NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1374 of 2023

[Arising out of the Impugned Order dated 25.08.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench in C.P. (IB) No. 3061/MB-IV/2019]

In the matter of:

M/s RMV IT Services Pvt. Ltd.
84 B, Shambhunath Pandit Street
Kolkata, West Bengal.

Also at:
M/s RMV IT Services Pvt. Ltd.
Room No. 303,14
Netaji Subhash Road
Kolkata, West Bengal – 700001

.... Appellant

Versus

M/s Red Eye Services Pvt. Ltd.
6th Floor, Gazdar Enclave,
Veera Desai Road, Andheri (West) Mumbai,
Maharashtra – 400053

.... Respondent

Present:

For Appellant : Ms. Megha Karnwal, Mr. Aditya Thorat and Mr. Karthikeya Suyag, Advocates.

For Respondent : Ms. Anjali Sharma, Mr. S.K. Sagar, Ms. Thanglunkim and Mr. Gaikhuanlung, Advocates.

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

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated

25.08.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in C.P. (IB) No. 3061/MB-IV/2019. By the impugned order, the Adjudicating Authority has dismissed the Section 9 application filed by the Appellant-RMV IT Services Private Limited for initiation of Corporate Insolvency Resolution Process ('**CIRP**" in short) of the Corporate Debtor. Aggrieved by the impugned order, the Appellant has come up with the present appeal.

2. The Ld. Counsel for the Appellant, Ms. Megha Karnwal, giving a brief factual background of the matter submitted that the Operational Creditor-M/s RMV IT Services Pvt. Ltd. had entered into six agreements with M/s Red Eye Services Pvt. Ltd.-Corporate Debtor/Respondent to supply them computer/IT products on rental basis without transfer of right with lock-in period. The Corporate Debtor started defaulting in making payment to the Operational Creditor from June 2018 because of which the Appellant stopped raising invoices with effect from 29.09.2018. Subsequently, the Operational Creditor on the request of the Corporate Debtor shared payment and invoice details. After adjusting the differential amount of Rs 27,033/- pointed out by the Corporate Debtor, the Operational Creditor submitted a computation sheet with corrected figures which reflected an outstanding amount of Rs 96,27,114.46/- payable by the Corporate Debtor. It was asserted that any further question of reconciliation of accounts therefore did not arise and the debt amount was therefore an undisputed amount. Since the outstanding dues were not cleared, the Corporate Debtor was requested to return all computer/IT products following which the

Corporate Debtor on 13.03.2019 sent an e-mail to the Operational Creditor pre-terminating all valid contracts with assurance to return all the machines. Thereafter the Appellant sent a Demand Notice on 28.05.2019 demanding payment of Rs 2,26,56,666/- including rental charges and pre-termination charges. The Corporate Debtor replied to the Section 8 Demand Notice on 12.06.2019. As the payments were not forthcoming, the Operational Creditor filed a Section 9 application which was rejected by the Adjudicating Authority. Aggrieved by the rejection of the Section 9 application, the present appeal has been preferred by the Operational Creditor.

3. Assailing the impugned order, the Appellant-Operational Creditor vehemently contended that the Adjudicating Authority had erroneously held that since no rental invoices had been raised by the Appellant from July 2018 onwards, sans these invoices, there was no claim as such made by the Operational Creditor. Further the Adjudicating Authority had wrongly held that the quantum of debt required reconciliation and that this was a ground of dispute between the parties. Submission was also pressed that the Adjudicating Authority on the one hand held that there was debt payable by the Corporate Debtor, however, also observed that the quantum of dues claimed by the Operational Creditor was in excess of the amount payable and on this basis wrongly proceeded to reject the Section 9 application. When debt was established, which debt was clearly above the threshold limit, and there was also a clear case of default in payment thereof by the Corporate Debtor, the Adjudicating Authority did not have the jurisdiction to enter into the realm of

