt. Ltd.  
Through its Directors  
Registered office at:  
No.19, Jawahar Lal Nehru Road,  
New Market Area, Dharmatala,  
Kolkata – 700 087, West Bengal**

**...Respondent**

**Present:**

**For Appellant : Mr. Gaurav Kejriwal, Mr. Ankit Kohli, Advocates**

**For Respondent : Mr. Ashish Choudhury, Mr. Anand Kamal,  
Advocates**

**J U D G M E N T**

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

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**‘IBC’** in short) by the Appellant arises out of the Order dated 18.10.2022 (hereinafter referred to as **‘Impugned Order’**) passed by the

Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) in CP(IB) No.1801/KB/2019. By the Impugned Order, the Adjudicating Authority dismissed the application filed under Section 9 of the IBC by the Operational Creditor for initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) against the Corporate Debtor. Aggrieved by this impugned order the present appeal has been preferred.

2. Making his submission, Learned Counsel for the Appellant stated that M/s Talbot & Company, the present Appellant/Operational Creditor provided a range of security services solutions to M/s Austin Distributors Private Limited, being the Corporate Debtor/Respondent. The Corporate Debtor had placed a work order on 30.09.2015 on the Operational Creditor for deployment of security guards and as per agreed terms and conditions, the Operational Creditor raised monthly invoices for payments to be made by the Corporate Debtor.

3. It has been submitted by the Learned Counsel for the Appellant that the Corporate Debtor failed to make payments for invoices raised by the Operational Creditor. The Operational Creditor issued several emails to the Corporate Debtor seeking payments of the outstanding bill but on not receiving the payments the Operational Creditor issued a demand notice under Section 8 of IBC on 26.07.2019. The Corporate Debtor replied to the demand notice on 06.08.2019 raising false and frivolous allegations against the Operational Creditor to evade payment. It was contended by the Learned Counsel for the Appellant that there were no pre-existing disputes before receipt of the demand notice and that in any case the pre-existing disputes

stood waived since the Corporate Debtor in his email dated 21.05.2019 had admitted its liability and had further stated that the non-payments of dues was on account of the tough market situation faced by them and that dues would be cleared soon.

4. The Learned Counsel for the Corporate Debtor, rebutting the contention of the Appellant submitted that the demand notice issued by the Operational Creditor was based on spurious and fabricated invoices and that claims arising out of the different and multiple contracts / agreements were clubbed together. Pointing out that there were several pre-existing disputes, it was submitted that the Corporate Debtor had suffered loss due to deficient and poor service rendered by the Operational Creditor and that this deficiency in services was communicated to the Operational Creditor prior to receipt of the demand notice on several occasions vide emails from 2016 to 2019. It has been further pointed out that poor quality of services rendered resulted in theft as well as damage to the property of the Corporate Debtor and that for such contractual violations, Operational Creditor is liable to pay compensatory damages.

5. Further it was stated that the Operational Creditor had admitted deficiency of services in their email dated 27.02.2016 and 29.08.2018 but chose to ignore the requests made by the Corporate Debtor to redress these problems. It was vehemently contended that in the face of these pre-existing disputes, the Adjudicating Authority had rightly dismissed the Section 9 application of the Operational Creditor.

6. We have duly considered the arguments and submissions advanced by Learned Counsel for both the parties and perused the records carefully in the light of the rival contentions.

7. The short point for our consideration is whether an operational debt above the threshold limit is due and payable and if there has been a default in the payment thereof and whether there is any pre-existing dispute between the parties. This examination would be in consonance with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353** ('Mobilox' in short) which is as reproduced below:-

*“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

*(i) Whether there is an “operational debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)*

*(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*

*(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

*If any of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”*

8. Coming to the question of whether there was an operational debt above Rs.1 lakh which had become due and payable and default in payment had occurred, we note from the impugned order that the Operational Creditor in the Company Petition filed under Section 9 of IBC had claimed Rs. 8,17,678.54 and interest of Rs.1,46,052/- from the Corporate Debtor. It is also noted that the Appellant in support of their contention that outstanding payments were due has relied on the fact that payments continued to be received from the Corporate Debtor from time to time till as late as 30.06.2019. It has been further submitted that reminders for clearing outstanding dues were sent from time to time to the Corporate Debtor as placed at pages 113-129 of Appeal Paper Book (“**APB**” in short). More importantly, it is contended that the debt has been squarely admitted by the Corporate Debtor in their email dated 21.05.2019 without mention of any dispute surrounding the debt. The said email as placed at page 130 of APB is as reproduced below: -

