NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1116 of 2022

(Arising out of Order dated 12.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P. (IB) No.834/KB/2018)

IN THE MATTER OF:

Hytera Communications Corporation Limited
Hytera Tower, 9108 Beihuan Road,
Shenzhen High-Tech Industrial Park North,
Beihuan Road, Nanshan District,
Shenzhen, China
Through Authorised Signatory
Mr. Prakash Jolad,
Working As : Country Manager (India)
R/o No.407, SLN Samruddi, Alfa Garden,
4th Cross, Near Diys Academy,
KR Puram, Bangalore – 560036. ... Appellant

Vs

Simoco Telecommunications (South Asia) Limited,
Godrej Genesis Building (2nd Floor),
Block-EP & GP,
Sector-V, Salt Lake Electronics Complex,
Kolkata, West Bengal-700091. ... Respondent

Present:

For Appellant: **Mr. Preet Pal Singh, Mr. Saurabh Sharma, Advocates**

For Respondent: **Kumarpal R Chopra, Chiron Singh, Advocates**

With

Company Appeal (AT) (Insolvency) No.1523 of 2022

(Arising out of Order dated 12.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in I.A. (IBC)No. 1056/KB/2021 in C.P. (IB) No.834/KB/2018)

IN THE MATTER OF:

Simoco Telecommunications (South Asia) Private Limited
Rep by its Managing Director
Mr. Sanjoy Kumar Ghosh
Having Regd Office at:

Godrej Genesis Building (2nd Floor),
Block-EP & GP, Sector-V,
Salt Lake Electronics Complex,
Kolkata, West Bengal-700001. ... Appellant

Vs

Hytera Communications Corporation Limited
Hytera Tower, Shenzhen High-Tech Industrial Park North,
Nanshan District, Shenzhen, China
C/o Sandersons & Morgans,
Solicitors & Advocates,
Royal Insurance Building,
5, Netaji Subhas Road, Kilkata 700001,
West Bengal ... Respondent

Present:

For Appellant: **Kumarpal R Chopra, Chiron Singh, Advocates**

For Respondent: **Mr. Preet Pal Singh, Mr. Saurabh Sharma, Advocates**

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) have been filed against the orders of the National Company Law Tribunal, Kolkata Bench, Kolkata dated 12.07.2022 in C.P. (IB) No.834/KB/2018). By the impugned order, the Adjudicating Authority has disposed of the petition filed by Operational Creditor - Hytera Communications Corporation Limited with directions as contained in paragraph 58 of the order. The Operational Creditor aggrieved by the order as well as the Corporate Debtor have come up in these Appeal(s), challenging the orders dated 12.07.2022. The parties hereinafter are referred as Operational Creditor and Corporate Debtor

2. Brief facts of the case giving rise to these Appeal(s) are:

(i) The Corporate Debtor approached the Operational Creditor and offered to purchase Digital Migration radio, intrinsically Safe Mission Critical Digital Radio, Tetra portable Terminal its system and application, Mobile Radio, Portable Radio Critical Surveillance & Dispatch System and wireless Video Transmission System and its Accessories. The Corporate Debtor placed purchase order on the Operational Creditor on 26.04.2012, 06.12.2012 and 30.01.2013.

(ii) Pursuant to the purchase order, the Operational Creditor supplied and delivered the goods to the Corporate Debtor and issued several invoices beginning from 07.12.2012 to 24.04.2013. The Corporate Debtor failed and neglected to make the full payment towards the invoices. Certain part payments were made and after adjustment of the part payments a sum of USD 1,441,490.78 was due and outstanding during the end of 2013. The Operational Creditor continuously followed with the Corporate Debtor for payment. The Corporate Debtor issued a 'Guarantee Letter' dated 31.12.2013 and undertook to pay outstanding amount of USD 1,441,490.78 before 15.04.2014. The Corporate Debtor, however, failed to make the payment and thereafter issued various acknowledgement in the year 2014 and 2015.

(iii) Vide letter dated 29.09.2014, the Corporate Debtor wrote that they will release all the outstanding payments before 31.10.2014 to the Operational Creditor. The Corporate Debtor once again on 02.04.2015 wrote that all pending outstanding payments shall be paid. The Corporate Debtor again vide letter dated 17.09.2015 acknowledged the outstanding debt and assured the Operational Creditor that they will pay approximately an amount of USD 160,000,00/- by the end of October 2015 and also an amount of USD 200,000.00 during the month of November and December 2015. The Corporate Debtor, however, failed to make the payments.