quantification of debt due and payable. It was also submitted that the Adjudicating Authority had wrongly construed the agreement between the parties to be a hire purchase agreement when five of these agreements were in the nature of simpliciter rental agreements. Further when the terms of agreement clearly provided for payment of balance rental in case of pre-termination of agreement, the Adjudicating Authority wrongly held that rent for balance tenure was not admissible as the assets had been taken back by the Operational Creditor. It was also contended that the Adjudicating Authority dismissed the Section 9 application on the ground that the same had been filed with a pre-meditated mindset on the part of the Appellant merely on the ground that the demand draft for Section 9 application fees had been filed before issue of Section 8 Demand Notice at a time when there is no such statutory embargo under IBC. It was also contended that the impugned order was also bad in law as it wrongly held that the Operational Creditor by not disclosing that they had received a Notice of Dispute from the Corporate Debtor had not acted in consonance with the provisions of IBC. Submission was pressed that this finding of the Adjudicating Authority was not in conformity with the decision of judgment of the Hon'ble Supreme Court in ***Macquarie Bank Limited Vs Shilpi Cable Technologies Ltd in Civil Appeal No. 15135 of 2017.***

4. Countering the arguments canvassed by the Appellant, Ms. Anjali Sharma, Ld. Advocate representing the Corporate Debtor- Respondent strenuously argued that the Adjudicating Authority had passed a well-reasoned order in rejecting the Section 9 application. The Operational Creditor has failed

to show the crystallised amount of operational debt and has been misusing the statutory provisions of IBC to compel the Corporate Debtor to pay up disputed amounts. It was emphatically asserted that the Respondent at no stage had admitted their liability or any default. Further, when the amount of debt was itself in dispute and was to be finalized after reconciliation and mutual discussion, the default cannot be stated to have arisen. It was also contended that the Appellant has claimed balance rental charges on grounds of implied termination of the agreement between the two parties. This claim backed basis in view of the fact that the Computer/IT assets had been returned back by them to the Operational Creditor. It was submitted that the disputes raised by the Corporate Debtor were genuine dispute and the Adjudicating Authority while dismissing the Section 9 application had correctly taken note of the fact that the Appellant was trying to abuse the process of law by making Section 9 as a tool for recovery proceedings which is violative of the objectives of IBC.

5. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

6. The short point for our consideration is whether any operational debt had emanated in pursuance of the terms of the six agreements between the two parties which required payments to be made to the Operational Creditor by the Corporate Debtor, and if so, whether said operational debt was an undisputed debt which exceeded an amount of Rs. 1 lakh and whether any default had been committed by the Corporate Debtor in respect of payment of such operational debt. It is pertinent to note that the Section 9 application was filed in 2019 in

the present case when the threshold for initiation of Section 9 proceedings was only Rs 1 lakh.

7. We propose to apply the test which has been laid down by the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353***, the relevant excerpts of which judgement is as follows:-

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
>
> *(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*
>
> *If any of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*

8. Let us now see whether the test laid down by ***Mobilox judgment supra*** of operational debt exceeding Rs. 1 lakh having become due and payable but not yet paid is applicable in the present case.

9. It is an admitted fact that both the Corporate Debtor and the Operational Creditor had entered into six agreements by which the Operational Creditor had supplied certain computer units to the Corporate Debtor. It is also an

undisputed fact that the Operational Creditor to begin with had been raising invoices and depositing GST with the appropriate authority but later stopped raising invoices. There is no denial of the fact that the Corporate Debtor was taking services from the Operational Creditor in terms of the aforementioned agreements without any demur or protest with regard to the computer/IT products which continued to be made available to them even after September 2018. When we look at the reply to the Section 8 Demand Notice dated 07.06.2019 submitted by the Corporate Debtor, we notice that the Corporate Debtor has harped on the fact that the invoices raised till June 2018 by the Operational Creditor had been paid and that invoices were not raised subsequently for mischievous reasons. The Adjudicating Authority has accepted the contention of the Corporate Debtor that claims for rentals for this period was not made by the Operational Creditor and in the impugned order has observed that the Corporate Debtor in their e-mail dated 18.02.2019 and 21.02.2019 had informed the Operational Creditor that they had not received invoices from July 2018 to February 2019.

10. The foremost question before us is whether in the background of facts that invoices were not raised by the Operational Creditor, there was any operational debt which was due and payable by the Corporate Debtor.