***“Ledger of Outstanding Amount\_Talbot & Co.***

AUSTIN DISTRIBUTORS <[austindistributors@yahoo.co.in](mailto:austindistributors@yahoo.co.in)>

*Reply-To: AUSTIN DISTRIBUTORS <[austindistributors@yahoo.co.in](mailto:austindistributors@yahoo.co.in)>*

*To: "talbotandcompany@gmail.com" <talbotandcompany@gmail.com>*

*Dear Sir,*

*We are in receipt of the statements of outstanding.*

*As we have already conveyed to your representative, we are experiencing very hard market situation and therefore business collection is very poor.*

*We are hopeful in a couple of months the situation will definitely improve and we will be able to clear the outstanding gradually as we have cleared part of the same earlier.*

*Kindly bear with us till such time.*

*Thanks*

*For Austin Group*

*HR & Admn Dept."*

9. The Learned Counsel for the Respondent however submitted that the Corporate Debtor in their reply filed to the Section 9 application before the Adjudicating Authority had denied and disputed the entire amount claimed by the Operational Creditor. It was further submitted that they never assured that necessary payments will be made to the Operational Creditor. As regards the email of 21.05.2019 which has been relied upon by the Operational Creditor to impute that the Corporate Debtor had acknowledged their liability, the Learned Counsel for the Respondent contested the email to be a creature of fraud and misrepresentation. In support of their contention, it has been pointed out that the email has not been sent by any authorized signatory or

any identifiable employee of the Corporate Debtor. It has been submitted that emails exchanged between the Corporate Debtor and the Operational Creditor were invariably signed by employees of the Corporate Debtor along with their names duly reflected therein. In the absence of any individual office holders name anywhere in the email of 21.05.2019, the Learned Counsel for the Respondent questioned the bonafide and legitimacy of the email and submitted that it was an act of fraud/misrepresentation by the Operational Creditor. Moreover, it was submitted that the email has been issued by the “HR-Admn Dept.” of the Corporate Debtor which is not authorized/empowered to issue such admission of debt/balance confirmation. The Learned Counsel for the Respondent has therefore, emphatically asserted that this email cannot be treated as admission/acknowledgement of any liability on the part of the Corporate Debtor towards the Operational Creditor. The Learned Counsel of the Appellant, however, argued that the defence raised by the Corporate Debtor does not hold ground since the email originated from the same email address as reflected in the Company Master Data on the portal of the Ministry of Corporate Affairs in respect of the Corporate Debtor as placed at page 364 of APB.

10. We note that the Adjudicating Authority has also taken cognizance of the email dated 21.05.2019 and that after taking note of the rival contentions of both the sides has taken a view that the said email is “very unconventional” in the light of the fact that the Corporate Debtor has been disputing the services rendered by the Operational Creditor. There is nothing wrong on the

part of the Adjudicating Authority in holding the email to be “unconventional” especially in the light of disputes raised by the Corporate Debtor with respect to services delivered by the Operational Creditor which we shall look into separately in the succeeding paragraphs. But for the fact that better phraseology than the word “unconventional” could have been used by the Adjudicating Authority, we otherwise agree with the Adjudicating Authority that the email is curiously issued without bearing the name and designation of the authorized employee of the Corporate Debtor. Investigating any ingredient of fraud in the said email being beyond the remit of the summary jurisdiction bestowed upon the Adjudicating Authority under Section 9 of the IBC, we also note that the Adjudicating Authority has correctly desisted from examining the elements of alleged fraud, if any.

11. This now bring us to the question whether there is any pre-existing dispute between the two parties. The Learned Counsel for the Respondent has pointed out that the Corporate Debtor had raised issues with respect to deficient quality of services provided by the Operational Creditor from 2016 onwards as communicated through email from time to time. Elaborating on the wide-ranging nature of disputes raised in the email communications so sent on 26.02.2016, 10.11.2017, 02.10.2018, 12.03.2019 and 14.03.2019, it was submitted that poor and deficient services had led to theft of goods belonging to the Corporate Debtor. Further loss was incurred on account of damages caused to a compressor due to negligence on the part of staff deployed by the Operational Creditor. It was also alleged that complaints were made regarding deployment of unethical security personnel as well as

irregular attendance on the part of manpower deployed and that in spite of these communications, the Operational Creditor did not take appropriate remedial measures. The Learned Counsel for the Appellant however contended that these disputes were frivolous and baseless since Corporate Debtor had continued to receive the services from the Operational Creditor even after their last email communication dated 14.03.2019.

