

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)**

Company Appeal (AT) (CH) (INS.) No. 260 / 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the 'Order' dated 04.10.2021 in IBA/751/2020, passed
by the 'Adjudicating Authority', (National Company
Law Tribunal', Division Bench – I, Chennai)**

In the matter of:

Mr. Keshav Kantamneni

Ex Managing Director

Uniply Industries Limited

Earlier at:

No. 572, Anna Salai, Teynampet,

Chennai – 600018

Presently located at:

No. 37, TTK Road, Alwarpet,

Chennai - 600018

(Amendment carried out as per

Order in IA 22 of 2022 dated 07.01.2022 Appellant

v

1. M/s. Kishan Chand Suresh Kumar,

Represented by its Partner

Mr. Mohit Bansal,

R/O. 133, Tagore Park,

Delhi – 110009

..... Respondent No.1

2. Mr. Lingumgunta Venkata Shyam Sundar

(Reg No. IBBI. IPA-002/IP-N00262/

2017-18/10775)

Interim Resolution Professional of

Uniply Industries Limited

No. 17, 3rd Floor, Gandhi Road,

Alwarthirunagar, Chennai - 600087

(Amendment carried out as per Order in

IA 21 of 2022 dated 07.01.2022)

..... Respondent No.2 /
Resolution Professional

Present:

For Appellant : Mr. Akhil Bhansali, Advocate
For Respondent No.1 : Mr. Ajit Sharma, Advocate
For Respondent No.2 / : Mr. Vijay Vigneshwar, Advocate
Resolution Professional

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

Justice M. Venugopal, Member (Judicial):

Introduction:

Company Appeal (AT) (CH) (INS.) No. 260 of 2021:

The 'Appellant' / 'Ex Managing Director of the 'Corporate Debtor' / 'Uniply Industries Limited', has filed the instant Comp. App (AT) (CH) (INS) No. 260 of 2021, as an 'Affected Person', on being dissatisfied with the 'impugned order' dated 04.10.2021 in IBA/751/2020, passed by the 'Adjudicating Authority', ('National Company Law Tribunal', Division Bench – I, Chennai).

2. The 'Adjudicating Authority', ('National Company Law Tribunal', Division Bench – I, Chennai), while passing the 'impugned order' dated 04.10.2021, in IBA/751/2020, at Paragraphs 12 to 15, had observed the following:

12. ``It was submitted that the principal amount due and payable by the Corporate Debtor is Rs.3,25,00,000/- and that the Corporate Debtor despite having its liability with respect to the outstanding sum, failed to make payments notwithstanding several requests and reminders and it is evident that there is no dispute with regard to the existence of the said operational debt. It was further submitted by the Operational Creditor further submitted that as on 20.02.2020, a principal sum of Rs.3,25,00,000/- along with interest of Rs.46,34,301/- (calculated @ 24% p.a. up to 20.02.2020 on the principal amount), totalling to Rs.3,71,34,301 was due and payable by the Corporate Debtor up to 20.02.2020.

13. Under such circumstances, it was submitted that the Operational Creditor issued a notice of Demand as stipulated under Section 8 of the IBC, 2016, to the Corporate Debtor on 20.02.2020, which was received by the Corporate Debtor on 24.02.2020 and also received through mail on 27.02.2020. From the Affidavit filed under Section 9(3) (b) of the IBC, 2016, it is evident that the Corporate Debtor has not raised any dispute in respect of the outstanding amount which is due and payable to the Operational Creditor nor paid the operational debt within 10 days from the date of receipt of the Demand Notice. Hence, the present Application has been filed by the Operational Creditor before this Tribunal on 17.08.2020 for initiation of CIRP as against the Corporate Debtor.

14. In relation to the Corporate Debtor, it is seen from the record of proceedings that when the matter came up for hearing on numerous occasions, the Corporate Debtor was represented by an Authorised Representative and time was sought on the pretext that the settlement was about to arrive between the parties. Thereafter, it is seen that there was no representation on behalf of the Corporate Debtor subsequently this Tribunal by its order dated 06.08.2021 has set the Corporate Debtor as ex-parte. Pursuant to that, it is seen that the matter came up for hearing on 03.09.2021 before this Tribunal and this Hon'ble Tribunal held as follows:

“It is seen from the records that the Respondent was set ex-parte on 06.08.2021, however, when the matter is taken up for hearing on 03.09.2021, Mr. Akhil Bhansali appearing on behalf of the Respondent. It is noted that till date no Application has been filed by the Respondent to set aside the ex-parte order passed by the Hon’ble Tribunal dated 06.08.2021.

The learned Counsel for the Respondent stated that even though the Respondent has been set ex-parte, he may be permitted to make the submissions based on the merits of the case. It was further submitted by the learned counsel for the Respondent that the alleged debt which is due and payable in respect of different company viz., M/s. Uniply Decor Ltd., 50% of the amount has been paid and also a settlement talks are underway in respect of a M/s. Uniply Industries Ltd, the Corporate Debtor herein.

Heard the submissions of both the parties, Order stands reserved.

15. Thus, it is seen that the Corporate Debtor under the garb of settlement is trying to delay the proceedings before this Tribunal. The Corporate Debtor has not denied that the amount is due and payable to the Operational Creditor; hence the default on the part of the Corporate Debtor is proved beyond any reasonable doubt. Thus, the Operational Creditor has proved that there is an ‘operational debt’ and ‘default’ which has been committed on the part of the Corporate Debtor. Further, it is also pertinent to note that the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor cannot seek shelter also under Section 10A of IBC, 2016. Under the said circumstances, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.’

and admitted the ‘Application’ and declared ‘Moratorium’, etc.