11. Coming to the question of whether there was operational debt due and payable by the Corporate Debtor and whether there was any incidence of default in payment on their part, it will be useful and constructive to refer to the e-mail correspondence exchanged between the two parties which are as reproduced

below chronologically. The first two emails dated 18.02.2019 and 20.02.2019 are as extracted below:

"From: Rahul Dhondwad
Sent: Monday, ***February 18, 2019*** *5:28 PM*
To: rajesh@rmvgroup.net
Cc: accounts@rmvgroup.net; Ganesh Pulijala; Pranall Jadhav; Deepak Upadhyay
Subject: RMV Ledger

Dear Rajesh,

As Discussed PFA till date payment & invoice details in which we have not received invoices from month of July 2019 to till Feb 2019.

Kindly verify it with your side and confirm Back.

Amount will finalise after our mutual discussion.

As discussed with Parmeshwar ji we have already handed over 4 cylinder setup, 2 ex30, 20 tower setup and 4 ex10 promise after our mutual discussion so will reduce rent accordingly.

Regards"

"On ***20-Feb-2019****, at 2:26 PM*

rajesh <rajesh@rmygroup.net> wrote:

Dear Sir,

With reference to trailing email we are hereby sending you the final ledger with corrected figures and entries.

Kindly check with your side and let us know if require any changes.

Further if you do not reply any changes then the ledger is deemed to be accepted by you."

(Emphasis supplied)

12. This set of two e-mails extracted above clearly shows that though rental invoices were not received from July 2018 from the Operational Creditor, the Corporate Debtor by their own volition, had sought all payment and invoice

details with the underlying understanding that following updation of invoices and amounts finalised basis mutual discussion, thereafter, payments would be made by Corporate Debtor. In response the Operational Creditor agreed to submit the ledger details for verification by the Corporate Debtor and to make changes thereto if required. This e-mail does not in any manner indicate any signs of objections/dispute raised with the Operational Creditor for the computer/IT product supplied by them.

13. We now come to the sequel of emails which followed thereafter between the two parties as below:

"From: Rahul Dhondwad
Sent: Thursday, ***February 21, 2019*** *5:12 PM*
To: rajesh
Cc: accounts@rmvgroup.net; Ganesh Pulijala; Pranali Jadhav; Deepak Upadhyay; parmeshwar@rmvgroup.net

Subject: Re: RMV Ledger

Dear Rajesh,

We cross checked ledger at our end, there is difference of INR 27033 in Feb month Payment.

July 2018 to Feb 2019 Bill yet to be receive.

Parmeshwar ji request to you please do not consider interest component, as you are aware we are already in trouble some how we are managing to pay pending dues.

Its just a request rest is your decision."

"Thu ***2/21/2019*** *6:10 PM*
From: "rajesh"
To: "Rahul Dhondwad"
Cc: accounts@rmvgroup.net, "Ganesh Pulijala'", "Pranali Jadhav'", "Deepak Upadhyay'", parmeshwar@rmvgroup.net
Dear Sir,

With ref to your email we confirm your adjustment amount of INR 27033 and after that the revised Outstanding comes to Rs.96,27,114.46 (9654147.46-Rs.27033).

Further as far as interest amount is concerned, this is as per the agreement and so no further changes required.

Hope things are clear between us regarding the final dues agreed."

(Emphasis supplied)

14. In response, the Operational Creditor had sent the final ledger to the Corporate Debtor seeking their confirmation having already made it clear in their previous email of 20.02.2019 that if no comments were received, the ledger entries would be deemed to have been accepted by them. Even at this stage, we find that the Corporate Debtor did not deny the veracity of the ledger entries except for indicating a variance of Rs 27,033/- in the payment made for the month of February as can be seen in the reply e-mail dated 21.02.2019. This e-mail makes it amply clear that the Corporate Debtor had acknowledged that it had not paid the rentals from July 2018 to February 2019 and had also accepted the outstanding amount appearing in the ledger of the Operational Creditor minus an amount of Rs 27,033/- only. The Operational Creditor thereafter on 21.02.2019 in their reply e-mail concurred to the proposed adjustment of Rs 27,033/- and indicated the outstanding amount receivable from the Corporate Debtor of Rs 96,27,114.96/- only which amount was not controverted as no supporting record has been put forth. These e-mails clearly signify that the Corporate Debtor have admitted to the outstanding due appearing in the ledger of the Operational Creditor. In such circumstances, when the Corporate Debtor had admitted their outstanding liability and it was frozen after mutual agreement

and adjustment of Rs 27,033/-, raising the issue of reconciliation of accounts as a ground of dispute clearly lacks substance and credibility. From the facts available on record, we are convinced that the operational debt had crystallized well ahead of the issue of the Section 8 demand notice.

