NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 664 of 2024

[Arising out of the Impugned Order dated January 17, 2024 passed by the Adjudicating Authority ("National Company Law Tribunal, New Delhi Bench, Court-III") in CP(IB) No. 892(ND)/2022]

IN THE MATTER OF:

Khushbu Dye Chem Private Limited
Having its registered office at:
M/403, Vardhaman Nagar,
Dr. R.P. Road, Mulund (West)
Mumbai – 400080
CIN: U51410MH2003PTC139518 **...Appellant**

Versus

Chemical Suppliers India Private Limited
Having its registered office at:
507, Plot No. D-4, 5, 6, 5th Floor
Krishna Apra Business Square, N.S.P.,
Pitampura, Delhi – 110034 **...Respondent**

Present:

For Appellant : Mr. Mohammed Zain Khan and Mr. Danish Ansari, Advocates

For Respondent :

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The present Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("Code") for seeking an order to quash/set aside the order dated 17.01.2024 ("Impugned Order") passed by the Adjudicating Authority in C.P. (IB)-892 (ND)/2022 titled "Khushbu Dye Chem Private Limited versus Chemical Suppliers India Private Limited", wherein the

Adjudicating Authority dismissed the aforesaid Company Petition filed u/s 9 of the Code by concluding that the debt amount is less than the threshold value of Rs.1,00,00,000/- (Rupees One Crore only) as required u/s 4 of the Code for initiating the Corporate Insolvency Resolution Process ("CIRP") against the Respondent and that there are pre-existing disputes in relation to the debt amount of Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only) plus interest of Rs.42,72,193/- (Rupees Forty Two Lakhs, Seventy Two Thousand, One Hundred and Ninety Three only).

Brief Facts of the Case

2. Somewhere in January 2021, the Director of Respondent approached the Director of Appellant with a proposal/request to provide/supply Isopropyl Alcohol, Toluene, Methyl Methacrylate, Methyl Iso Butyl Ketone and Acetone chemicals, which the Appellant agreed to supply subject to raising purchase orders and timely payments. The Respondent raised various purchase orders for purchase of chemicals. Accordingly, the Appellant supplied total chemicals worth Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eighty Hundred and Ninety One only) and raised seven invoices towards the same under which payment was to be made within 70 days. However, payment was not made despite repeated follow-ups.

3. The Appellant issued demand notice dated 24.06.2022 calling upon the Respondent to make payment of Rs. 1,82,54,891/- (Rupees One Crore, Eighty

Two Lakhs, Fifty Four Thousand, Eighty Hundred and Ninety One only). The Respondent, by its replies dated 13.07.2022 and 14.07.2022, admitted its liability but wrongly denied making payment alleging adjustment with respect to a separate transaction, thereby creating a false dispute to get out of the clutches of the Code.

4. The Appellant, by its rejoinders dated 15.07.2022, countered the false dispute raised by the Respondent. Thereafter, the Respondent towards its liability issued six cheques for total amount of Rs.2,43,86,959/- (Rupees Two Crores, Forty Three Lakhs, Eighty Six Thousand, Nine Hundred and Fifty Nine Rupees only). However, when the said cheques were deposited for clearance the same were returned unpaid with remark "payment stopped by drawer". Pursuant thereto, the Respondent filed false complaint of forgery of cheques against the Appellant.

5. The Appellant filed Company Petition No. C.P. (IB)-892 (ND)/2022 before the Adjudicating Authority u/s 9 of the Code praying for initiating the CIRP against the Respondent.

6. The Respondent, by its reply dated 26.04.2023 to the said Company Petition, admitted its liability but set-off the same on the ground of adjustment against a separate transaction wherein the Appellant had agreed to purchase 450 MT of Isopropyl Alcohol (“IPA”) from the Respondent, out of which delivery of 143.850 MT of IPA was taken and payment of Rs.2,36,79,147/- (Rupees Two Crores, Thirty Six Lakhs, Seventy Nine

Thousand, One Hundred and Forty Seven only) was made towards the same. However, Appellant could not take the delivery of the remaining IPA.

