NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 256 of 2021

[Arising out of Order dated 19.02.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No. IV) in Company Petition No. IB-1263/ND/2019]

In the matter of:

Henan Boom Gelatin Co. Ltd.
Having its Head Office At:
No.96, Middle of Hanghai Road,
Zhengzhou, Henan, China **...Appellant**

Vs.

Sunil Healthcare Limited,
Having its Registered Office At:
38E/ 252 A, 1st Floor, Vijay Tower,
Shahpurjat, New Delhi- 110049 **...Respondent**

For Appellant: **Mr. Mudit Sharma, Ms. Nandini Sharma, Advocates.**
For Respondent: **Ms. Sadapurna Mukherjee, Advocate.**

J U D G M E N T
(17th November, 2021)

Ashok Bhushan, J.

1. This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) has been filed challenging the order dated 19.02.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court-IV, New Delhi. The Appellant is 'Operational Creditor' whose Application under Section 9 of

the 'I&B Code' for initiating Corporate Insolvency Resolution Process has been rejected by the impugned order.

2. The brief facts and sequence of events which are necessary to be noted for deciding this Appeal are:

The Appellant, 'Operational Creditor' is a manufacturer and exporter of Gelatin & Collagen products having its registered office at 96, Middle of Hanghai Road, Zhengzhou, Henan China. The Respondent- 'Sunil Healthcare Limited' is a company engaged in the business of manufacturing man-made fibers which includes manufacturing of artificial or synthetic filament and non-filament fibers. An arrangement was entered between the 'Operational Creditor' and 'Corporate Debtor' for supply of Pharmaceutical Grade Gelatin, one of the conditions for such supply was that payment of the goods so supplied was to be made on the basis of Open Account 45 days after bill of lading date. Three Sales Contract were entered in between being (i) Sale Contract bearing No. 18BOOMG004 dated 25.01.2018; (ii) Sale Contract bearing No. 18BOOMG028 dated 05.03.2018 and (iii) Sales Contract bearing No. 18BOOMG029 dated 07.03.2018 in pursuance of which supply was made and Appellant raised Invoices bearing Nos. 18BOOMG004 dated 11.02.2018, 18BOOMG028 dated 19.03.2018 and 18BOOMG029 dated 19.03.2018. The Corporate Debtor failed to make payment within the agreed period. The Operational Creditor vide e-mail dated 20.07.2018 demanded the due payment of the unpaid operational debt. After some correspondence, a meeting was scheduled on 27.07.2018 at Shanghai between the parties which ended

into an understanding vide minutes dated 27.07.2018 whereby the Corporate Debtor admitted and acknowledged the unpaid operational debt of USD 3,77,392.00 and undertook to make payment thereof by way of three instalments to be paid as under:-

(i) first instalment before end of November, 2018;

(ii) second instalment before end of December, 2018; and

(iii) third before end of January, 2019.

The Corporate Debtor failed to adhere to its own undertaking and assurances given under Minutes of Meeting/ MoU dated 27.07.2018 and just before the expiry of the undertaking given by the Corporate Debtor wrote an email dated 30.01.2019 seeking further extension of time. The Corporate Debtor having not paid the amount, Demand Notice dated 01.02.2019 under Section 8 of the 'I&B Code' was issued by the Operational Creditor demanding payment of USD 3,77,392.00. Demand Notice was issued with all the relevant facts/ materials in prescribed format. Reply to the Demand Notice dated 04.02.2019 was send by the Corporate Debtor. In the reply dated 04.02.2019, the Corporate Debtor again accepted the liability to clear the payment. The reply to the Demand Notice referred to their earlier email dated 30.01.2019 by which a fresh plan for payment was suggested proposing payment in March, April, May and June, 2019. The Operational Creditor vide email dated 06.02.2019 informed the Corporate Debtor that the fresh payment proposal dated 30.01.2019 is unacceptable in view of the Memorandum of Understanding dated 27.07.2018. No payment having been made by the Corporate Debtor