15. It is still more pertinent to note that in this e-mail it has been admitted that though the Corporate Debtor is "already in trouble" it was somehow managing to pay their dues. This clearly tantamount to admission of debt. Even on the interest claimed by the Operational Creditor, the Corporate Debtor has not disputed the same but only made a request to dispense with the interest component on grounds of financial difficulties faced by them. In all fairness, the Corporate Debtor after seeking indulgence of the Operational Creditor to forego the interest amount also left the decision to the discretion of the Operational Creditor without disputing the computation of interest amount. This also cannot be viewed as a ground of dispute since the Operational Creditor had clarified that the interest was being charged in terms of the agreement.

16. When we look at para 5.5 of the impugned order, we find an inherent contradiction in the findings contained therein. On the one hand, the Adjudicating Authority has held that there is debt owed by the Corporate Debtor to the Operational Creditor and on the other hand, it has been held that the amount demanded by the Operational Creditor is in excess of the amount payable. Once there is an admission of debt and default and the debt which is due and payable is found to meet the threshold limit, that is sufficient for admission of a Section 9 application. It is not for the Adjudicating Authority to

go into the quantum of debt as long as the threshold limit is satisfied. The Adjudicating Authority therefore clearly fell in error in rejecting the Section 9 application while turning a blind eye to the admission of outstanding debt on the part of the Corporate Debtor.

17. This brings before us the related question as to whether the absence of rental invoices can be a tenable ground for the Corporate Debtor not to clear the outstanding rental dues.

18. To find an answer to the above question, we would like to keep in background the terms of agreement between the two parties. It is pertinent to note that the agreements between them are nomenclated as "Agreement for Rent/Hire of Computer." The validity of the rental tenure and lock-in period of the six agreements were not uniform in all the cases. Though these agreements were all separate and distinct agreements, however, there is a commonality of certain terms and conditions in these agreements. The Corporate Debtor was required to pay the monthly rent for the computer/IT products on or before 20th day of every month through Cheque/NEFT/RTGS and two months rent was to be paid in advance of which one month was for advance rental and one month was for interest free refundable security. In the case of only one agreement, provision was made for payment of interest charge @ 20% for the delayed period towards any delay after the due date. The agreements also clearly stipulate at Clause 14 that the computer/IT products were to be provided by the Operational Creditor *"purely on rental basis for agreed contract period on returnable basis"*.

19. The Adjudicating Authority in the impugned order has observed that the Corporate Debtor in their e-mail dated 18.02.2019 and 21.02.2019 had informed the Operational Creditor that they had not received invoices from July 2018 to February 2019 and that these invoices were not reflected in the GSTR-1 as well. When we look at the terms outlined in the agreements signed between the two parties, there is no requirement envisaged therein for raising of invoices by the Operational Creditor. When the terms of the agreement clearly stipulated that rent had to be paid on a monthly basis and there was no obligatory requirement spelt out for issue of invoices, in the given facts of the case, we are of the considered view that it cannot be argued that rental payments were not due or not payable merely because invoices were not raised. We also find that the Operational Creditor had a proffered a genuine reason for discontinuing the raising of invoices for GST had to be paid the moment the invoices were raised. They wanted to avoid a situation of having to pay the GST at a time when the Corporate Debtor was not making the rental payments. In fine, when the terms of the agreement made it binding on the Corporate Debtor to make rental payments on or before the 20th day of each month, the Corporate Debtor cannot be seen to avoid their liability on grounds of non-receipt of invoices. The Corporate Debtor cannot avoid the liability of making good this payment on the frivolous ground that invoices had not been raised by the Operational Creditor. To our mind, non-issue of invoices is a feeble argument to posit a justification for not having paid an admitted debt that had become due and payable. Moreover, when the operational debt had already arisen and become due, merely

because invoice was not raised, does not alter the colour and character of the operational debt and does not detract from its having become due and payable. This clearly establishes that the first two conditions laid down in the ***Mobilox judgment supra*** of operational debt exceeding Rs. 1 lakh and having become due and payable but not yet paid is squarely met.