12. We note that the Adjudicating Authority has recorded in details their findings that the Corporate Debtor had raised disputes with regard to services provided by the Operational Creditor. It would be useful to reproduce the relevant paragraphs from the impugned order as under: -

*“9.From the record at page 32 (i.e., email dated 26 February 2016), page 33 (i.e., email dated 10 November 2017), page 34 (i.e., email dated 02 October, 2018), Page 35 (i.e., email dated 12 March, 2019) and page 37 (i.e., email dated 14 March 2019) it is apparent that at various circumstances the Corporate Debtor raised disputes with respect to the service provided by the Operational Creditor.*

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*11.However, be that as it may, it is imperative to mention that from the year 2016 to 2019 the Corporate Debtor raised several issues with respect to the services provided by the Operational Creditor. Further, the email dated 21 May, 2019 is very unconventional because it is the same Corporate Debtor who has been disputing the services rendered by the Operational Creditor.”*

13. From the material available on record, we find that the Corporate Debtor has been sending email communications to the Operational Creditor on the shortcomings in the quality of services extended by them. We also find that the Operational Creditor has also admitted deficiency in services in their email dated 27.02.2016 as at page 421 of APB. Furthermore, it has also been submitted by the Learned Counsel for the Respondent that the Operational Creditor on 29.08.2018 had admitted vide an email communication that one of their staff responsible for executing the contractual obligations towards the Corporate Debtor was working in an unethical manner and in derogation of standard of service quality contemplated under the contract. That services continued to be received by the Corporate Debtor even after the last email dated 14.03.2019 in which they allegedly raised certain disputes, does not negate the existence of dispute between the parties. The Section 9 application has also been objected to by the Respondent and the reply was filed raising disputes and refuting the claim of the Appellant. We, therefore, do not find any cogent reasons to disagree with the Adjudicating Authority that disputes have been raised by the Corporate Debtor prior to issue of demand notice.

14. We may refer to the judgment of the Hon'ble Supreme Court in Mobilox where in Paragraph 51 of the judgment it was held that Adjudicating Authority has to seek 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. In paragraph 51, the following was laid down:

*“51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*

15. We find that the Adjudicating Authority in the present case has also followed the principles adumbrated in the Mobilox judgment and held that the disputes raised by the Corporate Debtor are not spurious or plainly

frivolous or vexatious. The relevant paragraphs of the impugned order are extracted here as under: -

*“13. Further, in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited<sup>3</sup> it was opined by the Hon’ble Apex Court that;*

*“33. ...What is important is that the existence of the dispute and / or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be .....”*

*14. The Hon’ble Supreme Court in Mobilox (Supra) has also observed that all that the Adjudicating Authority has to see at ‘the stage of Admission’ 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 or moonshine defence unsupported by tangible materials/evidence.*

*15. In this context it is pertinent to mention that the disputes raised by the Corporate Debtor are not spurious or plainly frivolous or vexatious. Hence, the Petition being C.P. (IB) No.1801/KB/2019 is dismissed. Needless to say that the Corporate Debtor is at liberty to resort to other remedies that may be available to it under any other law.”*

16. It is well settled that in Section 9 proceedings the Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. What has to be looked

into is whether the defence raises a dispute which needs further adjudication by a competent court. Disputes pertaining to contractual issues are not to be resolved in Section 9 proceedings. If we apply the test laid down in Mobilox by the Hon'ble Apex Court to the facts of the present case it is clear that the defence raised by the Corporate Debtor in their reply filed in Section 9 application is not illusory or moonshine. The present is neither a case where there is undisputed debt for which insolvency can be asked by the Appellant to be initiated. The Adjudicating Authority has, therefore, correctly applied the ratio of the Mobilox Judgment in dismissing the Section 9 application.

17. For the foregoing reasons, we are of the view that the Adjudicating Authority has rightly dismissed the application of the Appellant filed under Section 9 of IBC. We are satisfied that the impugned order does not warrant any interference. We however make it clear that in the event the Appellant seeks remedy before any other appropriate forum, it shall be open for the Appellant to do so in accordance with law. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

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

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

Place: New Delhi

Date: 10.01.2023

**PKM**