to the Operational Creditor, an Application under Section 9 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dated 18.05.2019 was filed by the Operational Creditor against the Corporate Debtor before the Adjudicating Authority in Form-5. The Adjudicating Authority issued notice on the Application. A reply dated 09.07.2019 was filed by the Corporate Debtor to Section 9 Application. Another reply dated 09.10.2019 was filed by the Corporate Debtor and in pursuance of the order dated 30.01.2020, the Corporate Debtor filed third reply dated 03.02.2020 to Section 9 Application. In third reply, the Corporate Debtor referred to email dated 30.07.2018 sent by the Corporate Debtor wherein reference was made to the email dated 04.05.2018 of the quality control department sent to CEO of the Corporate Debtor. The Adjudicating Authority heard the parties and by impugned order dated 19.02.2021 rejected the Application of Operational Creditor filed under Section 9 of the 'I&B Code'. This Appeal has been filed challenging the said order.

3. We have heard Mr. Mudit Sharma, Learned Counsel for the Appellant and Ms. Sadapurna Mukherjee, Learned Counsel for the Respondent.

4. Learned Counsel for the Appellant submits that the Adjudicating Authority has committed error in rejecting the Application relying on email dated 04.05.2018 sent by the quality control department to the CEO of the Corporate Debtor. The Adjudicating Authority wrongly assumed that there was pre-existing dispute, hence, the Application under Section 9 deserves

to be rejected. Learned Counsel submits that in response to Demand Notice under Section 8 issued by the Operational Creditor, as contemplated under Section 8(2) the Corporate Debtor sent its reply admitting the outstanding amount of USD 3,77,392.00 and has no mention about existence of a dispute. It is submitted that in the three replies filed before the Adjudicating Authority, the Corporate Debtor has now trying to create a dispute which was never in existence. Reliance on the email dated 04.05.2018 is also not relevant since in the meeting dated 27.07.2018 between the parties where the Corporate Debtor himself proposed a plan for repayment no such issue was raised or noticed. Further, even if the emails dated 04.05.2018 and 30.07.2018 are read, it does not indicate that there was existence of a dispute. Insofar as four debit notes dated 27.05.2019, 30.06.2019, 07.11.2019 and 10.12.2019 are concerned, the said debit notes were never acknowledged by the Operational Creditor and the debit notes were created by the Corporate Debtor which were all events subsequent to filing Application under Section 9 by the Operational Creditor. There being no existence of a dispute when Demand Notice under Section 8 was issued, the Adjudicating Authority committed error in rejecting the Application.

5. Learned Counsel for the Respondent submits that the email(s) dated 04.05.2018 and 30.07.2018 wherein the Corporate Debtor had indicated its issues regarding quality of the gelatine received from the Appellant, demonstrates existence of a pre-existing dispute. It is submitted that the case is fully covered by judgment of the Hon'ble Supreme Court in

"Mobilox Innovations Private Limited vs. Kirusa Software Private Limited- (2018) 1 SCC 353". Learned Counsel has placed reliance on four debit notes against which it is claimed that the invoices issued by the Operational Creditor has been settled. It is submitted that the debit notes have been acknowledged by the Appellant and insofar as the allegation of debit notes having been manufactured along with the email acknowledging the debit notes are concerned, no complaint of forgery has been lodged by the Operational Creditor as yet. It is submitted that no evidence is produced to show that the Adjudicating Authority has wrongly rejected Section 9 Application.

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

7. Before we proceed to examine the respective contentions, it is useful to notice the reasons given by the Adjudicating Authority for rejecting the Application. The entire discussion and reasons are contained in Paragraph 17 of the judgment, which reads as follows:-

> *"17. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice or invoice. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand Notice. We find that in the e-mail dated 04.05.2018, the quality Control department had indicated its issues to the CEO of the Corporate Debtor regarding quality of gelatine received from the Applicant, the same was communicated by the CEO of*

the Corporate Debtor to the Applicant vide email dated 30.07.2018, which was acknowledged by the Applicant, clearly demonstrates a pre-existing dispute. A pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor. Whether the Operational Creditor is entitled to seek recovery of the amount of balance USD 2,28,079 out of the total USD 3,77,392.00 as set off by the Corporate Debtor through issuance of Debit Notes, is not for the consideration of this Bench. However, the Applicant has the option to file a Civil suit before the appropriate forum, for the recovery of the same."