20. Another limb of argument raised by the Corporate Debtor in their reply to the Section 8 Demand Notice dated 12.06.2019 is that an amount of Rs 72 lakhs not having been adjusted shows that the accounts were not reconciled. The Corporate Debtor has harped on the fact that the Operational Creditor did not take into cognisance the payment of Rs 72 lakhs which had been made by them between July 2018 to March 2019. Submission was pressed that since the account reconciliation had not taken place, this constituted a valid ground for a pre-existing dispute. In support of their contention, reliance has been placed on the judgment of this Tribunal in ***East India Udyog Ltd. Vs SPML Infra Limited in CA(AT)(Ins) No. 256 of 2023*** wherein it was held that the issue of reconciliation of accounts tantamount to a dispute around the debt due and payable.

21. From the emails recorded above, we find that the Corporate Debtor had been given an opportunity to reconcile the entries in the ledger of the Operational Creditor. The Corporate Debtor made no objections to the ledger entries except seeking adjustment of an amount of Rs 27,033/- and reconsideration of the levy of interest charges. We find that the Operational Creditor also adjusted the amount of Rs 27,033/- as urged by the Corporate Debtor and accordingly

reduced the outstanding dues. No other issue of reconciliation was thereafter raised until the issue of the Section 8 Demand Notice. That the Corporate Debtor thereafter did not raise any further request for reconciliation of accounts clearly shows that there was no dispute between the two parties with regard to their *inter se* financial accounting. There is no mention whatsoever of any unadjusted payment of Rs 72 lakhs. When the Corporate Debtor was mindful of raising discrepancy for an amount as small and meagre as Rs 27,033/-, it defies logic that they would have been unmindful of the omission of non-adjustment of a sum of money of a substantial magnitude of Rs 72 lakhs. We are therefore inclined to take a considered view that the non-adjustment of Rs 72 lakhs which was raised in the reply to the Section 8 Demand Notice was an afterthought to tide over their outstanding liability qua the Operational Creditor. We are also of the view that reliance placed on the judgement in ***East India Udyog judgment supra*** is misplaced. The facts in that case are clearly distinguishable since the Corporate Debtor in that case had refused to accept the outstanding operational debt on the ground of non-reconciliation of accounts which dispute had been raised several times prior to the receipt of Section 8 Demand Notice. Thus, even on the third test laid down by ***Mobilox judgment supra*** we find that there is nothing credible to substantiate the pre-existence of dispute.

22. Attention has also been adverted by the Corporate Debtor to Part-IV of the Section 9 application filed by the Operational Creditor in which the amount claimed to be in default is Rs 2,26,56,666/- of which Rs 96,27,114/- is towards rental payment while Rs 1,30,29,552/- is on account of liability to pay balance

rental dues due to implied termination of contract. The Corporate Debtor has contended that once the assets given on rent had been taken back, the claim of rent for the balance tenure is contradictory. It was also pointed out that the agreements were terminated mutually and not by the Corporate Debtor. It has also been held by the Adjudicating Authority that once the equipment was returned, there was no case for payment of rental thereafter. It is the contention of the Corporate Debtor that the amount paid by them to the Operational Creditor was in excess of the amounts reflected in the invoices raised by them.