7. The Respondent alleged that the Appellant had to pay Rs.6,27,75,000/- (Six Crores, Twenty Seven Lakhs and Seventy Five Thousand only) plus GST of Rs.1,12,99,500/- (Rupees One Crore, Twelve Lakhs, Ninety Nine Thousand and Five Hundred only) for 450 MT of IPA. But the Appellant only paid Rs.2,36,79,147/- (Rupees Two Crores, Thirty Six Lakhs, Seventy Nine Thousand, One Hundred and Forty Seven only) towards 143.850 MT of IPA and failed to make balance payment of Rs.4,27,07,925/- (Four Crores, Twenty Seven Lakhs, Seven Thousand, Nine Hundred and Twenty Five only) plus GST towards balance product.

8. The Appellant further contended that instead of paying the aforesaid balance outstanding amount, it issued a credit note dated 18.07.2020 for Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand, One Hundred and Forty only) which was allegedly not accepted by the Respondent. And further alleged that in its claim of Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only), the Appellant failed to consider payment of Rs. 20,71,000/- (Rupees Twenty Lakhs and Seventy One Thousand only) made by the Respondent and also an alleged debit note of Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand and One Hundred Forty only). The Appellant, by its rejoinder dated 22.05.2023, denied the said allegations.

9. The Adjudicating Authority, by its Order dated 17.01.2024, rejected the said Company Petition by relying upon the emails of the Respondent regarding alleged set-off, the alleged payment of Rs.20,71,000/- (Rupees Twenty Lakhs and Seventy One Thousand only) and debit note of Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand, One Hundred and Forty only) which were in respect of a separate transaction, thereby wrongly concluding that the operational debt amount is less than the threshold value of Rs.1,00,00,000/- (Rupees One Crore only) as required u/s 4 of the Code, and by wrongly relying upon the said six cheques and police complaint, concluded that there exists a pre-existing dispute. The Adjudicating Authority failed to appreciate that the operational debt amount of Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only) under the said Company Petition was on the basis of said seven invoices which was admitted by the Respondent. However, the Adjudicating Authority wrongly relied upon the said cheques for coming to a conclusion that there exists a pre-existing dispute. The Adjudicating Authority failed to consider that there is no provision under the Code for set-off /adjustment /counterclaim and, accordingly, the issue of set-off by the Respondent did not arise at all. On account of the aforesaid, there could be no pre-existing dispute.

10. On the other hand, the Respondent contends that the instant application preferred by the Operational Creditor is a glaring abuse of the process, since the Operational Creditor has failed to bona-fidely disclose the

existence of disputes in relation to its claims. The Appellant is guilty of *suppressio veri* and *suggestio falsi*, in as much as, these disputes existed much prior to the filing of the Application or, for that matter, before issuance of the demand notice itself, and the Operational Creditor deliberately suppressed these material facts from this Hon'ble Tribunal.

11. The demand of the Appellant is untenable as the invoices amounting to Rs.1.82 Crores (approx.) got adjusted against the outstanding payment which was required to be paid by the Appellant against the material purchased by the Respondent on behalf of the Appellant.

12. The Appellant had issued the purchase order dated 18.06.2020 to the Respondent for supplying 450 MT of IPA at the rate of Rs.139.50/- per kilogram. Since the Respondent is the trader of the chemicals, it procured 450 MT of IPA demanded by the Appellant from the market and waited for the Respondent to lift 450 MT material. However, the Respondent lifted only 143.850 MT of the material and paid only for 143 MT instead of 450 MT. The Appellant had ordered IPA worth Rs.6,27,75,000/- (Rupees Six Crores, Twenty Seven Lakhs and Seventy Five Thousand only) plus GST of Rs.1,12,99,500/- (Rupees One Crore, Twelve Lakhs, Ninety Nine Thousand and Five Hundred only) for 450 MT but paid only Rs.2,00,67,075/- (Rupees Two Crores, Sixty Seven Thousand and Seventy Five only) for 143.850 MT only and the balance amount of Rs.4,27,07,925/- (Rupees Four Crores, Twenty Seven Lakhs, Seven Thousand, Nine Hundred and Twenty Five only)

plus GST amount of Rs.1,12,99,500/- (Rupees One Crore, Twelve Lakhs, Ninety Nine Thousand and Five Hundred only) was never paid by the Appellant.

13. After waiting for some time, the Respondent approached the Appellant to lift the material and release the payment of Rs.4,27,07,925/- (Rupees Four Crores, Twenty Seven Lakhs, Seven Thousand, Nine Hundred and Twenty Five only) plus GST as the Respondent had procured the material from the market on his behalf on credit.