(iv) The learned Counsel for the Operational Creditor issued a statutory notice under Section 433, 434 and 439 of the Companies Act, 1956 and vide their letter dated 26.08.2016 demanded payment of USD 621,348.05 along with interest. The Corporate Debtor replied to the statutory notice vide letter dated 17.09.2016 acknowledging the liability and stated that it shall reconcile their books and ascertain the exact claim due.

(v) Before winding up petition could be filed, the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") was enforced and the Operational Creditor thereafter issued a Demand Notice dated 15.02.2017 under Section 8 of the code claiming outstanding amount of USD 621,348.05. The Corporate Debtor replied to the notice.

(vi) The Operational Creditor thereafter filed a Company Petition on 30.05.2018. In the Company Petition, parties entered into series of discussions and a consent Terms of Settlement was drawn on 02.02.2019, where the Corporate Debtor agreed to pay the entire amount in six installments. In Terms of the Settlement, the Company Petition was disposed of.

(vii) Subsequently, on non-remittance of the amount as per the consent Term of Settlement, the Operational Creditor filed an Application to revive the Company Petition, which was revived by the Adjudicating Authority. The Corporate Debtor claimed to have written a letter to its Bankers (Indian Overseas Bank) for transmitting the amount. The Corporate Debtor was advised that approval of Reserve Bank of India ("**RBI**") is required for making the payment. The Corporate Debtor claims to have sent some application to RBI for granting approval. However, no remittance of payment had been made.

(viii) In the Company Petition on 30.08.2021, the Counsel for the Corporate Debtor made a statement that Corporate Debtor is ready and willing to make payment of USD 621,348.05, which is due and payable, subject to clearance from the reserve Bank of India. The Adjudicating Authority passed an order on 30.08.2021 directing the Corporate Debtor to keep Indian rupee equivalent to this amount in fixed deposit and receipt in this regard to be handed over to the Registry of the Tribunal to

establish bona fides of the Corporate Debtor. After the order dated 30.08.2021, an Application was filed by the Corporate Debtor to recall the said order, which Application was disposed of by the Adjudicating Authority on 12.07.2022, refusing to recall the said order. However, Adjudicating Authority directed the Corporate Debtor to make the deposit of the approximate conversion of USD in Indian Rupees and place the same with the Registry within 60 days from the order. The Corporate Debtor did not comply the order dated 12.07.2022, nor deposited the amount. The Company Petition was finally heard by the Adjudicating Authority and by the impugned order dated 12.07.2022, the Adjudicating Authority after hearing the parties took the view that the Corporate Debtor having expressed his willingness to deposit the amount, have not committed default and failure of the Corporate Debtor in discharging the admitted outstanding debt has become a force majure in this particular case. Hence, the Adjudicating Authority did not admit the Application. However, the Adjudicating Authority again directed the Corporate Debtor to deposit the amount in Indian rupees in the shape of an interest bearing deposit (FDR) within 60 days. The Adjudicating Authority, refused to initiate the CIRP. The findings of the Adjudicating Authority contained in paragraphs 57 and 58 are to the following effect:

*"**57.** Having considered all the peculiar facts and circumstances and the law laid down by the Hon'ble Supreme Court and Hon'ble Appellate Tribunal, it will not be a practical approach to pass an order of CIRP in respect of the Corporate Debtor herein even though, the Corporate Debtor has acknowledged its debts and had made promises and undertakings to deposit the amount in Court. The main hurdle that is coming in the way of the Corporate Debtor in making payment of the outstanding debt is that it has to be paid in USD, subject to a clearance and NOC from the RBI, which has become necessary due to various circumstances beyond the control of the Corporate Debtor. The Corporate Debtor has submitted that it has tried its best to get the NOC from the Reserve Bank of India, for which repeated requests and reminders have been issued by the Corporate Debtor. The Corporate Debtor does not have any objection in making the payment immediately as soon as the Reserve Bank of India grants a permission to that effect. Another factor that goes in favour of the Corporate Debtor is that the Corporate Debtor had filed a writ petition being number as W.P.NO. 13669/2021, seeking directions upon the Reserve Bank of India for its inaction in granting the said permission and in spite of the directions passed by the Hon'ble High Court of Calcutta approval in making delayed foreign remittances has not been granted to the Corporate Debtor for making payment of the outstanding dues being claimed by the Operational Creditor in the present petition.*