Appellant's Contentions:

3. Assailing the 'Propriety', 'Validity' and 'Legality', of the 'impugned order' dated 04.10.2021 in IBA/751/2020, passed by the 'Adjudicating Authority', ('National Company Law Tribunal', Division Bench – I, Chennai), in admitting the 'Application' under Section 9 read with Rule 6 of the Insolvency and Bankruptcy Code, 2016 (filed by the '1st Respondent / Petitioner / Operational Creditor'), the Learned Counsel for the Appellant submits that the 'Appellant', was transacting with the 'Respondent', over a long period of time and that the '1st Respondent' and the 'Appellant', entered into a 'Business Relationship', wherein, the 'Respondent', had supplied 'Ply', 'Plywoods' and 'Block Boards' to the 'Appellant', under various consignments, during the period between Feb'2017 to Jan'2018. Moreover, the 'Respondent', also supplied raw materials to 'Uniply Décor Limited' (a 'Sister Concern' of the 'Appellant').

4. According to the Learned Counsel for the Appellant, the 'Respondent', based on the 'Purchase Orders' of the 'Appellant', had raised 'Invoices', and owing to reasons and factors beyond the control of the 'Appellant', the 'Appellant', was precluded from duly honouring its 'Payment Obligation'.

5. It is represented on behalf of the Appellant, that the 'Appellant' had paid a sum of Rs.3,20,00,000/-, as against the 'Agreed Debt Sum' of Rs.5,25,00,000/- and further an 'Outstanding' of Rs.2,05,00,000/-, is yet to be paid by the 'Appellant'.

6. In this connection, the Learned Counsel for the Appellant that the 'Respondent / Operational Creditor', had relied on the 'Memorandum of Compromise', for filing a 'Petition' in IBA/751/2020 (under Section 9 of the I & B Code, 2016), in accordance with the terms and conditions, as mentioned in the 'Memorandum of Compromise' in question, the 'Debt', in question, itself is subject to numerous compliances, as mentioned in the 'Memorandum of Compromise'. In fact, the 'Respondent' / 'Operational Creditor', is barred from claiming future and past interest at 24%, on the 'Principal Amount', when the 'Principal Sum' claimed itself, was mutually arrived at by the 'Parties', and recorded the 'Memorandum of Compromise'. As such, the 'Debt Sum' is crystalised, based on the 'Memorandum of Compromise'. However, the interests component, added to the total 'Outstanding Debt', is disputed by the 'Appellant'.

7. The Learned Counsel for the Appellant contends that the amount, claimed to be in default', is based on the 'Memorandum of Compromise', which is Rs.3,25,00,000/- and further that the 'Claim' of the

`Respondent', based on the unpaid `Instalments', under the `Memorandum of Compromise', is not to be considered as an `Operational Debt'.

8. The Learned Counsel for the Appellant takes a stand that the I & B Code, 2016, is not intended to be a `Substitute', to a `Recovery Forum', and the instant case, is not a `fit' one to initiate `Corporate Insolvency Resolution Process'.

9. The Learned Counsel for the Appellant forcefully contends that `where a `Party', wishes to avail the remedy under the I & B Code, 2016, for breach of the terms of a `Settlement Agreement', an `Application', under I & B Code, 2016, `shall not be maintainable'.

10. The Learned Counsel for the Appellant, submits that it is a matter of record that with the payment of the amount, claimed by the Respondent, is partially due from another Company, by the name `Uniply Décor Limited', who is not a `Party' to the proceedings. Further, `Uniply Industries Limited', had paid its `old Debt', as per the terms of the `Settlement Agreement'.

11. The Learned Counsel for the Appellant points out that it is the `Debt' of `Uniply Décor Limited', which remains `unpaid' and hence, the

`Petitioner, in the Company Petition could not have continued to proceed with the Company Petition, despite, the above payments.

12. The Learned Counsel for the Appellant comes out with a plea that the `Memorandum of Compromise`, is binding on the necessary `Parties` concerned, and Clause 5 of the `Memorandum of Compromise`, provides a `Schedule of Payment`, which gives details of the `Instalment of Payments`, along with other due dates. Later, the `Appellant`, had started making the payments, but the `Respondent` continued to accept the payment, beyond the time stipulated under the `Memorandum of Compromise`.

13. The Learned Counsel for the Appellant, adverts that a `Demand Notice`, alleging `Default`, was dated 20.02.2020, which was given after the `Respondent`, had received and accepted payment of instalments amounting to Rs.2,00,00,000/- till 19.02.2020. In such a situation, the alleged delays, in payment of instalment for the months August 2019 to October 2019, could not be taken as `Default`, in view of the provision of Section 55 of the Indian Contract Act, 1872. Thereafter, the `Respondent`, had accepted the payments, without retaining any right, as provided under the `Law`. Both the `Parties`, had agreed to substitute a

`New Contract' or `Alter' it, and as such, there is no question of `Default', as per I & B, Code, 2016.

14. The Learned Counsel for the Appellant brings it to the notice of this `Tribunal', that the `Respondent' had accepted the payments made in small `Tranches', amounting to Rs.3,20,00,000/-, till the date of `Admission' of `Corporate Insolvency Resolution Process'. Hence, the `Application', under Section 9 of the I & B Code, 2016, cannot be triggered and accepting the `Delayed Payments', without expressing any `demur', the `Respondent' cannot `Claim', breach of `Memorandum of Compromise'.

15. The Learned Counsel for the Appellant contends that by `altering ' the then existing `Operational Debt', and by arriving at a mutually agreed `Substituted Amount', the Parties are to act only upon the consensus recorded in the `Memorandum of Compromise', and the `Appellant', is liable to pay in respect of the `Substituted Amount'. In fact, the `Respondent', had agreed to release the `Appellant' from its `Original Debt' (`Operational Debt'), by arriving at a new `Debt', therefore, the Respondent is estopped from making `Claims', in the nature of `Operational Debt'.