23. To examine the credulity of their contention, it would be useful at this stage to reproduce the e-mails exchanged between the two parties as late as in March 2019 which was just two months preceding the Section 8 Demand Notice. The emails are as reproduced below:

> *"On **Mar 13, 2019**, at 3:28 PM, rajesh <rajesh@rmvgroup.net> wrote:*
>
> *Dear Sir,*
> *This is with reference to our rental agreement of under mentioned IT products :-*
> *1. 42 Mac Pro Cylinders (Full set)*
> *2. 43 Mac Servers (full set) and*
> *3. 11 Promise storages*
>
> *As per the terms of the contract, you are required to pay rental every month but since last 4-5 months we have not received our monthly rental. We have done several conversations (email as well as telephonic) and in those conversations you have made several commitments but you have failed to meet your commitments every time.*
>
> *Further our rental dues have increased to Rs.9627114.46 along with interest and charges till February 2019. In the mean time you have dishonored several cheques issued by you to meet the rental dues.*

Thus as per the discussion and terms of the agreement (since you have violated the terms of the agreement) we request you to handover all the above mentioned equipment by 6 p.m today amicably.

We reserve all the rights to receive the rental dues along with the interest penalty as tallied in the previous email.

Finally request you to inform your people to cooperate with our team, present at your office to collect the materials.

Hope things are clear and expecting your smooth cooperation in this regard."

"Re: Breach of rental terms and request to handover the materials

*Wed **3/13/2019** 5:28 PM*

From: Rahul Dhondwad

To: rajesh

Cc: Deepak Upadhyay, parmeshwar@rmvgroup.net, accounts@rmvgroup.net, legal@rmvgroup.net, "Saveena Sachar, Lawhive"

Dear Rajesh,

As per our verbal communication along with Rs sir Parmeshwar ji myself and Deepak Parmeshwar ji decided to pre-terminate all valid contracts and return the machines after that we have started returning the machines and we have returned most of the machines only few cylinder setup is with us.

Even we are returning all pending Mac Pro cylinders.

Request to you please reply on email and confirm on the agreement disputes.

Also we never denied that we will not return the machine and even cooperating to return the setup.

Need some more time to return the setup.

Today we are giving 3 Mac Pro cylinder.

@Parmeshwar ji let's meet tomorrow discuss and close this."

(Emphasis supplied)

24. From the above emails it is clear that the Corporate Debtor was very much a party to pre-terminating the agreement and therefore was responsible to pay the balance rental charges. Furthermore, the agreements at Clause 21 clearly provided that if the Corporate Debtor terminated the contract before the end of the rental term, it would be bound to pay 100% rental of the first twelve months and 75% of the balance rental term. The contention of the Corporate Debtor is that the agreement was pre-terminated mutually and therefore they were not liable to pay balance rental charges. It has been contended that the amount of Rs 1,30,29,552/- claimed by the Operational Creditor therefore signified existence of pre-existing dispute. This is a feeble defence as the e-mails on record shows that the Corporate Debtor had consciously pre-terminated the agreement. Moreover, we find force in the contention of the Operational Creditor that even if the balance rental dues are not factorised, the outstanding operational debt prior to pre-termination still exceeded the threshold limit.

25. This brings us to yet another finding returned by the Adjudicating Authority in rejecting the Section 9 application on the ground that the Operational Creditor by depositing the Section 9 application fees on 16.05.2019 which step preceded the issue of Section 8 Demand Notice on 28.05.2019 had acted in a pre-meditated manner.

26. To arrive at our analysis, the statutory construct of IBC needs to be recapitulated. Section 8(1) of the IBC requires the Operational Creditor, on occurrence of a default, to deliver a Demand Notice on the Corporate Debtor for payment of unpaid operational debt. Section 8(2) provides that Corporate

Debtor, within a period of 10 days of the receipt of the Demand Notice, is required to bring to the notice of the Operational Creditor existence of dispute, if any. Under Section 9(1), if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Section 8(2), he may file an application under Section 9(1) of the IBC. Further, Section 9(5)(ii) contemplates that Adjudicating Authority shall reject the application if notice of dispute has been received by the Operational Creditor or there is record of dispute in the Information Utility.

27. Having noticed Sections 8 and 9 of the IBC, we find that in the facts of the present case, the Operational Creditor had dutifully sent a Section 8 Demand Notice and thereafter filed the Section 9 application only after expiry of 10 days' time. Thus, there is no sign or evidence of any violation or contravention of the statutory provisions of the IBC with regard to filing of either the Section 8 Demand Notice or Section 9 application. There is no statutory prescription of any time-frame for deposit of Section 9 application fees nor any embargo placed on filing of such application fees prior to issue of Section 8 Demand Notice or prior to receipt of reply to Section 8 Demand Notice from the Corporate Debtor. At best, the deposit of the Section 9 application fees even before the issue of Section 8 Demand Notice reveals that the Operational Creditor was taking extra precaution that no undue time gets lost in the process of filing Section 9 application. Can a litigant be punished for being alert and vigilant in securing justice? It is clearly preposterous on the part of the Adjudicating Authority to have rejected the Section 9 application of the present Appellant for displaying

diligence in approaching the Adjudicating Authority for redressal of their grievance in accordance with law.