***58.** In the aforesaid circumstances, we have no other alternative but to hold that the Corporate Debtor has not committed any default and the failure of the Corporate*

Debtor in discharging the admitted outstanding debt has become a force majure in this particular case. We clearly hold that this is an admitted and acknowledged outstanding debt owed to the Operational Creditor by the Corporate Debtor which has not been paid only because of lack of the NOC/Permission to be issued by the RBI. We grant liberty to the Operational Creditor to claim the said amount which would be deposited by the CD in Indian rupees in the shape of an interest bearing deposit (FDR) within 60 days from today, and would remain lying with the Registry of this court, equivalent in US $ outstanding, as and when the permission is granted by the Reserve Bank of India. The Operational Creditor can avail any legal remedy available to the Operational Creditor anywhere and anytime but the relief sought by the Operational Creditor in the present petition i.e. initiation of CIRP in respect of the CD, cannot be granted. It is also directed that the Corporate Debtor shall always cooperate and facilitate in obtaining the RBI Permission so that the payment can be withdrawn from the Registry as early as possible."

(ix) Aggrieved by the said order, both the Operational Creditor and Corporate Debtor has come up in this Appeal.

3. We have heard Shri Preet Pal Singh and Shri Saurabh Sharma, learned Counsel appearing for the Operational Creditor and Shri Kumarpal R Chopra and Shri Chiron Singh, learned Counsel appearing for the Corporate Debtor.

4. The learned Counsel for the Operational Creditor submits that the debt of the Operational Creditor having been acknowledged by the Corporate Debtor, which is due and has not been paid by the Corporate Debtor inspite of repeated assurances, the Adjudicating Authority committed error in not admitting Section 9 Application. It is submitted that remittance of the amount to the Operational Creditor by the Corporate Debtor was obligation of the Corporate Debtor and the plea of the Corporate Debtor that he could not obtain permission of the RBI cannot be construed a ground to refuse to admit Section 9 Application. The Corporate Debtor has never been serious in making the payment, which is clear from repeated correspondence made by the Corporate Debtor assuring the payments, including the execution of the consent Term of Settlement, which was not complied with by the Corporate Debtor. The Adjudicating Authority has even directed the Corporate Debtor to deposit the equivalent Indian Rupee amount, on a submission made on behalf of the Corporate Debtor that he is ready and willing to make the payment. However, the Corporate Debtor failed to make the deposit, inspite of the order dated 30.08.2021 and 12.07.2022 as well as by the impugned order. The Corporate Debtor has been repeatedly disobeying the orders of the Court and having not deposited the amount, he is not entitled to be heard. The Appeal filed by the Corporate Debtor challenging the order needs to be rejected, whereas the Appeal filed by the Appellant – Operational Creditor be allowed and direction be issued to admit Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor.

5. The learned Counsel for the Corporate Debtor refuting the submissions of learned Counsel for the Appellant – Operational Creditor submits that Adjudicating Authority does not have any equity jurisdiction to direct for deposit of the amount. The Code does not provide any provision for directing the Corporate Debtor to deposit funds with the Registry. Orders passed by the Adjudicating Authority asking for deposit falls outside the scope of Adjudicating Authority. It is submitted that no default has been committed by the Corporate Debtor. The amount could not be transmitted to the Operational Creditor, since the permission of the RBI was not received. The Adjudicating Authority while acting under the Code cannot operate as a Court of Equity. Learned Counsel for the Corporate Debtor has placed reliance on judgments of the Hon'ble Supreme Court and two judgments of this Tribunal in support of his submission. It is submitted that failure in remitting the funds was not due to any default of the Corporate Debtor, hence, present was not a case of any default, so as to direct the Adjudicating Authority for admission of the CIRP. The Adjudicating Authority has rightly refused to admit Section 9 Application. It is submitted that order passed by the Adjudicating Authority to deposit the amount by the Corporate Debtor is beyond jurisdiction.