8. The issue under consideration in Appeal is as to whether there was a pre-existing dispute when Notice under Section 8 was issued. We may notice Section 8 of the 'I&B Code', is as follows:-

*"**8. Insolvency resolution by operational creditor.** - (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –

(a) existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings

filed before the receipt of such notice or invoice in relation to such dispute;

(b)the [payment] of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding [payment] of the operational debt in respect of which the default has occurred."

9. Sub-section (2) of Section 8 obliges the Corporate Debtor who has been delivered a Demand Notice under Section 8(1) by Operational Creditor to bring into notice of the Operational Creditor "existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute".

10. From the material on record there is no dispute between the parties that the three invoices were sent by Operational Creditor dated 11.02.2018, 19.03.2018 and 19.03.2018 demanding total amount of USD 3,77,392.00. Payment of the said amount was demanded by the Operational Creditor by email dated 20.07.2018. Thereafter, a meeting between the parties took place at Shanghai on 27.07.2018. The meeting was attended on behalf of the CEO of the Corporate Debtor along with

Senior Vice President. The proceedings are brought on record as Annexure- A/10. Para Nos. 1 and 2 of the proceedings are as follows:-

> ***"MOU Between Sunil Healthcare Ltd. & Henan Boom Gelatin Co. Ltd. on Schedule of payments due to Henan Boom Gelatin Co. Ltd., held on 27th July 2018 at Shanghai.***
>
> xxx xxx xxx
>
> *1. The circumstances by which the delay of payment occurred for the three containers supplied vide invoices: 1). 18BOOMG004 dt. 11-02-2018, 2). 18BOOMG028 dt. 19-03-2018, 3). 18BOOMG029 dt. 19-03-2018 has been explained by SHL, which was understood by HBGL.*
>
> *2. As it was already communicated to HBGL vide email dt. 20th June on payment schedule (copy enclosed), the following payment schedule for Invoices were reiterated and mutually agreed between SHL & HBGL.*
>
> *1. Invoice 18BOOMG004 dt 11-02-2018 to be paid before end of November' 18.*
>
> *2. Invoice 18BOOMG028 dt 19-03-2018 to be paid before end of December' 18.*
>
> *3. Invoice 18BOOMG029 dt 19-03-2018 to be paid before end of January' 18."*

11. The above minutes clearly records acknowledgment of debt by the Corporate Debtor and undertaking to make the payment in three instalments. The last instalment to be paid before end of January, 2019. When no payment was made, Demand Notice under Section 8 was issued demanding payment of USD 3,77,392.00. Demand Notice was in Form-3

with all relevant particulars. Reply to the notice was immediately given by the Corporate Debtor vide its letter dated 04.02.2019. For ready reference, it is useful to quote the entire contents of the email which was to the following effect:-

> *"Subject- Reply of Notice of under Section 8 of the Insolvency and Bankruptcy Code 2016 read with Rule 8- reg.*
> *Ref: Your letter no. 4625/32007/CH/19/01 dated 01.02.2019*
> *This is with reference to above mentioned subject and demand notice received from you in Form no. with respect to demanding of USD 3,77,392.00 on behalf of your client viz. Henan Boom Gelatin Co. Ltd. China, please note as under:*
>
> *1. That we are surprised and shocked to see the demand notice in Form no.3 from you on behalf of your client with respect to Gelatin supplied to our Company viz Sunil Healthcare Limited.*
> *2. That we are in discussion with your client for payment of entire dues through email. The schedule of payment has already been shared with your client via email dated 30.01.2019, by Sr. Vice- President of our Company, a copy of the same is enclosed as Annexure-1. We are in constant touch with your client at several points of time, which shows our intention and commitment to make payment. Further, our Company enjoy very amiable and positive relations with your client for the last many years. Both the parties are committed towards perusing this cherished association and remain fully committed in resolving*

all/ any matter within ambit of free and firm mutually acceptable terms of reference.