28. Submission was also pressed by the Corporate Debtor that the Operational Creditor did not disclose in their affidavit that they had received a notice of pre-existing dispute and that on this count alone, the Section 9 application deserves to be rejected. We also notice that the Adjudicating Authority has held that the affidavit filed by the Operational Creditor under Section 9(3)(b) of the IBC does not mention whether any Notice of Dispute was received by them from the Corporate Debtor. The relevant para of the impugned order is as reproduced below:

> *5.2 From the perusal of the Affidavit u/s 9(3)(b), it is noticed that the Deponent on behalf of the Applicant has affirmed that at para 3, "Additionally, there is no existence of any suit or arbitration proceeding nor annexed a record of the pendency of the suit or arbitration proceedings filed before the receipt of demand notice issued by the Applicant/ Operational Creditor, abovenamed, nor sent a prof of repayment of unpaid operational debt as required under Section 8(2) of the Insolvency and Bankruptcy Code, 2016." Section 9(3)(b) mandates the operational creditor to furnish "an affidavit to the effect that there is no notice to be given by the corporate debtor relating to a dispute of the unpaid operational debt". This Bench finds that the Affidavit purported to have been filed u/s 9(3)(b) does not in fact state whether any notice of dispute, which may be not in nature of suit or arbitration proceeding, was received from the Corporate Debtor or not.*

29. It was submitted by the Corporate Debtor that the Adjudicating Authority had correctly taken cognisance of this infraction of Section 9 of the IBC. Per contra, the Operational Creditor has placed reliance on the judgment of the Hon'ble Supreme Court in ***Macquarie judgment supra*** in which it has been held that once the Section 8 Demand Notice is replied to by the Corporate

Debtor, any affidavit to this effect is not required to be given by the Operational Creditor.

30. At this stage it may be useful to refer to the relevant excerpts of the ***Macquarie judgment supra*** which is as reproduced below:

> *13. When we come to Section 9(3)(b), it is obvious that an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt can only be in a situation where the corporate debtor has not, within the period of 10 days, sent the requisite notice by way of reply to the operational creditor. In a case where such notice has, in fact, been sent in reply by the corporate debtor, obviously an affidavit to that effect cannot be given.*

Guided that we are by the judicial precedents laid down by the Hon'ble Apex Court, when we see the impugned order in the light of the ***Macquarie judgment supra***, we are constrained to observe that para 5.2 of the impugned order is bad in law.

31. From the aforesaid discussion and analysis of facts and circumstances, we are of the considered opinion that the Corporate Debtor has defaulted in the payment of operational debt, of an amount exceeding Rs 1 lakh, which amount had clearly become due and payable, and further in the absence of any pre-existing dispute, we find that impugned order of the Adjudicating Authority in admitting the application under Section 9 of IBC cannot be sustained.

32. With the aforesaid discussion, we are of the considered view that the Adjudicating Authority has erroneously rejected the application under Section 9 of IBC. The Appeal is allowed with the following directions:

(i) The impugned order dated 25.08.2023 passed by the Adjudicating Authority rejecting the Section 9 application is set aside.

(ii) On a copy of this order being produced before the Adjudicating Authority by the Appellant within 10 days of its uploading, the Adjudicating Authority may pass an order admitting the Section 9 application after allowing a period of one month for the parties to settle between themselves.

(iii) During the aforesaid period of one month, it shall be open to the Corporate Debtor to approach the Operational Creditor to enter into a settlement for discharge of their debt. In the event of a settlement fructifying, the same may be brought on record before the Adjudicating Authority which may then consider the same and pass appropriate orders in accordance with law.

(iv) Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 25.11.2025

Abdul