6. We have considered the submissions of learned Counsel for the parties and have perused the record.

7. The Adjudicating Authority in the impugned order has in detail noticed all the relevant facts and submissions of both the parties. The acknowledgments made by the Corporate Debtor from time to time have

been noticed by the Adjudicating Authority. From the sequence of the facts and pleadings of the parties, there remains no dispute between the parties regarding the outstanding dues of the Operational Creditor to a sum of USD 621,348.05 plus interest. It is relevant to notice that Corporate Debtor has time and again acknowledged the debt, which has been noted by the Adjudicating Authority in its order. The amount became due at the end of year 2013. However, after adjustment of the part payments and thereafter repeated assurances were given by the Corporate Debtor for making the payment, no payment was made. In this context, we only notice one of the letter dated 17.09.2015 issued by the Corporate Debtor to the Operational Creditor, which letter was part of the Application filed under Section 9 by the Operational Creditor. The letter dated 17.09.2023 is as follows:

> *"Dated 17th September, 2016*
>
> *The President*
> *Hytera Communications Corporation Limited*
> *Shenzhen, China.*
>
> *Sub: Overdue payment*
> *Ref: Your letter dated 28.08.2015*
>
> *Dear Mr. Chen,*
> *Hope you are in good health and doing well in your business.*
>
> *With reference to your letter as mentioned above, I would like to clarify the position of Simoco Telecommunications (South Asia) Limited.*
>
> *Our company had gone through a very bad phase of business during 2013-14. We were almost in the verge of closure during the first quarter of 2014. The virtual business was zero. There was no cash flow in the*

company and to be honest we were in a bankrupt situation. There was a huge loss in the financial year 2013-14 and the losses were more than US$ 2 Million. There was no direction to the management how to overcome the situation and every employee in the organization was scared.

You are aware that we were largely dependent on telecom business especially with Hytera products. Due to the typical government policy of licensing we could not execute orders in time and the system became too much complicated. We lost huge money due to exchange variation and at the end of the day we reached a situation where it was Impossible for us to continue with the radio business.

In the end of first quarter of 2014 for the survival of the company we took a desperate attempt for our revival by way of starting a low cost housing project. With god grace the project was successful and we got good response from the market and we could able to arrest closure of the company. With this project we could able to somehow come out partially from the bankrupt situation with few bankers. However, we still have problems in couple of accounts.

With the present situation In next 6-7 months time we will have a reasonable cash flow from which we will be able to spare some money to make payment against your outstanding. With the present situation and considering the cash flow for the month of September and October, we are hopeful that we will be able to clear approximately US$ 1,60,000 by end of October'15 towards various supply of radios.

During the month of November and December'15 considering the present cash flow we will be able to clear approximately US$ 2,00,000 to US$ 2,50,000 against the various supply of radios. The balance outstanding will be taken up after that and we will communicate you the payment schedule later on.

We understand the pressure you people are facing and we are really sorry for the delay in making the payments. We fully appreciate your effort in supporting Simoco in all aspect and we are assuring you that we will clear all the payments whatever is due. We are trying out best to come out from the present crisis and we are not confident that next 6-8 months time we will manage the positioning of the company.

You have shown enough patience and supported us, we are requesting you to bear with us for few more months. In between we are in the process of sending you the payments.

Thanking you,

For Simoco Telecommunications (South Asia) Limited
Sd/-
(Sanjoy Kumar Ghosh)
Managing Director"

8. The above letter clearly indicates that the Corporate Debtor was not in the position to make the payment of outstanding, although the dues were acknowledged. In the said letter itself, the Corporate Debtor has stated that it was in bankrupt situation. The Company Petition was filed

by the Operational Creditor on 30.05.2018 and thereafter consent Terms of Settlement were entered on 02.02.2019, on which basis the Company Petition was disposed of, which subsequently was revived and proceeded further. On 30.08.2021, on behalf of the Corporate Debtor a statement was made by the Corporate Debtor, stating that they are willing to make the payment, which is due to the Operational Creditor. The order dated 30.08.2021 is as follows:

> *"Ld. Counsel on both sides present.*
>
> *It has been submitted across the Bar that the Corporate Debtor is ready and willing to make payment of USD 621348.05 which is due and payable to the Operational Creditor, subject to clearance from Reserve Bank of India which is being pursued by all available legal means. We record these submissions made by the Ld. Counsel for the Corporate Debtor, which is made upon specific instructions to this effect.*
>
> *We feel that the interest of justice would be served if we direct the Corporate Debtor to keep Indian rupee equivalent to this amount in fixed deposit and receipt in this regard to be handed over to the Registry of this Tribunal to establish bona fides of the Corporate Debtor. The tenure of the Fixed Deposit shall be for a period of six months in the first instance.*
>
> *Ld. Counsel for the Corporate Debtor seeks three weeks to make deposit. At request and considering the circumstances and also the fact that the Corporate Debtor is stated to be an MSME, three weeks' time is*

granted. FDRs in this regard to be submitted to the Joint Registrar of this Tribunal on or before 30.09.2021.

This arrangement is acceptable to the Operational Creditor as submitted by the Ld. Counsel appearing on its behalf. List the matter on 05.10.2021."

9. The Corporate Debtor did not make the deposit as directed by the Adjudicating Authority, however, filed an Application being IA (IBC) No.1056/KB/2021 for recall of order dated 30.082.2021. The Adjudicating Authority refused to recall the order dated 30.08.2021, however, granted 60 days further time to deposit the amount. Paragraphs 22 and 23 of the said order are follows:

*"**22.** We direct the Corporate Debtor to make a deposit of the approximate conversion of USD in Indian Rupees and place the same with the Registry of this Court, within 60 days from this order.*

***23.** This unusual situation that has arisen in this matter makes us wiser and prevents us from making any order of Corporate Insolvency Resolution Process against the Corporate Debtor because default has taken place but not due to the fault of the Corporate Debtor. The Corporate Debtor accepts and acknowledges the liability and is ready to make the payment but the only hurdle is the permission that has not been granted by the RBI for whatever reasons or formalities that are yet to be completed by the Corporate Debtor."*

10. Inspite of the order dated 12.07.2022, the Corporate Debtor did not deposit the amount and thereafter the Company Appeal was heard and

finally decided. The Adjudicating Authority by the impugned order, after noticing the submissions of the parties has recorded its conclusion in paragraph 57 and 58, which we have already extracted above.

11. The Adjudicating Authority observed that although the Corporate Debtor has acknowledged the outstanding debt, but Corporate Debtor has not committed any default and the failure of the Corporate Debtor in discharging the admitting outstanding debt has become a force majure in this particular case. We are not in agreement with the aforesaid view of the Adjudicating Authority. The default has been committed by the Corporate Debtor, which is an admitted fact and repeated acknowledgment by the Corporate Debtor and promises to make the payments were in vain. The default was committed by the Corporate Debtor within the meaning of the Code and the reason that Corporate Debtor or its Bankers were unable to obtain permission for remittance of amount overseas, cannot be made a reason to hold that no default is committed. Present is a case where repeated assurances were made by the Corporate Debtor for payment of outstanding dues and it was inaction or unwillingness of the Corporate Debtor to make payment of outstanding dues, which resulted in the situation.

12. As noted above, the Adjudicating Authority passed three orders, directing the Corporate Debtor to deposit the equivalent amount in Indian Rupees in the Court in FDR, i.e., order dated 30.08.2021, 12.07.2022 and the impugned order. In the impugned order 60 days' time was granted to

the Corporate Debtor to deposit the amount, which also has not been complied with. The Corporate Debtor while not complying the orders of the Adjudicating Authority to deposit the amount in Court, cannot be heard in saying that there is no default on its part, since it has not been able to transmit the amount due to want of permission from RBI. Present is a case where debt and default was fully proved and further in view of the conduct of the Corporate Debtor, in not obeying the orders of the Adjudicating Authority to deposit of the equivalent amount in Indian Rupees, default was fully established and the view of the Adjudicating Authority that no default has been committed by the Corporate Debtor is unsustainable and cannot be approved.