3. That in view of above, you are requested to take in loop your client and bring its kind attention the schedule of payment as shared above and withdraw the Demand notice in Form no.3 under IBC-2016, as our Company is very much competent to clear its dues as per the commercial terms, agreed between the parties.

You are requested to take the above intimation in your record and oblige use."

12. The reply as required under Section 8(2), it is incumbent on Corporate Debtor to bring into the notice to the Operational Creditor 'existence of a dispute'. Although notice under Section 8(1) was replied by the Corporate Debtor vide email dated 04.02.2019 as extracted above, but there is **no mention of existence of a dispute**. Rather the reply dated 04.02.2019 reiterate that the Respondents are ready to make the payment as per their revised plan communicated on 30.01.2019.

13. There is a statutory purpose for requiring a Corporate Debtor to bring into notice of the Operational Creditor about the existence of a dispute in its reply to Section 8(1) notice. The purpose is that if there is a dispute in existence, the same may be immediately communicated to the Operational Creditor so that he may chart his course of action. When no mention of existence of dispute is made by the Corporate Debtor, the Operational Creditor can immediately file Application under Section 9 which has been done in the present case by Operational Creditor.

14. Section 8 has come for consideration before the Hon'ble Supreme Court in ***"Mobilox Innovations Private Limited vs. Kirusa Software Private Limited"***. In Para 33, the Hon'ble Supreme Court laid down:

> *"33. ..... What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no*

notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [Section 9(5)(i)(b)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [Section 9(5)(i)(c)], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [Section 9(5)(i)(d)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [Section 9(5)(i)(e)], it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7

days granted by the proviso [Section 9(5)(ii)(a)]. It may also reject the application where there has been repayment of the operational debt [Section 9(5)(ii)(b)], or the creditor has not delivered the invoice or notice for payment to the corporate debtor [Section 9(5)(ii)(c)]. It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [Section 9(5)(ii)(d)]. Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected [Section 9(5)(ii)(e)]".

15. In para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 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 one 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."

16. Although in reply to Section 8(1) notice, there was no mention of existence of dispute by the Corporate Debtor but Corporate Debtor has sought to improve his case on the strength of three replies which he has filed before the Adjudicating Authority in reply to Section 9 Application. We may briefly notice the substance of above three replies which were submitted by the Corporate Debtor before the Adjudicating Authority. In reply dated 09.07.2019 in Paragraphs 11 and 15 following was mentioned:-

"11. It is submitted that the present Petition under Section 9 of the Code is not maintainable as there is a pre-existing dispute in relation to the amounts claimed by the Petitioner……."

xxx xxx xxx

"15. That to the our surprise the Operational Creditor has failed to disclose the existing dispute

between the parties due to delay in supply/ dispatch of gelatine to us, which had consequentially resulted the losses to the Corporate Debtor. Despite having knowledge of the dispute between the parties, the Petitioner had maliciously filed the present application and the same ought to be dismissed on this ground alone. It is clear that the present Application has been filed, not because there is any default on part of the Respondent, but as an attempt to arm twist the Respondent to submit to the illegal demands."

17. The above reply indicates that pre-existing dispute referred in reply was in relation to the amount claimed. In second reply dated 09.10.2019, in paragraph 12, the Corporate Debtor in the heading of 'pre-existing disputes' stated following:-

*"**Pre- Existing Disputes***

12. The Applicant has intentionally and in a mala fide manner suppressed a crucial fact that the Corporate Debtor and Operational Creditor have a very sound, strong business association, which is age old and time tested. Despite the outstanding debt mentioned in the Application, the Operational Creditor has directly through his own personal involvement effected shipments of worth US$4,41,000 to Corporate Debtor which have been adjusted against the alleged disputed Invoices as demonstrated herein below. The table below unequivocally establishes that even after shipment of goods mentioned under disputed Invoices, the Operational Creditor had made direct supply of three shipment and Business Transactions entered post dispute stage amounted to

a total value of US$4,41,000/-. This itself establishes That:

a) Good, harmonious and continuous business relationship between Operational Creditor and Corporate Debtor.

b) Existence of "No Dispute" to any invoice due to Operational Creditor."

