RAJRATAN BABULAL AGARWAL

v.

SOLARTEX INDIA PVT. LTD.& ORS.

(Civil Appeal No. 2199 of 2021)

OCTOBER 13, 2022

[K. M. JOSEPH AND RISHIKESH ROY, JJ.]

Insolvency and Bankruptcy Code, 2016 – s.9 – Application under – Corporate Insolvency Resolution process – 'Pre-existing dispute' – Application filed by first respondent u/s.9 of IBC against the second respondent – Case premised on there being a sale, and a 'debt' owed by the second respondent under the sale – The third respondent was the Interim Resolution Professional – Appellant is an ex-director of the second respondent – NCLT rejected the version of the appellant that there existed a pre-existing dispute and admitted application filed by first respondent u/s.9 of IBC against the second respondent – Order affirmed by NCLAT – Whether the appellant raised a dispute which can be described as 'a pre-existing dispute' as understood by Supreme Court in the decision in Mobilox Innovations Private Limited v. Kirusa Software Private Limited *case – Held: In* Mobilox *case, the Supreme Court took the view that one of the objects of the IBC in regard to operational debts is to ensure that the amount of such debts which is usually smaller than the financial debts does not enable the operational creditor to put the corporate debtor into the insolvency resolution process prematurely – It was further declared that it is for this reason that it is enough that a dispute exists between the parties – The standard with reference to which a case of a pre-existing dispute under the IBC must be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit – Once this subtle distinction is not overlooked, on facts, the NCLAT clearly erred in finding that there was no dispute within the meaning of the IBC – The approach of the NCLAT cannot be sustained – Application filed by the first respondent against the second respondent under s.9 accordingly rejected – Sale of Goods Act, 1930 – Doctrines/Principles – Principle of preponderance of probability.*

A *Mobilox Innovations Private Limited* v. *Kirusa Software Private Limited* **(2018) 1 SCC 353 : [2017] 10 SCR 1006 – relied on.**

Balwant Singh and Others v. Anand Kumar Sharma and Others **(2003) 3 SCC 433 : [2003] 1 SCR 653;**
B *Ahmadsahab Abdul Mulla (2) (dead) v. Bibijan and Others* **(2009) 5 SCC 462 : [2009] 5 SCR 476 and** *Mangilal Karwa v. Shantibai* **AIR 1956 Nag 221 – referred to.**

Case Law Reference

C **[2017] 10 SCR 1006**	**relied on**	**Para 2**
[2003] 1 SCR 653	**referred to**	**Para 21**
[2009] 5 SCR 476	**referred to**	**Para 57**

D CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2199 of 2021.

From the Judgment and Order dated 27.05.2021 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 546 of 2020.

E Kavin Gulati, Sr. Adv., Anish Agarwal, Tejas Agarwal, Avi Tandon, Ms. Vanshika Gupta, Ms. Meghna Tandon, Mayur K., Advs. for the Appellant.

Manoj Harit, Vikram Hegde, Shantanu Lakhotia, Ms. Deepanwita Priyanka, Advs. for the Respondents.

F The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. By the impugned order, the National Company Law Appellate Tribunal (hereinafter referred to as 'NCLAT' for brevity) has dismissed the appeal filed by the appellant challenging the order passed by the
G National Company Law Tribunal (hereinafter referred to as 'NCLT' for brevity) dated 28.05.2020. By the said order, the NCLT admitted an application filed by the first respondent under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') against the second respondent. The third respondent was appointed as the Interim

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Resolution Professional and a moratorium followed. The appellant is an ex-director of the second respondent.

2. The question which falls for decision is whether the appellant has raised a dispute which can be described as 'a pre-existing dispute' as understood by this Court in the decision in *Mobilox Innovations Private Limited* v. *Kirusa Software Private Limited*[1]. NCLT has rejected the version of the appellant that there exists a pre-existing dispute which stands affirmed by the NCLAT.

3. The facts necessary for resolution of the *lis* can be stated as follows:

On 24.09.2016, there were two High Seas Sale Agreements. One was between respondent No. 2 and one Rawalwasia Textile Industries Private Limited. The other High Seas Sale agreement was between the same seller and one company, the name of which is shortened as STDPL.