14. On 18.07.2020, the Appellant issued one credit note of Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand, One Hundred and Forty only) instead of Rs.5,40,07,425/- (Rupees Five Crores, Forty Lakhs, Seven Thousand, Four Hundred and Twenty Five only) to the Respondent without any settlement or any intimation to the Respondent. The Respondent immediately sent an email to the Appellant and demanded the pending amount for the remaining 306.150 MT and requested the Appellant to lift the balance material as soon as possible. However, the Appellant did not lift the material despite numerous communications and emails shared by the parties.

15. Further, the Appellant has filed the present application for the wrong principal amount which included the amount already paid by the Respondent. The total amount claimed by the Appellant as principal amount is Rs.1,82,54,891/ (Rupees One Crore, Eighty Two Lakhs, Fifty Four

Thousand, Eight Hundred and Ninety One only). However, the said amount does not consider payment of Rs.20,71,000/- (Rupees Twenty Lakhs and Seventy One Thousand only), which was paid by the Respondent on 20.03.2020 and the debit note of Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand, One Hundred and Forty only) issued by the Respondent while calculating the principal amount. Therefore, the alleged due amount being claimed by the Appellant as principal amount is also less than the threshold limit of Rs.1,00,00,000 (Rupees One Crore only) as per the provisions of Section 4 of the Code. Hence the present application is liable to be dismissed.

16. The Respondent has placed reliance on ***Steel India Vs. Theme Developers Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 1014 of 2019] decided on 11.02.2020*** and claims that amount towards interest on loan cannot be termed as an operational debt. It contends that it is settled law that interest claimed is not part of operational debt as defined under Section 5(21) of the Code. This aspect is clear when the definition of operational debt is seen in juxtaposition to the definition of financial debt. In the definition of financial debt under Section 5(8) of the Code, interest is specifically defined as part of financial debt. However, in the definition of operation debt under Section 5(20), there is a deliberate omission of the term 'interest'. Further, such unilateral stipulation of interest without any agreement or understanding between the parties is wholly untenable and is an attempt to claim inflated amount. In the matter of ***Steel India (supra)***, it has been

specifically held by this Hon'ble Tribunal that claim amount towards interest cannot be termed as operational debt.

17. Further, the Respondent issued debit notes to the Appellant for the storage charges paid by the Respondent to store the unlifted materials of the Appellant and for the interest paid by the Respondent.

18. The Appellant issued legal notice dated 05.09.2022 for dishonouring of cheques allegedly issued towards settlement of the account. There was no settlement executed between the parties and the Respondent never issued cheques on the dates mentioned in the respective cheques. It is pertinent to mention that the cheques mentioned in the said legal notice were issued by the Respondent in the year 2020, which were stopped because the payment was made through RTGS in 2020. Appellant fraudulently changed the dates of the cheques and presented them in the bank for clearing but the Respondent immediately stopped the payment of the cheques as they were tempered by the Appellant. The Appellant had committed the offence of cheating and forgery. The Respondent also filed police complaint against the Appellant for committing cheating and forgery.

19. In fact, the Appellant also filed a police complaint against the Respondent company in Mumbai for not paying the alleged pending amount and the directors of the Respondent company received notice from the Mulund Police Station, Thane, Mumbai, which clearly manifests the pre-existing disputes between the parties regarding the payments.

20. Respondent contends that from a plethora of communications, it can be demonstrated that the parties were constantly in discussions over pre-existing and unresolved disputes. However, the Operational Creditor, in order to arm twist the Corporate Debtor, has filed the instant Application.

21. The present petition may therefore be dismissed on the very ground of pre-existing dispute.

Appraisal

22. We have heard the Ld. Counsel appearing for the Appellant and also perused the records.

23. The following issues emerge for our consideration:

a) Whether the present application is within the minimum default amount of Rs. 1,00,00,000/- (Rupees One Crore only) as provided under Section 4 of the Code or not.

b) And whether there is a pre-existing dispute with respect to the amount claimed to be due in the application or not in the instant case

24. Recapitulating, in the instant case Appellant supplied chemicals worth Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only) to the Respondent based on purchase orders and raised seven invoices with a payment term of 70 days, which were not honoured despite repeated follow-ups. A demand notice dated 24.06.2022 was issued by the Appellant, to which the Respondent replied on

13.07.2022 and 14.07.2022 admitting liability but alleging adjustments based on a separate transaction. The Respondent issued six cheques towards the claimed liability, which were dishonoured with the remark “payment stopped by drawer.” Subsequently, the Respondent filed a police complaint alleging forgery. The Respondent's claims of set-off/adjustment are baseless as the Code does not provide for such provisions and the debt amount of Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only) is admitted and not disputed. The Adjudicating Authority erred in concluding that the debt amount is less than Rs.1,00,00,000/- (Rupees One Crore only) and that there is a pre-existing dispute based on unrelated transactions and dishonoured cheques.