16. The Learned Counsel for the Appellant points out that the 'Unpaid Dues', cannot fall within the ambit of the term 'Operational Debt', as the Respondent is 'estopped', from claiming so, in light of the 'Discharge' and subsequently, entering into a 'Memorandum of Compromise'. Hence, the 'Appellant', is obliged to 'Discharge its Liability', towards the 'New Contract'.

17. The Learned Counsel for the Appellant contends that the 'discharge of one's Contractual obligations', by way of performing the 'Original Terms of the Contract', is substituted by either a whole 'New Contract' or a new set of obligations, within the same 'Contract'. Also that, the 'Respondent', had charged interest till 30.06.2020 at 24% and that the 'Claim' of 'Interest' is untenable, because of the fact that the 'Respondent', had accepted 'part payments', without giving any 'Notice' that they would 'Claim' interest for the 'Delayed Payment', and therefore, the 'Respondent', is precluded from 'Claiming' interest, based on the principle of 'Waiver' and 'Acquiescence'.

18. The Learned Counsel for the Appellant while rounding up, submits that the 'Appellant', had continued to pay the 'Respondent', towards his 'Outstanding Dues', even during the 'Adjudication' of 'Petition', under Section 9 of the Code', which the 'Respondent', had deliberately

concealed before the 'Adjudicating Authority', and prays for 'allowing' the 'Appeal', by setting aside the 'impugned order' dated 04.10.2021 in IBA/751/2020, passed by the 'Adjudicating Authority', ('National Company Law Tribunal', Division Bench – I, Chennai),

Appellant's Decisions:

19. In this connection, the Learned Counsel for the 'Appellant', refers to the Judgment of this 'Tribunal' dated 25.11.2020 in Amrit Kumar Agrawal v. Tempo Appliances Private Limited (vide Comp. App (AT) (INS) No. 1005 of 2020, wherein, at Paragraph 4, it is observed as under:

4. 'Mere obligation to pay does not bring the liability within the ambit of 'financial debt'. The debt, along with interest, if any, should be disbursed against the consideration for the 'Time Value of Money'. Breach of terms of an agreement including a Settlement Agreement whereunder payment may be due would not fall within the ambit of Section 5(8) so as to constitute a 'Financial Debt'.'

20. The Learned Counsel for the 'Appellant', refers to the 'Order' of the 'Tribunal' ('National Company Law Tribunal', New Delhi) dated 03.06.2022 in M/s. Alhuwalia Contracts (India) Ltd. v. M/s. Logix Infratech Pvt. Ltd., reported in 2022 SCC Online, wherein, at Paragraph 15, it is observed as under:

15. 'As per the definition referred to supra, Operational Debt means a claim in respect of provision of goods or services

including employment. Now we consider the case of the Applicant and we observe, the claim of the applicant do not fall either under the category of the supply of the goods or service rendered by the Corporate Debtor. Rather the claim of the Applicant is based on the breach of terms and conditions of the settlement agreement, on the basis of which the Applicant has claimed that there is default in payment of the amount as referred to part IV of the application. And the second part of the Operational debt says a debt in respect of payment dues arising under any law for the time being enforce. Admittedly the claim of the Applicant also do not come under this part of the definition of the Operational debt.’’

21. The Learned Counsel for the Appellant, adverts to the ‘Order of the Tribunal’ (‘National Company Law Tribunal’, Delhi Bench) in *Nitin Gupta v. International Land Developers Private Limited* in IB No. 507 / ND / 2020, wherein at Paragraph 18, it is observed as under:

18. ‘Applying this principle decided in the matters referred to Supra, we are of the considered view that the case of the Applicant is also covered with the aforesaid decision. Therefore, in our considered view, the default of payment of settlement agreement do not come under the definition of Operational debt. Hence, we are not inclined to allow the prayer of the Applicant.’’

22. The Learned Counsel for the Appellant, refers to the ‘Order’ of the ‘Tribunal’ (New Delhi) in *M/s. Brand Reality Services Ltd. v. M/s. Sir John Bakeries (India) Pvt. Ltd.*, reported in MANU/NC/7776/2020, wherein, it is observed that an ‘Operational Debt’, under the I & B Code, 2016, does not take account of unpaid ‘Debt’ instalments, under the

`Settlement Agreement`, and that if the relationship between the `Parties`, to the dispute is not of `Corporate Debtor` and `Operational Creditor`, then, such other payment defaults would not come, within the ambit of the I & B Code, 2016.

23. The Learned Counsel for the Appellant, falls back upon the `Order` of the `Tribunal`, (`National Company Law Tribunal`, Delhi Bench) in Bajaj Rubber Company Private Limited Vs. Saraswati Timber Private Limited, wherein it is held that, the breach of the terms and conditions of payment, according to a Settlement Agreement does not come under the purview of the Operational Debt`, as defined under the I & B Code, 2016, and it cannot be a basis to trigger `Corporate Insolvency Resolution Process`, against the `Corporate Debtor`.

24. The Learned Counsel for the Appellant, refers to the `Order` of the `Tribunal`, (`National Company Law Tribunal`, Allahabad Bench) dated 14.05.2019, in M/s. Delhi Control Devices (P) Ltd. v. M/s. Fedders Electric and Engineering Ltd. (vide Company Petition (IB) No. 343 / ALD / 2018), wherein it is held that the Unpaid Instalments`, as per the Settlement Agreement, cannot be treated as an `Operational Debt`, as per Section 5 (21) of the I & B Code, 2016.