4. STDPL, according to the appellant, is a sister concern of the second respondent. This arrangement, which was essentially made on the representation of one Mr. Sameer Agrawal, was not honoured. Mr. Sameer Agrawal offered to supply 500 Metric Tonnes of coal each to the second respondent and its sister concern through the first respondent. The purchase order in respect of STDPL was dated 11.10.2016. The purchase order in respect of second respondent is dated 27.10.2016. The purchase order contemplated Gross Calorific Value of 5400. The total moisture content was put as less than 40% +/- 2%. Out of 500 Metric Tonnes, the second respondent was supplied 412 Metric Tonnes. The supply began from 28.10.2016 and ended on 02.11.2016. According to the appellant, the coal was to be used in boilers which manufactures starch and allied products. The coal is placed over the boilers in silos which are nearly 15 feet in height and hold upwards of 200 metric tonnes of coal at once. The appellant lays stress on certain lab reports of tests, which were actually conducted allegedly at its own labs indicating that the quality of coal did not conform to what was promised and what was more, allegedly it led to the malfunctioning of the boiler. On 30.10.2016, an e-mail was sent to the first respondent. It reads as follows:

[1] (2018) 1 SCC 353

"Dear sir,

With reference to 5400 gcv imp coal supply to (stdpl) dhule and (Hdpl) jammer, following issues are to be shared.

For dhule plant: high moisture and powder percentage is to be found, already discussed to you.

For jammer plant: recently supply include high level of powder percentage and moisture too.

Kindly consider the issues and please make us assure about quality of coal should not be down the level. Pics attached for your reference."

Hdpl referred to in the communication is the second respondent.

5. The next correspondence to notice is e-mail dated 03.11.2016. It is addressed to the first respondent by the second respondent. It reads as follows:

"M/s. Sortex India Pvt. Ltd.

105, Raghuvir Textile Mall,

Aai Mata Chowk, Dumbhal

Parvat Patiya,

SURAT . 395010

Kind Attn: Mr. Samirji

Sub: Inferior/poor quality of Indonesian Coal.

Dear Sir,

We have placed an order for 500 MT Indonesian Coal to you vide our P.O. No. HDPL/2016-17/586 dated 27.10.2016 for 5400 GCV and Moisture condition is 38-40%. But, on receiving the coal we found that GCV less than 4000 and size of coal is 0mm 50% and maximum size is 5mm to 6 mm only and moisture is 48-50%. It seems if we receive such type of coal we are facing the cleaning

problem of boiler and due to that nozzle bent and boiler become damaged. This will occur heavy production losses. Hence, please stop delivery of the material/coal and advise us what to do this loss. If any more losses occurred due to poor/inferior quality of coal, we may debit the same amount in your account, which may please be noted.

Thanking you,

Yours faithfully,
For Honest Derivativeds Pvt. Ltd.

Ravi Jajodia
Vice President (Operation)"

6. The first respondent responded to the communication dated 03.11.2016 by its email dated 04.11.2016. It reads as follows:

"Dear Sir,

It is not possible that the coal is off 4000 gcv, secondly from port it is possible that moisture can go upto 42 percent but not above that also because at port they are putting water on the coal as per GPCB guidelines of pollution.

So please take a note regarding this. We have immediately stopped the delivery, but please inform your transporter.

Regards,

Samir Agarwal

Rawalwasia Group

104, Raghuvir Textile Mall,

Bh. DR world, 1 mata chock

Poona Khumbhariya Road, Surat-India-395010

M - +91-9824102989, +91-9374538264

O - +91-261-2705000"

7. Pursuant to the same, further supply was stopped. The first respondent, on 03.02.2018 issued the requisite notice under the IBC and raised a claim for Rs.1573279 + 30 per cent interest totaling to Rs. 21,57,700.38. The second respondent furnished a reply on 17.02.2018.

A Under the reply, it demanded a total amount of Rs.4.44 crores consequent on the coal not being of the quality promised. Respondent No. 2 also has filed two civil suits, one against Rawalwasia Textile Industries Private Limited and the other, against the first respondent claiming damages. It is pointed out that court fee of Rs. 3 lakhs was deposited. After exchange of the notices as mentioned in the IBC, an application under Section 9 B was filed on 30.04.2018 by respondent No. 1 against respondent No. 2. A reply was filed by respondent No. 2 pointing out that there was a pre-existing dispute and seeking dismissal of the application under Section 9. The judgment was reserved on 20.11.2019. The application came to be admitted as already noted by the order passed on 28.05.2020. The C constitution of Committee was stayed by the NCLAT. With the filing of the appeal against the order passed by the NCLAT an order of *status quo* was passed.