25. Per contra, the Appellant has suppressed material facts and the existence of disputes, which predate the filing of the application and the issuance of the demand notice. The debt amount claimed by the Appellant is adjusted against an outstanding payment due from the Appellant to the Respondent for a separate transaction involving the supply of 450 MT of IPA. The Appellant failed to pay for the remaining 306.150 MT of IPA and issued a credit note without settlement, which was not accepted by the Respondent. The alleged due amount claimed by the Appellant is less than the threshold limit of Rs. 1,00,00,000/- (Rupees One Crore only) as per Section 4 of the Code when considering the payments made by the Respondent and the debit notes issued. The cheques mentioned by the Appellant were related to previous transactions and were stopped due to payments made through

RTGS. Further, the Appellant's claim includes interest, which is not part of 'operational debt' as defined under Section 5(21) of the Code. Most importantly, there are pre-existing disputes evidenced by numerous communications and police complaints filed by both parties.

26. The present Appeal filed under Section 61 of Code seeks an order to quash/set aside the Order dated 17th January 2024 of the Adjudicating Authority. The dismissal of the CP by the Adjudicating Authority was based on two primary grounds: (i) the debt amount is less than the threshold value of Rs.1,00,00,000/- (Rupees One Crore only) as required under Section 4 of the Code for initiating the Corporate Insolvency Resolution Process ("CIRP") against the Respondent, and (ii) the existence of pre-existing disputes in relation to the debt amount claimed by the Appellant.

27. We first look into the crucial issue of threshold amount. The Appellant/Operational Creditor has claimed the outstanding principal amount of Rs. 1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only) and also interest. When the payment had been made by the Respondent to the tune of Rs. 20,71,000/- (Rupees Twenty Lakhs and Seventy One Thousand only) and the debit note of Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand, One Hundred and Forty only) which was not accepted by the Respondent, are considered and deducted from the amount claimed, the remaining amount of Rs. 89,58,751/- (Rupees Eighty Nine Lakhs, Fifty Eight Thousand, Seven

Hundred and Fifty One only) is indeed less than the threshold limit of Rs.1,00,00,000/- (Rupees One Crore only). Furthermore, it has to be noted that in the Appellant's claim of Rs.1,82,54,891/- (Rupees One Crore, Eighty Two Lakhs, Fifty Four Thousand, Eight Hundred and Ninety One only) interest cannot be added as part of operational debt under Section 5(21) of the Code.

28. The Respondent has placed reliance on ***Steel India (supra)***. In the cited judgment, the claim amount towards ***interest alone*** on loan was not termed as an operational debt. The relevant extracts are as follows:

> This Appellate Tribunal in the case of ***Company Appeal (AT) (Insolvency) No. 1227 of 2019 in S.S. Polymers Versus Kanodia Technoplast Limited*** held that:
>
> "5. Admittedly before the admission of an application under Section 9 of the I&B Code, the 'Corporate Debtor' paid the total debt. The application was pursued for realisation of the interest amount, which, according to us is against the principal of the I&B Code, as it should be treated to be an application pursued by the Applicant with malicious intent (to realise only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the 'Corporate Debtor' and which is barred in view of Section 65 of the I&B Code."
>
> (Quoted verbatim)
>
> Similarly, in case of ***Company Appeal (AT) (Insolvency) No. 883 of 2019 in SBF Pharma Versus Gujarat Liqui Pharmacaps Pvt. Ltd***., this Appellate Tribunal rejected the Petition for the realization of only interest amount, on the ground that the Petition is filed for other than for the Resolution of Insolvency or liquidation. This Appellate Tribunal observed that:
>
> > "7. In the present case, we find that the Respondent- 'Corporate Debtor' is not insolvent and viable and feasible to pay the claim amount. Only for recovery of the interest, the Appellant is pursuing the Insolvency Resolution Process which, according to us, is malicious intent for any purpose other than for the resolution of insolvency, or liquidation."
> >
> > (Quoted verbatim)
> >
> > The respondent further contends that, the claim of interest alone on loan, does not clarify as an 'Operational Debt' under the 'I & B Code'. It is settled that the charging of interest, ought