1st Respondent's / Petitioner's Submissions:

25. According to the `1<sup>st</sup> Respondent / Petitioner / Operational Creditor`, in spite of adequate number of opportunities and time, being given to the `Appellant`, the `Appellant`, had not made the `Outstanding Principal Sum` of Rs.2.05 Crores, leave alone the `Outstanding Interest Component`. Further, from the `Status Report` dated 24.02.2022, filed by the `Resolution Professional`, there were massive irregularities, in the operations of the `Corporate Debtor` Company. Moreover, the `Resolution Professional`, had identified the `Preference`, `Undervalued` and `Extortionate Transactions`, worth more than Rs.563 Crores, by the `Corporate Debtor` to `KKN Holdings Private Limited` (a Group Company of the `Corporate Debtor`), being managed by the same `Managing Director Mr. Keshav Kantemneni`, as the `Appellant`, herein.

26. The Learned Counsel for the 1st Respondent, adverts to the fact that the `Forensic Auditors`, were appointed, to carry out the `Forensic Audit`, review `High Value Related Party Transactions`, and also identified the other allegedly `PUFE Transactions`, worth Rs.133 Crores. Also that, the `Resolution Professional`, had preferred a `Petition`, under Section 19 (2) of the I & B Code, 2016, before the `Adjudicating Authority`, to seek co-operation of the `Suspended Board` and the `Key Managerial

Personnels’, who have not handed over the ‘Books’ and ‘Information’, prayed for, by the ‘Resolution Professional’. Apart from that, there are ‘number of ‘Debtors’ of the ‘Corporate Debtor’ and it is in the advanced stage of the ‘Corporate Insolvency Resolution Process’, with claims of over Rs.274 Crores and more than Rs.198 Crores of admitted Claims.

27. The Learned Counsel for the 1st Respondent points out that, it is evident from the timelines, that the ‘Defaults’, had occurred in the year 2018 and in the year 2019, with a promise to effect ‘payments’, by Oct’2019, much before the spread of ‘Covid-19 Pandemic’ in India, Viz. March 2020. As such, the contra stand of the Appellant, that it was prevented from making ‘payments’, because of Covid-19 Pandemic’, is an ‘incorrect’ one.

28. The Learned Counsel for the 1st Respondent contends that the ‘Appellant’ has admitted its ‘Liability’ in the instant Comp. App (AT) (INS) No. 260 of 2021 (vide Page 7 of the ‘Memorandum of Appeal’), wherein, it is mentioned as under:

DATE	MODE OF PAYMENT	AMOUNT RECEIVED
07.05.2019	NEFT TRANSFER	Rs.25,00,000
08.05.2019	NEFT TRANSFER	Rs.25,00,000
09.05.2019	NEFT TRANSFER	Rs.10,00,000

09.05.2019	NEFT TRANSFER	Rs.10,00,000
17.05.2019	NEFT TRANSFER	Rs.15,00,000
24.05.2019	NEFT TRANSFER	Rs.15,00,000
01.06.2019	NEFT TRANSFER	Rs.15,00,000
28.06.2019	RTGS TRANSFER	Rs. 5,00,000
17.07.2019	RTGS TRANSFER	Rs.50,00,000
19.02.2020	Through NEFT	Rs.25,00,000
		Rs.2,00,00,000

29. Moreover, in Page 8 of the 'Memorandum of Appeal', an 'Outstanding Sum' of Rs.2,05,00,000, is yet to be 'paid by the 'Appellant', is tacitly admitted by the 'Appellant'.

1st Respondent's / Petitioner's Citations:

30. The Learned Counsel for the 1st Respondent, refers to the 'Order' of the 'National Company Law Tribunal' (Mumbai Bench) dated 28.10.2021, in Infobay Interactive India Private Limited v. Clear Channel India Private Limited, reported in MANU/NC/2605/2021 (vide CP(IB)–1243(MB)/2019, wherein, at Paragraphs 23 & 24, it is observed as under:

23. ``Therefore, even assuming that a part of the amount is disputed, however, since the clear cut admitted debt amount is more than Rs. 1 lakh, the Application u/s. 9 cannot be rejected and is liable to be admitted. In this regard, reliance is placed by the Bench on the Hon'ble NCLAT Judgment in Gupshup Technology

India Pvt. Ltd. v. Interpid Online Retail Pvt. Ltd. (Company Appeal (AT) (INS) No. 23 of 2019), in which the Hon'ble NCLAT observed as follows:

“14. From the decision of the Hon'ble Supreme Court, it is clear that Section 3 (6) defines 'Claim' to mean a right to payment even if it is disputed. The Code gets triggered the moment default of Rs. 1 lakh or more (Section 4) occurs.”

24. In view of the above, it is clear to the Bench, that the 'Corporate Debtor', is in default of a debt due and payable and the default is in excess of minimum amount of Rs. 1 Lakh stipulated in Section 4 (1) of the IBC. In view of this, the Company Petition, CP (IB)-MB-2019 is 'Admitted'.”

31. The Learned Counsel for the 1st Respondent, cites the Judgment of this Tribunal dated 20.09.2019, in the matter of Jakson Engineers Limited v. Reflex Energy, (vide Comp. App (AT) (INS) No. 12 of 2019, SCC Online NCLAT 1244), wherein, it is observed as under:

“As we find that there is no dispute with regard to the aforesaid amount and it remaining outstanding and being more than Rs.1 Lakh, the Application under Section 9 was fit to be admitted.”