13. Now we come to the submissions advanced on behalf of the Corporate Debtor. It is submitted by learned Counsel for the Corporate Debtor that Adjudicating Authority does enjoy any equity jurisdiction. It is submitted that while acting under the IBC, the Adjudicating Authority cannot operate as a Court of Equity. Learned Counsel for the Corporate Debtor relied on three judgments of the Hon'ble Supreme Court namely – ***M/s. S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Ltd., Civil Appeal No.4583 of 2022; Innoventive Industries Limited vs. ICICI Bank and Another - (2018) 1 SCC 407; and E.S. Krishnamurthy and Ors. vs. Bharathi Hi-tech Builders Pvt. Ltd. – (2022) 3 SCC 161***. We first come to the judgment of Hon'ble Supreme Court in M/s. S.S. Engineers. The S.S. Engineers was a case where Section 9 Application filed by S.S. Engineers was admitted by the Adjudicating Authority against

which order, Appeal filed by Hindustan Petroleum Corporation Ltd. was allowed by the Appellant Tribunal. The Operational Creditor filed an Appeal in the Hon'ble Supreme Court. The Hon'ble Supreme Court affirmed the order of the Adjudicating Authority and has held that Adjudicating Authority committed a grave error of law by admitting application of the Operational Creditor, even though there was a pre-existing dispute as noted by the Adjudicating Authority. The Hon'ble Supreme Court held that there being pre-existing dispute, Application under Section 9 could not have been admitted. In above reference the Hon'ble Supreme Court has examined the nature and jurisdiction exercised by the Adjudicating Authority. In paragraph 31 and 32, following has been laid down:

> *"**31.** The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for nonpayment of disputed dues claimed by an operational creditor.*
>
> ***32.** There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance*

dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.

14. The Hon'ble Supreme Court in paragraph 32 has clearly held that if a claim of Operational Creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. The ratio of the above judgment of Hon'ble Supreme Court as contained in paragraph 32, clearly support the submission of Operational Creditor in the present case. The sequence of events clearly proves that the Corporate Debtor has adopted a dishonest and deliberate attempt to avoid payment of operational debt.

15. The next case relied by learned Counsel for the Corporate Debtor is ***Innoventive Industries Limited vs. ICICI Bank and Another***, where the Hon'ble Supreme Court had examined the nature of jurisdiction of the Adjudicating Authority while considering the jurisdiction in Section 7 and Section 9 Applications. In paragraph 29 of the judgment, following has been stated:

*"**29.** The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of*

10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

16. We fail to see how the law laid down by the Hon'ble Supreme Court in ***Innoventive Industries Ltd.*** supports the submission of the Corporate Debtor.

17. The next judgment relied by learned Counsel for the Corporate Debtor is judgment of the Hon'ble Supreme Court in ***E.S. Krishnamurthy and Ors. vs. Bharathi Hi-tech Builders Pvt. Ltd.*** (supra). In the above case, Hon'ble Supreme Court while considering an Application under Section 7 held that Adjudicating Authority cannot direct Corporate Debtor to settle the dispute. It has been held by the Hon'ble Supreme Court that Adjudicating Authority is empowered to only verify whether a default has occurred or not. Based upon its decision, the Adjudicating Authority either admit or reject an Application. In paragraph 32 and 34, following has been laid down:

*"**32.** In Innoventive Industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, paras 28 and 30 : (2018) 1 SCC (Civ) 356] , a two-Judge Bench of this Court has explained the ambit of Section 7 IBC, and held that the adjudicating authority only has to determine*

whether a "default" has occurred i.e. whether the "debt" (which may still be disputed) was due and remained unpaid. If the adjudicating authority is of the opinion that a "default" has occurred, it has to admit the application unless it is incomplete. Speaking through Rohinton F. Nariman, J., the Court has observed : (SCC pp. 438-39, paras 28 & 30)

> *"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to [**Ed.** : The word between two asterisks has been emphasised in original.] any [**Ed.** : The word between two asterisks has been emphasised in original.] financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered*

post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

* * *

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law

or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

(emphasis supplied)

34. *The adjudicating authority has clearly acted outside the terms of its jurisdiction under Section 7(5) IBC. The adjudicating authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the adjudicating authority must then either admit or reject an application, respectively. These are the only two courses of action which are open to the adjudicating authority in accordance with Section 7(5). The adjudicating authority cannot compel a party to the proceedings before it to settle a dispute."*

18. The proposition laid down by the Hon'ble Supreme Court in the above case are well settled. The present is not a case where Adjudicating Authority has directed the Corporate Debtor to settle the dispute with the Operational Creditor. It was the Corporate Debtor, who acknowledged and showed his readiness and willingness to make the entire payment. The judgment of the Hon'ble Supreme Court in ***E.S. Krishnamurthy*** does not help the Appellant-Corporate Debtor in any manner.