> to be an actionable claim, enforceable under law, provided it was properly agreed upon between the parties. In this case, Learned Counsel for the Appellant submits that the email dated 05th September 2015, relates to the quotation only. The scanned copy of the email is as under:
>
> XXX XXX XXX
>
> It is also pertinent to allege that the outstanding amount is towards interest on the delayed payments, for which there was a pre-existing dispute, before issuance of demand notice. The alleged claim amount, towards interest on loan alone, cannot be termed as an 'Operational Debt'. For the reasons aforesaid, we are not inclined to interfere with the order passed by the Learned Adjudicating Authority."
>
> (emphasis supplied)

In this claim amount towards ***interest alone*** on loan was not termed as an operational debt. This may not fully support the case of the Respondent.

29. But reliance can be placed exclusively on ***SS Polymers Vs. Kanodia Technoplast Limited (supra)*** cross referenced in ***Steel India (supra)*** on the issue of the interest to be charged in the invoice which was not signed by the Appellant. It was held to be a 'unilateral document' and such interest could not have been recovered. The relevant extracts are:

> "3. The Adjudicating Authority has noticed that a sum of Rs. 25,00,000/- out of Rs. 32,71,800/- was paid to the Appellant by 31st December, 2018 through RTGS(s). The remaining amount of Rs. 7,71,800/- was also paid by 'Corporate Debtor' to the Applicant by 17th January, 2019 through NEFT(s). The said amounts were paid before the admission of the application under Section 9 of the I & B Code. Even after receiving the total amount due, the Appellant pursued the application under Section 9 of the I & B Code for a sum of Rs. 2,16,155/- towards interest. In these background, the Adjudicating Authority observed that in the absence of any Agreement, no such amount can be claimed.
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> 4. The Learned Counsel for the Appellant relied on 'Invoices' to suggest that in the 'Invoices', the claim was raised for payment of interest. However, we are not inclined to accept such submission as they were one side Invoices raised without any consent of the 'Corporate Debtor'.
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> 5. Admittedly, before the admission of an application under Section 9 of the I & B Code, the 'Corporate Debtor' paid the total debt. The application was pursued for realisation of the interest amount, which, according to us

> is against the principle of the I & B Code, as it should be treated to be an application pursued by the Applicant with malicious intent (to realise only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the 'Corporate Debtor' and which is barred in view of Section 65 of the I & B Code."
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> (emphasis supplied)

In the instant case also, the unilateral stipulation of interest by the Appellant without any agreement or understanding between the parties further weakens the Appellant's claim.

30. Furthermore, according to Section 5(21) of the IBC, **'operational debt'** is defined as *"a claim for the provision of goods or services, including employment, or a debt for the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government, or a local authority."* Section 5(8) of the Code defines ***'financial debt'*** as *"a debt along with interest, if any, which is disbursed against the consideration for the time value of money."* If we compare both the said definitions, we find that '*interest*' is specifically mentioned in the definition of financial debt but no such mention is available in the definition of operation debt. Thus, we can conclude that the Appellant's inclusion of interest in the claimed amount is untenable as interest cannot be termed as operational debt under the Code.

31. In view of the above cited judgments and the provisions of the Code, we are in agreement with the submissions made by the Respondent that the interest in the present facts of case cannot be included in the claims filed under Section 9 of the Code.

32. Under these conditions, after disallowing payment of Rs.20,71,000/- (Rupees Twenty Lakhs and Seventy One Thousand only) made by the Respondent and the debit note of Rs.72,25,140/- (Rupees Seventy Two Lakhs, Twenty Five Thousand, One Hundred and Forty only) and disallowing the interest, the operational debt amount is less than the threshold value of Rs.1,00,00,000/- (Rupees One Crore only) as required under Section 4 of the Code. Hence, we are satisfied that the present application is below the threshold limit of Rs.1,00,00,000/- (Rupees One Crore only) and cannot agree with the claims of the Appellant in terms of the threshold amount and we cannot find any infirmity in the findings of the Adjudicating Authority.