32. The Learned Counsel for the 1st Respondent, relies on the 'Order' of the 'National Company Law Tribunal' (New Delhi Bench – Court II) dated 17.01.2022, in the matter of M/s. Sahaj Bharti Travels v. M/s. HCL Technologies Limited (vide MANU/NC/0095/2022), wherein, at Paragraph 42, it is observed as under:

42. ``Thus, in sequel to the aforesaid discussion, we find that the Operational Debt claimed by the Applicant, even if it is limited for the period up to 30.04.2018, being above Rs.1 (one) Lakh, the Application survives. Since, all this Adjudicating Authority is required to see is whether there is a debt due and default has occurred. However, while adjudicating the default, the Adjudicating Authority does not have to indulge in determining the extent or details of debt. The moment it is satisfied that the unpaid amount of default is above Rs 1 Lakh or Rs 1 Crore as the case may be, it is bound to admit the application. In the context, we are further strengthened by the law laid down by the Hon'ble Supreme Court in the matter of "Innoventive Industries Ltd. Vs. ICICI Bank and Ors. – (2018) 1 SCC 407", whereby it is held that:

“The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. 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.”

(Emphasis supplied)

33. The Learned Counsel for the 1st Respondent, falls back upon the 'Order' of the 'National Company Law Tribunal' (New Delhi Bench) dated 08.06.2021, in Schneider Electric India Pvt. Ltd. v. Apex Electro Devices Pvt. Ltd., (vide MANU/NC/1466/2021), wherein, it is observed as under:

“In our view, if the amount of a debt more than 1 Lakh, if admitted which in this case has also been admitted by the corporate debtor, in terms of email dated 26.04.2017 along with the confirmation in the ledger account filed by the Corporate Debtor and the said has become due as per their own averments in reply to this application at Para 20, leaving no scope for any further adjudication.”

(emphasis supplied)

34. The Learned Counsel for the 1st Respondent, cites the 'Order' of the 'National Company Law Tribunal' (New Delhi Bench) dated 01.07.2022, in the matter of Uniworld Telecom Limited v. Asia Telecom Private Limited, reported in MANU/NC/3871/2022, wherein, on the facts and circumstances of the case, it was observed that *“..... and upon appreciation of the documents placed on record to substantiate their respective claims, this 'Adjudicating Authority' is of the view that there is an operational debt which is due from the corporate debtor and the corporate debtor has defaulted in making payment of the amount due and accepted the said default'. Therefore, in the absence of any pre existence of dispute, the Tribunal admits this Application and initiates CIRP on the Corporate Debtor with immediate effect.”*

35. The Learned Counsel for the 1st Respondent, cites the Order of this 'Tribunal' dated 10.03.2022 in Brand Realty Services Ltd. v. Sir John Bakeries India Pvt. Ltd. (vide Comp. App (AT) (INS) No. 958 of 2020, reported in MANU/NL/0162/2022, wherein, at Paragraph 13, it is observed as under:

13. "Our above conclusion is further fortified then we look into the scheme of Section 9(5)(ii) which provides that the Adjudicating Authority can reject the Application if - "notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility". The above provision indicates that even if no notice of dispute has been received, and there is record of dispute in the Information Utility the Application under Section 9 is to be rejected by the Adjudicating Authority. The above provision clearly indicates that even in absence of notice of dispute, Adjudicating Authority can reject the Application if there is record of dispute in the Information Utility. It goes without saying that record of dispute in the Information Utility can very well be pointed out by the Corporate Debtor before the Adjudicating Authority when notice is issued under Section 9. Further in Reply to Section 9 Corporate Debtor can bring the material to indicate that there are pre-existing disputes in existence prior to issuance of demand notice under Section 8. We thus are of the considered opinion that mere fact that Reply to notice under Section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application. In the above context, we may refer to Judgement of this Tribunal in "Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited" (Company Appeal (AT) Ins. No. 1354 of 2019) decided on 24th February,

2020 in paragraph 50, following observations have been made by this Tribunal:

“...Even otherwise, mere failure to reply to the demand notice does not extinguish the rights of the Operational Creditor to show the existence of a preexisting dispute...”

We thus set aside the Impugned Order and remit the matter back to the Adjudicating Authority to consider the Application afresh. We are not expressing any view on the merits of the case and it is for the Adjudicating Authority to consider the submission of the parties and after hearing the parties pass appropriate order. In view of the setting aside of the Impugned Order, Application under Section 9 of the IBC is revived before the Adjudicating Authority and be considered afresh in accordance with law after hearing the parties. The Appeal is allowed to the above extent.”

36. The Learned Counsel for the 1st Respondent, cites the Judgment of this ‘Tribunal’, dated 05.02.2021, in the matter of Ashok Agarwal v. Amitex Polymers Private Limited (vide Comp. App (AT) (INS) No. 608 of 2020, reported in MANU/NL/0034/2021 at Paragraphs 44 to 48, wherein, it is observed as under:

44. “In the present case, the Appellant/Operational Creditor supplied the goods based on invoices beginning from 19.2.2011 to 26.3.2011 amounting in all to a sum of Rs.7,28,072/- and in due discharge of legal liability/lawful debt towards payment of dues/Invoices by the Respondent/Corporate Debtor had paid a sum of Rs.1,10,221/- as mentioned by the Appellant/Operational Creditor in the Application in Part IV under caption of 'Particulars of Operational Debt'.

45. In totality, a sum of Rs.7,50,000/- being the due amount towards 'Principal' and Rs.1,35,000/- towards 'Penalty' is equal to

Rs.8,85,000/- was claimed by the Appellant/Operational Creditor for the goods supplied by the Appellant/Operational Creditor through the various Invoices as stated supra, it is bounden duty of the Respondent/Corporate Debtor to pay the due amount in issue. Company Appeal (AT)(Insolvency)No.608 of 2020.