18. In para 13 of the same reply, it was further stated that Operational Creditor failed to disclose that due to repeated delay in supply/ dispatch of gelatine to the Corporate Debtor, the same had consequentially resulted in losses to the Corporate Debtor for which the Corporate Debtor raised two debit notes of US$ 69,600/-.

19. Now coming to the third reply of the Corporate Debtor dated 03.02.2020, another plea has been taken to support the pre-existing dispute on the basis of email(s) dated 04.05.2018 and 30.07.2018. It is useful to look into paragraph 4 of the reply, which was to the following effect:-

*"**Existence of Pre-Existing Dispute***

4. *The Applicant has intentionally and in a mala fide manner suppressed a crucial fact that the Corporate Debtor and Operational Creditor have a very sound, strong business association, which is age old and time tested. Vide email dated 04.05.2018 the quality Control department had indicated its issues to the CEO of the Respondent regarding quality of gelatine received from the petitioner, the same was*

communicated by the CEO of the Respondent to the Petitioner vide email dated 30.07.2018, which was acknowledged by the Petitioner vide its email dated 30.07.2018 of the quality issues in the gelatine supplied by it to the Respondent, clearly demonstrating of a pre-existing dispute. A copy of the email dated 04.05.2018 and 30.07.2018 is annexed hereto and marked as ***"Annexure R1 (Colly)."***

20. It is to be noted that the mention of email(s) dated 04.05.2018 and 30.07.2018 were not taken any ground in reply to notice dated 04.02.2018. Further, when parties met on 27.07.2018 at Shanghai and Memorandum of Understanding was entered between the parties, no issue regarding any quality issue was raised nor noted in the proceedings dated 27.07.2018. However, to satisfy ourselves we looked into the email dated 04.05.2018 as well as the email dated 30.07.2018 which is claimed to have been sent to the Operational Creditor by the Corporate Debtor. The email dated 04.05.2018 is internal correspondence between quality department of the Corporate Debtor to its CEO. What was communicated to Operational Creditor is email dated 30.07.2018. The email dated 30.07.2018 has been brought on record at Page 183 of the Paper Book. The email dated 30.07.2018 reads as follows:-

"Dear Ancho,

During our meeting on 27th July in Shanghai, I shared with you the below mail which was drafted in May 1st week. As desired I am forwarding the mail to you.

The Quality reports of both 250 Bloom and 180 Bloom supplies are enclosed. The Quality of 250 Bloom Gelatin supplied was found be good. Please tell the manufacturer to maintain this blend in future supplies as well.

As regards to 180 Bloom; here again the parameters are as per the requirements and the blend is good.
However, we are observing wooden chips/ particles in the 180 Bloom Gelatin bags. May be during the packing the Gelatin there was some contamination or the Gelatin is stored in ply based wooden containers. Please explain this to the supplier to take care of this in the subsequent supplies".

21. When we read the entire email, it is clear that with regard to 250 Bloom and 180 Bloom supplies were found to be good as per parameters. The only observation made was that certain wooden chips/ particles in the 180 Bloom Gelatin bags were found. What was requested in the email was "*please explain this to the supplier to take care of this in the subsequent supplies".* At best, from the above, it is clear that no dispute was raised by the Corporate Debtor with regard to the supply of 250 Bloom and 180 Bloom. There is specific mention that parameters are as per the requirements and the blend is good. With regard to certain wooden chips / particles found in the bags, the observation was that it should be taken care in the subsequent supplies. Thus, the email dated 30.07.2018 also cannot be read to mean that there was any dispute between the parties

qua the supply which was made by three invoices for which payment was asked for.