8. We have heard Mr. Kavin Gulati, learned Senior Counsel appearing on behalf of the appellant. We further heard Shri Manoj Harit, D learned Counsel appearing on behalf of respondent No. 1. We also have heard Mr. Nakul Dewan, learned Senior Counsel appearing for the IRP.

9. Shri Kavin Gulati, learned Senior Counsel would draw our attention to the following paragraph in the impugned order:

> E "19. With the above admission in the affidavit, it is apparent that on 30.10.2016, STDPL, a sister concern of the Corporate Debtor has sent an e-mail to Group Concern of the Operational Creditor in regard to the Purchase Order dated 11.01.2016 whereas, the present claim is in regard to the Purchase Order dated 27.10.2016. It is also to be seen that there is no reference of this e-mail in the F reply to the statutory notice. In the said e-mail it is not mentioned that it is in relation to the Purchase Order dated 27.10.2016. In the subsequent e-mail dated 03.11.2016, there is no reference to the earlier e-mail dated 30.10.2016. In such circumstances, we are of the view that the e-mail dated 30.10.2016 is not related to the transaction in question."

G 10. He would complain that NCLAT committed a clear mistake. The error lies in proceeding on the basis that in the email dated 30.10.2016 sent by STDPL – sister concern of the corporate debtor, there is mention only of purchase order dated 27.10.2016. It is pointed out with reference to the email that the said email indeed contains reference to the supply

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of coal to HDPL-the second respondent-the corporate debtor in this case. Still further he drew our attention to para 22. Para 22 reads as follows:

> "Upon a bare reading of e-mail dated 03.11.2016, it is clear that the Corporate Debtor stated that the supplied coal is not as per specification and due to that nozzle bent and boiler has become damages which would led to heavy production losses. Hence, it was requested that delivery of the coal be stopped. It is also mentioned that if more losses occurred due to poor/inferior quality of coal they may debit the same amount in the account of the Operational Creditor. The Operation Creditor has sent a reply through e-mail dated 04.11.2016 and immediately stopped the delivery of coal. Thereafter, Corporate Debtor has neither issued any debit note nor has returned the supplied coal but consumed the same. It means that after receiving the e-mail dated 04.11.2016 the Corporate Debtor was satisfied and kept quiet for about 15 months. It is only when they received a statutory notice that they filed a Civil Suit against the Operational Creditor."

11. It is on the basis of the said discussion that the NCLAT found that there was no dispute in regard to the transaction in question and that it was to avoid the liability that corporate debtor through its reply to the notice tried to impress that there was a pre-existing dispute. He next drew our attention to the purchase order.

12. He would point out therefrom that under the terms and conditions with statutory details, Note 1 provided that a certificate of analysis is required along with the material.

13. He drew our attention to Section 12 of the Sales of Goods Act, 1930 (hereinafter referred to as 'Act'). He would contend that under the said provision in a contract of sale of goods, a term may be a condition or a warranty. He would proceed on the basis that this case involves the appellant having elected to treat the condition relating to the quality of the goods as a warranty. The goods in question are raw materials. The goods were supplied in between 28.10.2016 to 03.11.2016.

14. He drew our attention to Section 41 of the Act and contended that a buyer must have the right to examine the goods. He next drew our attention to Section 42 of the Act.

A 15. Immediately upon discovery of the fact that the goods delivered were not in conformity with the terms of the purchase order, the appellant had registered its protest as it were on 30.10.2016. This was again taken up on 03.11.2016 and the communication which is addressed by the first respondent on 04.11.2016 also would fortify appellant's case that the complaint of the appellant was not a spurious one. The first respondent
B is found making an attempt at justifying the moisture content of coal not being in terms of the purchase order. He would contend that Section 59 of the Act declares the remedies open to a buyer who has elected to treat the breach of a condition as a warranty and the said provision contemplates a suit for damages and what is more, even setting up the
C extinction of the price.

16. He would point out that suits were filed within the period of limitation even if it may be that the filing of the suits may strictly not be a circumstance which is relevant in the scheme of the IBC. Nonetheless, it goes a long way to *establish* the case of the appellant that there was
D a dispute which was pre-existing and the institution of the suits following which in fact, a huge amount of Rs. 3 lakhs was paid as court fees would only point to the dispute not being a spurious adventure. He would also point out with reference to what happened in the NCLT that contrary to the mandate of Rule 150 of the NCLT Rules, 2016 which sets a time limit of 30 days from final hearing to pronounce the order, that the said
E rule being observed in its breach has resulted in patent mistakes creeping into the order and non-advertence to the vital issues which were agitated before the Tribunal.