19. The learned Counsel for the Corporate Debtor has also placed reliance on few judgments of this Tribunal. The first judgment is ***(2022) SCC OnLine NCLAT 3355 – Agarwal Veneers vs. Fundtonic Services***

Pvt. Ltd. In the above case, this Tribunal has observed that IBC cannot be used for the purpose of debt recovery. This Tribunal in paragraph 15 to 20 laid down following:

> *"**15.** It is clear from the aforenoted provisions of the Code and also the Regulations therein that unless the Operational Creditor along with its Application furnishes a copy of the invoices, the bank statements and the financial accounts, the Adjudicating Authority is empowered to reject an incomplete Application.*
>
> ***16.** Lastly, we address to the Contention of the Ld. Counsel for the Appellant that merely because the Corporate Debtor is a going concern and an MSME, the Adjudicating Authority ought not to have rejected the Application on this ground also.*
>
> ***17.** The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. The Parliament has made a conscious effort to ensure that there is a significant difference between 'Resolution' and 'Recovery'. The Hon'ble Supreme Court has time and again observed that the fundamental intent of IBC is 'maximising the value of assets' in the process of 'Resolution'.*
>
> ***18.** In 'Mobilox Innovations Private Limited v. Kirusa Software Private Limited', (2018) 1 SCC 353, the Hon'ble Apex Court has examined in detail the United Nations Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be*

denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures.

19. *If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of 'Reorganising' or 'Resolution of the Company' does not arise. This Tribunal in 'Binani Industries Limited v. Bank of Baroda', Company Appeal (AT) (Ins.) No. 82 of 2018, has differentiated between 'Recovery' and 'Resolution' and has observed that IBC is not a Recovery Proceeding. 'Recovery' dispossesses the 'Corporate Debtor' of its assets while a Resolution is an effort to keep it afloat. Further, this Tribunal in 'Asset Advisory Services v. VSS Projects', CP (IB) No. 96/7/HDB (2017), and also in 'Praveen Kumar Mundra v. CIL Securities Ltd.', 2019 SCC OnLine NCLAT 334 Page Company Appeal (AT) (Insolvency) No. 512 of 2021 NCLAT 334, has noted that CIRP cannot be initiated with fraudulent intent 'for any purpose other than the Resolution of Insolvency or Liquidation' and therefore it is clearly covered under Section 65 of the Code.*

20. *The Hon'ble Supreme court in 'Vidarbha Industries Power Ltd. v. Axis Bank Ltd.' 2022 SCC OnLine SC 841 has observed that even if there is a 'debt' and 'default', the Adjudicating Authority should use its discretion in admitting/rejecting an Application. In the instant case, the Adjudicating Authority has rightly rejected the Application on this ground too."*

20. The above case in no manner helps the Corporate Debtor in the facts of the present case.

21. The next judgment of this Tribunal relied by learned Counsel for the Corporate Debtor is judgment of this Tribunal in ***Praveen Kumar Mundra vs. CIL Securities Ltd. – (2019) SCC OnLine NCLAT 334***, where the Appeal preferred against the order, rejecting Section 9 Application was heard. The Appellate Tribunal in the above case in paragraph 9 has upheld the order of the Adjudicating Authority on the ground that the Appellant has initiated CIRP with fraudulently and malicious intent, which judgment has no application in the present case.

22. The next judgment relied by learned Counsel for the Corporate Debtor, of this Tribunal is ***Company Appeal (AT) (CH) (INS.) No.268/2023 IA No.834/2023 – Mr. Maulik Kirtibhai Shah vs. United Telecoms Ltd.*** The question was in the above case is as to whether on the basis of MoU dated 10.09.2005 and Settlement Agreement dated 01.11.2018, Section 9 Application could have been maintained. This Tribunal held that claim arising out of Settlement Agreement cannot be an operational debt, since IBC is not recovery mechanism. In paragraph 14, following has been held:

> *"**14.** From the aforesaid it is evident that the Petition filed in respect of claims arising under the aforementioned Settlement Agreement [even if disputed herein] does not come within the definition of 'Operational Debt']. Time and again, the Hon'ble Apex Court in a catena of Judgments held that the IBC is not a 'recovery*

mechanism'. Even if the Settlement Agreement is taken into consideration, this 'Tribunal' is of the earnest view that the claims arising under the 'MOU' lost the character of 'Operational Debt' and became a debt simpliciter. In respect of' in the definition of Operational Debt cannot be interpreted widely so as to include any agreement between the parties which does not specifically pertain to the supply of goods or services. A wide interpretation would only defeat the scope and objective of the code. Keeping in view, the spirit of the Code, this 'Tribunal' is of the considered view that at best, the claims are contractual claims for which appropriate Civil Proceedings may lie."

23. In the above judgment, this Tribunal held that definition of operational debt cannot be interpreted widely so as to include any agreement between the parties, which does not specifically pertain to the supply of goods or services. The above judgment has no application in the facts of the present case, since in the present case the operational debt arose of supply of goods, which is an admitted fact.

24. The next judgment relied by the learned Counsel for the Corporate Debtor is judgment of Chennai Bench in ***Transfer Appeal (AT) No.227 of 2021 (Company Appeal (AT) (INS.) No.326 of 2020) – Tricolite Electrical Industries Limited vs. WIPRO Limited***, where the Appeal has been filed against the order dismissing Section 9 Application. The order was affirmed holding that when there is pre-existing dispute, Application

under Section 9 could not have been entertained against a solvent company. In paragraph 16-17, following has been held:

> *"**16.** It is the consistent stand of the Respondent Company that 97% of the Amount was paid and the balance 3 % was kept on hold only on account of evaluating customer satisfaction and it was established that there was a delay of six weeks on behalf of the Appellant Company in executing the job assigned to them on account of which liquidated damages / Penalty of Rs. 40,56,539/- which is as per the terms of the Contract was levied. Therefore, this Tribunal is of the considered view that there is a pre-existing dispute which is not a spurious defence which is a mere bluster. In the aforenoted judgment of **'Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.', (Supra),** it is clearly held that the Court does not at this stage examine the merits of the dispute, but as long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the Application. This Tribunal is of the considered view that the aforenoted ratio is applicable to the facts of this case as we are satisfied that a 'dispute' truly existed for the Respondent Company to have withheld 3% of the total invoice amount.*
>
> ***17.** Regarding whether Section 9 Application can be entertained against a Solvent Company, the scope and objective of the Code has to be kept in mind before admission of such an Application. The spirit of the Code is maximization of the assets and Resolution and not Recovery. The Hon'ble Supreme Court in the matter of **'Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Anr.' (Supra)** has held that 'the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the*

corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.' "

25. The above judgment also in no manner support the contentions of the Corporate Debtor in the facts of the present case.

26. In view of our foregoing discussions, we are of the view that present is a fit case to admit when inspite of several promises and acknowledgement, the Corporate Debtor failed to pay the outstanding debt. The Corporate Debtor also has not complied with the order of the Adjudicating Authority directing for depositing the amount equivalent to Indian Rupee in the Court, instead it cited certain regulatory procedure in obtaining the permission for remitting the amount, which order was also not complied by the Corporate Debtor. We are of the view that Adjudicating Authority ought to have admitted Section 9 Application.

27. In result, we partly allow the Company Appeal (AT) (Ins.) No.1116 of 2022 and set aside the order of the Adjudicating Authority, insofar as it refused to initiate Corporate Insolvency Resolution Process against the Corporate Debtor. Rest of the order of the Adjudicating Authority is affirmed. We dispose of the Appeal in following manner:

(1) Company Appeal (AT) (Ins.) No.1116 of 2022 is partly allowed. The order of the Adjudicating Authority refusing to initiate CIRP is set aside and further following directions are issued:

(a) The Adjudicating Authority shall pass an order of admission under Section 9 of the Code within 60 days from the date when copy of the order is produced before it.

(b) Within 60 days, it shall be open for Corporate Debtor to make the payment by remittance of the amount to the Operational Creditor and file a proof before the Adjudicating Authority.

(2) Company Appeal (AT) (Ins.) No.1523 of 2022 is dismissed.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

7th November, 2023

Ashwani