46. The other aspect of the matter to be significantly pointed out is that the Respondent/Corporate Debtor through its purchase orders had offered to make payment to the Appellant / Corporate Debtor within a period of 45 - 60 days and in fact the payment was agreed to be made within 30 days from the date of Invoice. As a matter of fact, the Respondent / Corporate Debtor had not made any payment in respect of the due amount even after the 'Consent Decree' passed by the Competent Court of law.

47. Section 3(10) of The Insolvency and Bankruptcy Code 2016 defines 'Creditor' and even in the said definition a 'Decree Holder' cannot be excluded to file an Application under the Code. Going by the definition 3(10) of 'Creditor', it includes 'Financial Creditor', 'Operational Creditor'.

48. Be that as it may, in the light of detailed qualitative and quantitative discussions and also this Tribunal keeping in mind the entire conspectus of the attendant facts and circumstances of the instant case in a holistic fashion comes to a resultant conclusion that the impugned order passed by the National Company Law Tribunal, New Delhi Bench dated 8.6.2020 as an incorrect and invalid one in the eye of law. Viewed in that perspective, this Tribunal to prevent aberrational justice and to promote substantial cause of justice set aside the impugned order in IB 1895 dated 8.6.2020 passed by the National Company Law Tribunal, New Delhi Bench. Resultantly the Appeal succeeds.''

37. The Learned Counsel for the 1st Respondent, cites the Judgment of the Hon'ble Supreme Court of India dated 04.02.2022, in the matter of

Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited (vide Civil Appeal No. 2839 of 2020), reported in MANU/SC/0152/2022, wherein, at Paragraphs 60 to 64, it is observed as under:

60. *“In the present case, CMRL issued the cheque of Rs 50,00,000 to the Proprietary Concern on 7 November 2013. However, at that time, it was issued as an advance payment for the purchase order of the appellant. It was only on 2 January 2014 that CMRL terminated its project with the appellant, and it was after this that the Proprietary Concern encashed the cheque. Subsequently, correspondence was exchanged between the Appellant and the Proprietary Concern in July 2016 in relation to the re-payment of the amount. Thereafter, a joint meeting was also held on 4 August 2016. Till this point in time, both the parties were in negotiation in relation to the re-payment and the minutes of meeting show that the Proprietary Concern was willing to make the re-payment if CMRL issued a letter stating that they will not pursue a claim in the future or if the appellant provided a bank guarantee for the amount.*

61. *A final letter was addressed by the Appellant to the Proprietary Concern on 27 February 2017, demanding the payment on or before 4 March 2017. The Proprietary Concern replied to this letter on 2 March 2017, finally refusing to make re-payment to the appellant. Consequently, the application under Section 9 will not be barred by limitation.*

G Conclusion

62. *Therefore, we answer the three issues formulated earlier in the following terms:*

(i) The appellant is an operational creditor under the IBC, since an ‘operational debt’ will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor;

(ii) The respondent will be considered to have taken over the Proprietary Concern in accordance with its MOA; and

(iii) The application under Section 9 of the IBC is not barred by limitation.

63. The appeal is allowed by setting aside the impugned judgment and order of the NCLAT dated 12 December 2019. Since the CIRP in respect of the respondent is ongoing due to this Court's order dated 18 November 2020, no further directions are required.

64. Pending application(s), if any, stand disposed of.''

38. The Learned Counsel for the 1st Respondent, submits that in the instant case, the 'Debt', arose out of the 'Unpaid Invoices', for the Goods, supplied by the 1st Respondent to the 'Corporate Debtor', and that the 'Outstanding Amounts', were not paid. Also that, the 'Outstanding Sum(s)', are also duly reflected in the 'Ledger Account' (for the period from 01.04.2015 to 31.03.2016, onwards), maintained in the name of the 'Appellant' / 'Company', by the '1st Respondent' and the relevant 'Ledger Entry', is in Pages 205 & 206 of the 'Appeal Paper Book' ('Ledger Account' – for the period from 01.04.2019 to 31.03.2020).

Dispute:

39. It is pointed out that a 'Dispute', does not mean a mere denial, namely 'no payment is due', because there is a 'Dispute'. To decide whether, there exists a 'Dispute', whether there is 'plausible' contention,

which requires further investigation and ensure that the 'Dispute', is not based on 'Feeble Arguments' or 'Assertion of Facts', which are 'Unsupported' by 'Evidence'.

40. The 'Dispute' of 'Privity of Contract', has no 'relevance', if the 'Debt' payable', is more than Rs. One Lakh. Even if the 'Sum', is 'Disputed', if the 'Claim', is more than Rs. One Lakh (now Rs. One Crore), 'the Corporate Insolvency Resolution Process', can be 'Initiated'.

41. A 'Corporate Debtor', must 'exhibit', a 'Preexisting Dispute'. Further, the 'disputed questions', pertaining to 'Claims' and 'Counter Claims', cannot be decided by an 'Adjudicating Authority', in an 'Application', under Section 9 of the Code.

Admission:

42. 'Admission', is a 'Self Harming Statement', 'Express' or 'Implied', 'Oral' or 'Written', which is 'adverse' to an 'Individual's case'. Further, 'Admissions', are 'substantive evidence', even though, the makers of the same are not confronted with their 'Statements'. In 'Law', 'Admissions', are 'receivables', to 'establish', matters of 'mixed fact / Law'.

Acknowledgement of Debt:

43. An 'Acknowledgement', is a candid 'Admission', by a 'Debtor', to the 'Creditor', indicating that 'he owes money to the Creditor'. In so far as an 'Acknowledgement of Debt' is concerned, it does not create a new 'Debt'. If an 'Individual', acknowledges the 'Invoices' or 'Ledger Account', maintained by the 'Operational Creditor', it implies an 'Acknowledgement', in respect of the same and 'implies', a 'Promise to Pay', should the 'balance turnout', to be against a 'Person', making it.