22. Now we revert back to the order of the Adjudicating Authority as noted above. The existence of dispute has been assumed by the Adjudicating Authority only on the basis of the email(s) dated 04.05.2018 and 30.07.2018. The statute uses the expression 'existence of a dispute'. The word 'dispute' has been defined in Black's Law Dictionary as in the following manner:-

> *"**Dispute.** A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a relation to which jurors are called and witnesses examined. See Cause of action; Controversy; Justiciable controversy; Labor dispute."*

23. The pre-existing dispute which may be ground to thwart an Application under Section 9 has to be real dispute a conflict or controversy, a conflict of claims or rights should be apparent from the reply as contemplated by Section 8(2). The Corporate Debtor is not to raise bogie of disputes but there has to be real substantial dispute. It is true that the Adjudicating Authority has to see the reply and the contents therein and has not to enter into adjudication of the dispute. He is only required to look into the substance of the pleading to find out whether there is a real dispute is decipherable from the reply.

24. The existence of dispute when the Demand Notice was issued is mandatory condition for exercising jurisdiction to reject the Application by the Adjudicating Authority as is referred to in sub-section (5) of Section 9. We may notice sub-section (5) of Section 9, which reads as follows:-

> *"**9. Application for initiation of corporate insolvency resolution process by operational creditor.** –.....(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order–*
>
> *(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -*
>
> *(a) the application made under sub-section (2) is complete;*
>
> *(b) there is no [payment] of the unpaid operational debt;*
>
> *(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
>
> *(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
>
> *(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*
>
> *(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –*
>
> *(a) the application made under sub-section (2) is incomplete;*

(b) there has been [payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority."

25. In the present case, no notice of dispute has been received by the Operational Creditor as noted above. There is another expression in clause (d) noted above that 'there is a record of dispute in the information utility', the present is also not a case where there is record of any dispute in the information utility nor any such pleading or material has been placed before us. The very basis on which the Adjudicating Authority rejected the Application is not in existence. There being no pre-existing dispute between the parties, the Adjudicating Authority ought to have admitted the Application and proceeded with the Corporate Insolvency Resolution Process.

26. The Adjudicating Authority has observed that whether the Operational Creditor is entitled to seek recovery of the amount of balance USD 2,28,079 out of the total USD 3,77,392.00 as set off by the Corporate

Debtor through issuance of Debit Notes, is not for the consideration of this Bench. However, the Applicant has the option to file a Civil suit before the appropriate forum, for the recovery of the same.

27. The four debit notes issued by the Corporate Debtor have been strongly denied by the Operational Creditor. It has been submitted that they have been manufactured for the purposes of the case after filing of the Application under Section 9. The receipt or acknowledgment of the said debit notes has also been denied. It is not necessary for us to pronounce as to whether the debit notes are forged or manufactured for the purposes of this case, since the very basis of the decision of Adjudicating Authority was the existence of dispute which we have already dealt above. It is further relevant to notice that there was repeated acknowledgment of debt of USD 3,77,392.00 by the Corporate Debtor which is fully proved by the minutes of meeting dated 27.07.2018 and email dated 30.01.2019 issued by the Corporate Debtor admitting the operational debt and seeking more time for making payment thereof. Further, even in reply dated 04.02.2019 sent in response to Notice under Section 8(1), the Corporate Debtor explicitly showed its willingness and commitment for payment of entire dues. Another reply dated 12.02.2019 was sent by the Corporate Debtor to the statutory notice expressing its commitment to clear debt of the Appellant. There being categorical acknowledgment and admission of debt by the Corporate Debtor, it is not open for the Respondent to contend that there was no debt and the Application could not have been filed by the Operational Creditor.

28. In view of the aforesaid, the impugned order of the Adjudicating Authority dated 19.02.2021 is set aside. Application of the Operational Creditor filed under Section 9 stands admitted and the Adjudicating Authority is directed to proceed with. The Corporate Insolvency Resolution Process shall be deemed to have commenced from this date. The Adjudicating Authority shall pass an order as contemplated under Section 13 within two weeks from today after hearing both the parties. The copy of this order shall be produced by the Appellant herein within three days before the Adjudicating Authority. The Appeal is allowed accordingly.

[Justice Ashok Bhushan]
Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
Anjali