17. Shri Manoj Harit, learned Counsel appearing on behalf of the first respondent, on the other hand, would point out that the only materials
F that existed prior to the date of the notice under the IBC even as per the case of the appellant are the three emails. The emails are dated 30.10.2016, 03.11.2016 and 04.11.2016. He would contend that the documents do not show that there is a dispute. Admittedly, there is no suit or arbitration proceeding initiated as contemplated for the purpose
G of Section 9 of the IBC. Here is a case where the second respondent consumed the goods supplied even after the alleged deficiency continued to exist. The alleged variations do not constitute a dispute. The conduct of the second respondent would show that the claim of dispute is a sham. It is contended that in the email dated 03.11.2016, it is stated that in the event of any further damage, the same would be debited in the
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account of the first respondent. This circumstance is seized upon to contend that no damage had occurred till 03.11.2016 which was sufficiently serious to warrant a debit to the account of the first respondent. Till 03.11.2016, the appellant continued to consume the coal. In this regard, reference is placed on the words 'any more damage'. No debit note was raised after 03.11.2016. This shows there was no further damage.

18. Even after the email dated 03.11.2016, the appellant continued to use the coal. The argument based on a period of 3 years being available to file a suit close to Rs. 4 crores as against the amount of approximately Rs.15 lakhs which is the subject matter of the application under Section 9 is sought to be brushed aside as indicative of the dispute not being a genuine one. If the claim was genuine, it would have been reflected in its book of accounts. The claim that the suit can be filed within the period of limitation does not fit in with the scheme of Section 9 of the IBC.

19. The purchase order contemplated payment within 7 days of delivery. There is no denial of liability to pay before 12.11.2016 which is the last day by which the account became payable. The analysis reports relied on by the appellant are sought to be painted as concoctions. Rule 150 of the NCLT Rules, it is pointed out is only directory and not mandatory.

20. Learned Counsel would contend that the emails relied upon by the appellant must not be seen as anything more than an effort by the buyer to wriggle out of its obligation to make payment for goods which were received. He would further contend that the purchase order contemplated production of the certificate of analysis. Therefore, when the certificate of analysis was present, it is inconceivable how the appellant without disputing the same could claim that the goods delivered fell short of the standards agreed to between the parties. As regards the claim by the appellant that the goods were consumed in large lots (the case of the appellant is that the total quantity delivered was 412 metric tonnes out of the total quantum agreed of 500 metric tonnes and that the manufacturing process is such wherein at one go large quantity can be put into the boiler) it is contended that it is not correct. He would further submit that the boilers would contain specific material indicating the total amount of raw materials which are put into it. In this regard, he would draw our attention to the findings of this Court in *Mobilox Innovations Private*

A *Limited* (supra) that a dispute which is raised must be supported with evidence. He would contend that there is no evidence which can be considered worthwhile so as to not treat the dispute as spurious.

21. The third respondent is the Interim Resolution Professional. He is represented before us by Shri Nakul Dewan, learned Senior B Counsel. He would submit that he is making submissions on behalf of the corporate debtor. After referring to the facts, he would contend that the task cut out for the NCLT is not a mechanical one. While it is not required to establish the existence of a credible dispute, it is duty bound to ascertain whether there is a credible existence of a dispute. The C questions which would arise, according to him, are, whether the consumption of the coal by the corporate debtor constituted acceptance of the goods and obliged it to make payment. The argument is to be based on a *prima facie* test. He would further pose the question as to whether the emails dated 30.10.2016 and 03.11.2016 evidenced or any other contemporaneous document evidenced deficiency in the quality of D coal supplied or the coal resulted in damage to the corporate debtor. He also would draw our attention to Sections 41 and 42 of the Act. He would point out that there is a purchase order which sets out a guarantee. This constituted the reservation of the right to reject the material on the ground. There is no evidence, it is pointed out, that the right to reject was exercised when delivery was effected of 412 Metric Tonnes of the coal. E The corporate debtor has accepted and consumed the delivered coal. As far as Rule 150 of the NCLT Rules is concerned, it is described as a directory provision. The consequence of non-compliance is not set out. The principle laid down by this Court in *Balwant Singh and others v. Anand Kumar Sharma and others*[2] is enlisted in support to contend F that the results urged by the appellant cannot follow. He would also submit that the perusal of the accounts does not establish the case that a loss ensued to the corporate debtor, in that, accounts do not show that the coal in question was not used.