44. An 'Acknowledgement', to whomsoever made, is a valid 'Acknowledgement', if it points with reasonable certainty, to the 'Liability' under a 'Dispute'. To put it differently, a 'Person', acknowledging, must be aware of his 'Liability' and the 'Commitment', should be towards that 'Liability'.

45. Section 18 of the Limitation Act, 1963, applies not only where 'Liability' is 'Admitted', unconditionally, but also, where the 'Admission' is 'Conditional', provided the condition is satisfied, as per decision, in South India Insurance Company v. Union of India, reported in (1971) 1 MLJ at Page 373. Moreover, 'actual payment of money', is not required under Section 18 of the Limitation Act, 1963, but, it is 'essential under Section 19 of the Limitation Act, 1963'.

46. An 'Acknowledgement', has the effect of creating a new period run from the 'date of acknowledgment'. It does not create a 'New Contract'. Therefore, it is distinct from a 'Novation of Contract', with the meaning of Section 62 of the Indian Contract Act, 1872, as per decision in *Hastimal v. Shankar*, reported in AIR 1952 Raj at Page 7 (Full Bench).

47. An 'Acknowledgment', extends the 'Period of Limitation'. An 'Acknowledgement' of 'Liability', ought to be a necessary implication, so that the 'Acknowledgement', is 'clear' and 'unequivocal', as per the decision *Sarangdhar Singh v. Lakshmi Narayan*, reported in AIR 1955, Patna at Page 320.

Discussions:

48. Before the 'Adjudicating Authority', ('National Company Law Tribunal', Division Bench – I, Chennai), the '1st Respondent / Petitioner / Operational Creditor', in Form No.5 (filed under Section 9 of the Code read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016), under Part IV 'Particulars of Operational Debt', had averred that the 'Principal Sum' of Rs.3,25,00,000/- was due and the interest till 30.06.2020 was calculated at 24% per annum and the 'Total Amount Due', was mentioned as Rs.3,99,55,123.29.

49. Further, as per Clause 5 of the 'Memorandum of Compromise', the 'Debtors', undertook to pay a sum of Rs.5,25,00,000/-, to the 'Operational Creditor', in accordance with the 'Schedule of Payment', specified in the said Clause. Also that, the 'Corporate Debtor', had issued six Post Dated Cheques from its Account in favour of the 'Operational Creditor', for a total Sum of Rs.5,25,00,000/-, which was the agreed payable 'Sum', as per the said 'Memorandum of Compromise'. The 'six cheques', issued by the 'Corporate Debtor', along with their respective cheques were dishonoured on being presented to the 'Banker' of the 'Corporate Debtor'.

50. It is further mentioned in IBA/751/2020, before the 'Adjudicating Authority', by the '1st Respondent / Petitioner' that, from and out of the 'Total Admitted Sum', payable by the 'Corporate Debtor' to the 'Operational Creditor', the 'Corporate Debtor', had till date, made payment of Rs.2 Crores only on numerous dates through Bank RTGS / NEFT, in complete 'Violation' and 'Disregard', to the agreed 'Schedule' in the 'Memorandum of Compromise', into the account of the 'Operational Creditor'.

51. According to the '1st Respondent / Petitioner /Operational Creditor', a sum of Rs.3,25,00,000/- is the 'Unpaid Operational Debt',

payable by the 'Corporate Debtor' to the '1st Respondent / Operational Creditor'. The breakup of Rs.3,99,55,123.29 (being the amount claimed to be in default) is 'Principal Sum i.e., Rs.3,25,00,000/-' and the 'Interest i.e., Rs,74,55,123.29' (Interest calculated at 24% per annum till 30.06.2020).

52. It comes to be known that the 'Operational Debt' fell due on various dates between May'2019 and October 2019. The details are set out in the undermentioned 'Tabular Form':

S.No.	Date of Default	Details
1	08.05.2019	Failed to pay Rs.1.50 Crores.
2	08.06.2019	Failed to pay Rs.75 Lakhs.
3	08.07.2019	Failed to pay Rs.75 Lakhs.
4	08.08.2019	Failed to pay Rs.75 Lakhs.
5	08.09.2019	Failed to pay Rs.75 Lakhs.
6	08.10.2019	Failed to pay Rs.75 Lakhs.

53. Before the 'Adjudicating Authority', the '1st Respondent / Petitioner / Operational Creditor', under Part V of Form No.5 in IBA / 751 / 2020 at Serial No. 10 (vide Page 67 of the 'Appeal Paper Book' in 'Diary No. 864 dated 11.10.2021), had mentioned that the 'Ledger Account' of the 'Corporate Debtor', maintained by the 'Operational

Creditor' along with 'Letter of Explanation', was filed vide Annexure – II (9) (Colly).

54. In the instant case, although on the side of the 'Appellant', a plea is taken, that the 'Unpaid Dues', under a 'Settlement Agreement', is not an 'Operational Debt', and also that, a 'Violation' of the 'Memorandum of Compromise' dated 30.04.2019, cannot be a basis to initiate 'Corporate Insolvency Resolution Process', against the 'Corporate Debtor', it is evident from the 'Memorandum of Compromise' dated 30.04.2019, and other materials available on record that the 'Outstanding Principal Amount', remains 'Unpaid' and on this ground alone, the instant 'Appeal', deserves to be dismissed, in the considered opinion of this 'Tribunal'.

55. In the present case, the 'Defaults', took place in the year 2018 and later in the year 2019, with a promise to effect payments, by October 2019, prior to the 'Covid-19 Pandemic', in March 2020.