33. For finding out the existence of any pre-existing disputes in the instant matter, we have considered the email communications dated 01.10.2020, 05.10.2020, 18.11.2021 and reply emails. We have perused these emails on record from pages 137 to 148 of the appeal paper book (APB) which are exchanged between the Respondent / Corporate Debtor and the Appellant/ Operational Creditor. The Respondent has been requesting time and again for lifting the remaining 306.150 MT IPA, for which purchase order was placed by the Appellant. Perusal of these emails explain that the Appellant ordered 450 MT of IPA, which was not picked fully as only 143.850 MT of the material was initially lifted. The Respondent has been asking to lift the remaining 306.150 MT of IPA. Adjudicating Authority in its order also notes these emails as contained at pages 54 to 58 of the APB.

34. Respondent also refers to the credit note given by the Appellant to the Corporate Debtor. This has not been accepted by the Respondent claiming it to be a one-sided communication. All this goes on to establish that there has been a dispute which has been going on between the Appellant and the Respondent. From the above emails on record and also on the basis of the materials on record, we are satisfied that the Corporate Debtor had raised a pre-existing dispute with respect to the amount claimed by the Operational Creditor.

35. Further, both the parties were having a dispute with respect to some cheques issued by the Respondent. Appellant had issued a legal notice dated 05.09.2022 for dishonouring of cheques. The Respondent claims that these cheques were issued in the year 2020 and they were stopped for payment as necessary payment was made through RTGS in the same year. The Respondent has claimed that the Appellant has fraudulently changed the dates of cheques and presented them in the bank for clearing but the Respondent immediately stopped the payment of the cheques and also filed a police complaint against Appellant for committing cheating and forgery. This is another dispute which has been going on between the parties. Without going into the details of the criminal case, apart from this material also there is sufficient other material on record that suggests there was a pre-existing dispute.

36. The Appellant had contended that the Adjudicating Authority had failed to consider that there was no provision under the Code for set-off /adjustment

/counterclaim and, accordingly, the issue of set-off by the Respondent did not arise at all. The Appellant places reliance in the matter of ***Bharti Airtel Limited & Anr. Vs. Vijaykumar V. Iyer & Ors. (2024) 4 SCC 668***. *"It claims that the provisions of set-off in terms of Order 8 Rule 6 of CPC or insolvency set-off as permitted by Regn. 29 of the Liquidation regulations cannot be applied to CIRP."* The issue in the cited case was whether there existed a right to claim set-off in CIRP, when the resolution professional proceeds in terms of Clause (a) to sub-section (2) of Section 25 of the Code to take custody and control of all the assets of the Corporate Debtor. The above judgment is not applicable in the present case as CIRP process has not begun. In the instant case, the matter at hand is for CIRP admission under Section 9 of the Code. On the other hand, the set-off which has been used by the Respondent is with respect to business transactions between the Appellant and Respondent, which is more of adjustment of accounting entries. Instead of exchanging physical money, accounting adjustments have been made. Accordingly, the contentions of the Appellant cannot be accepted in the facts of the present case.

37. The Respondent's claims regarding separate transactions involving supply of IPA, dishonoured cheques, and police complaints filed by both parties substantiate the presence of such disputes. The Appellant's attempt to deny the relevance of these disputes and the alleged adjustments lacks merit, as the disputes are well-documented and predate the demand notice.

38. It is well settled that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument, it would suffice for the Adjudicating Authority to reject the application filed under Section 9 of the Code, the Adjudicating Authority being precluded from determining as to whether the Corporate Debtor would be successful or not, with regard to the said dispute, at the time of decision making. This has been well settled by the Hon'ble Supreme Court in ***Mobilox Innovation Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** at para 40 wherein it was held as under:

> ".."
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> 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..."

Conclusion & Order

39. In light of the above analysis, it is evident that the Adjudicating Authority's Order dated 17th January 2024 is well-founded and does not warrant interference. The operational debt amount claimed by the Appellant is less than the threshold limit required under Section 4 of the Code, and there are pre-existing disputes between the parties.

40. Accordingly, the present appeal is dismissed, and the Order of the Adjudicating Authority dated 17th January 2024 in C.P. (IB)-892 (ND)/2022 is upheld. The parties are directed to bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi
August 06, 2024
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