56. Apart from that, the 'Appellant', in the instant 'Appeal Memorandum', had tacitly admitted that, till date, a payment of Rs.2,00,00,000/-, was made in favour of the 'Respondent' by the 'Appellant' and 'UDL' as against the 'Outstanding Sum' of

Rs.5,25,00,000/-, which was admitted by the Respondent. Therefore, the 'Balance Outstanding Sum', payable was Rs.3,25,00,000/-.

57. Continuing further, the 'Appellant', in the 'Appeal', vide Page 11 of the 'Appeal Paper Book' (Diary No. 864 dated 11.10.2021), under the caption 'IX - Grounds (D)', had averred that, 'so far paid an amount of Rs.3,20,00,000/- towards 'Settlement', and an 'Outstanding' of Rs.2,05,00,000/-, is yet to be paid by the 'Appellant'.

58. In the instant 'Appeal Memorandum', the 'Appellant', has expressed a desire to make payment, but the same is not accepted by the 'Respondent', because of the fact that, inspite of ample opportunities and time granted, the 'Appellant', has not made payment, in respect of 'Outstanding Principal Amount' of Rs.2.05 Crores, barring the 'Outstanding Interest factor', as opined by this 'Tribunal'.

59. In 'Law', the 'Adjudicating Authority', is only to ascertain, where there is a 'Debt' due 'in fact' and 'in Law', payable by the 'Opposite Party' and that a 'Default', is committed. In reality, the extent or details of 'Debt', to be decided or not to be gone into by the 'Adjudicating Authority', in dealing with the 'Application', preferred by the 'Operational Creditor'.

60. No wonder, if a 'Debt Sum', of 'more than Rs.1 Lakh' is 'Admitted', an 'Application', under Section 9 of the I & B Code, 2016, is to be 'Admitted', by an 'Adjudicating Authority'.

61. Needless to point out by this 'Tribunal', that if the 'Debt Sum' is 'more than Rs. 1 Lakh'(now it is 'Rs. 1 Crore'), then, an 'Application' under Section 9 of the I & B Code, 2016, is not to be 'Rejected', by an 'Adjudicating Authority'.

62. In the present case, there is no material brought on record on the side of the 'Appellant', to exhibit, the 'Existence' of a 'Preexisting 'Dispute', in regard to the 'Interest'. In fact, the 'Memorandum of Compromise', dated 30.04.2019 is a document, filed in support of the Section 9 'Application', before the 'Adjudicating Authority', by the '1st Respondent / Operational Creditor', to establish an 'Acknowledgement of Debt', by the 'Appellant / Corporate Debtor'.

63. Besides the above, an 'Affidavit' along with the 'Ledger Account' of the 'Appellant', maintained in the 'Books of Accounts' of the '1st Respondent / Operational Creditor', along with the 'Copy of Statement of Accounts', was filed by the '1st Respondent / Petitioner / Operational Creditor', vide Page 193 – 195 of the Appeal Paper Book (Diary No. 864 dated 11.10.2021 – filed by the 'Appellant').

64. It cannot be brushed aside, that the 'Invoices' and the 'Ledger Account', were the cementing platform, for the '1st Respondent / Petitioner / Operational Creditor', to prefer an 'Application' in IBA/751/2020, before the 'Adjudicating Authority', ('National Company Law Tribunal', Division Bench – I, Chennai).

65. In the instant case, the 'Appellant', had not produced any 'Document', to the subjective satisfaction of this 'Tribunal', evidencing the 'prevalent' of 'Preexisting Dispute', either prior to the 'issuance of Notice', under Section 8 of the I & B Code, 2016, or in 'Reply', to the 'Notice', issued under Section 8 of the Code, by the '1st Respondent / Petitioner / Operational Creditor'. Also, the 'Appellant', had failed to exhibit any 'interest' / 'controversy' / 'dispute', when the Section 9 'Application', was pending before the 'Adjudicating Authority'.

66. In view of the detailed upshot, on a careful consideration of the respective contentions advanced on either side, this 'Tribunal', keeping in mind the facts and circumstances of the instant case, in a 'conspectus manner', comes to a consequent conclusion that the 'Appellant', has not repudiated that the 'Sum' is 'Due' and 'Payable' to the '1st Respondent / Petitioner / Operational Creditor', by the 'Corporate Debtor', and that the 'Debt' of the 'Corporate Debtor', is very clearly established, by

the `1<sup>st</sup> Respondent / Petitioner / Operational Creditor`, and because of the fact that, the `Operational Debt` and `Default`, were committed by the `Corporate Debtor` and therefore, the Section 9 `Application` in IBA/751/2020, before the `Adjudicating Authority`, (`National Company Law Tribunal`, Division Bench – I, Chennai), was filed by the `1<sup>st</sup> Respondent / Petitioner / Operational Creditor`, well before the `Covid-19 Pandemic`, and on going through the `impugned order` dated 04.10.2021 in IBA/751/2020, passed by the `Adjudicating Authority`, (`National Company Law Tribunal`, Division Bench – I, Chennai), this `Tribunal`, without any haziness, holds that the act of `Admitting` the Section 9 `Application`, by the `Adjudicating Authority`, as per Section 9 (5) of the Code, is free from any `Legal Infirmities`. Resultantly, the instant `Appeal` fails.

Disposition:

In fine, the instant Comp. App (AT) (CH) (INS) No. 260 of 2021 is dismissed. No costs. The connected pending `IAs` are closed.

**[Justice M. Venugopal]
Member (Judicial)**

**[Kanthi Narahari]
Member (Technical)**

12/12/2022

SR/TM