22. In response, Shri Kavin Gulati, learned Senior Counsel would G invite the Court to undertake a more exhaustive survey of the Act. He drew our attention to Section 13 besides Section 63 and the substance of his argument is as follows:

He would contend that the law provides that if the buyer treats the contravention of a condition as a violation of a warranty, the rights

H [2] 2003 (3) SCC 433

declared in Section 59 come into play. The right includes a right to sue not merely for damages but also to extinguish even the price of the goods. He would submit that proceeding on the basis that the appellant has accepted the goods, in view of Section 42 of the 1930 Act, it would not be fatal to the appellant. He would contend that Section 13 (2) would then apply in the facts. In other words, this is a case where, out of 500 Metric Tonnes, the Court can proceed on the basis that there was a delivery of 412 Metric Tonnes of coal and the same was consumed by the corporate debtor. The act of consumption may constitute acceptance of the goods within the meaning of Section 42. But the mere acceptance of the goods within the meaning of Section 41 would not deprive the buyer of the right which follows treating a condition as a warranty and seeking remedies as provided in Section 59 of the Act. Such remedies include the relief of the extinction of the price of the goods. The suit filed within the period of limitation cannot be brushed aside for the mere reason that it was not filed immediately or rather that the suit was not pending within the contemplation of Section 9 of the IBC. He would, in fact, point out that the corporate debtor was having a turnover of about Rs.314 crores in the previous year. He would ask the Court to bear in mind how unreasonable it would be to still postulate that for an amount of about Rs. 15 lakhs, a corporate body would risk its goodwill and very existence, unless the dispute projected was one which was genuine. He would further contend that all of these aspects must be considered in light of the limited scrutiny of the question as to whether there is a dispute. He would point out that a conspectus of the history of legislation as unravelled by this Court in *Mobilox Innovations Private Limited* (supra), would show the following:

Under Section 433 of the Companies Act, 1956, while a dispute could be raised to resist an order of winding up, the Court had to consider whether the dispute was a *bona fide* one. The legislature was perfectly aware of the law in this regard. The law does not require the existence of a *bona fide* dispute to defend an application under Section 9 of the IBC. All that is required is that the dispute must not be got up and spurious. In this regard, he drew our attention to the exposition of the law in *Mobilox Innovations Private Limited* (supra).

ANALYSIS : THE ACT

23. We may notice the relevant provisions of the Act. Sections 4 deals with sale and agreement to sell:

A "4. Sale and agreement to sell.— (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

xxx xxx xxx

B (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

C (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Thus, till the property passes, there is no sale. Property has been defined in Section 2(11) as the general property in goods, and not merely D a special property.

24. Section 12 deals with Condition and warranty.

"12. Condition and warranty. — (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

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(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of F the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the G contract. A stipulation may be a condition, though called a warranty in the contract."

25. Section 13 deals with when a condition is to be treated as a warranty.

"13. When condition to be treated as warranty. — (1) Where H a contract of sale is subject to any condition to be fulfilled by

the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, 1 *** the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise."

26. Section 14 provides for certain implied warranties and conditions and it reads as follows:

14. Implied undertaking as to title, etc.—In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

27. Section 15, inter alia, provides for an implied condition in a sale of goods by description that the goods must conform with the description.

28. Section 16 is also relied upon by the appellant and it reads as follows: -

"16. Implied conditions as to quality or fitness.—Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a

A contract of sale, except as follows:— (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there B is an implied condition that the goods shall be reasonably fit for such purpose: Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

C (2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

D (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

E 29. Section 17 provides for implied condition in the case of a sale by sample. Thus, it can be seen that the Act declares or provides for various implied conditions and warranties.

30. We may also notice Section 19, which deals with the aspect of passing of property in a contract of sale of goods.

F "19. Property passes when intended to pass. — (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to he transferred.

(2) For the purpose of ascertaining the intention of the parties G regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass H to the buyer."

31. Chapter IV deals with performance of the contract. Under Section 31, it is the duty of the seller to deliver the goods and of the buyer to accept and to pay for them in accordance with the terms of the contract of sale. Section 32 reads as follows: -

> "32. Payment and delivery are concurrent conditions. — Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods."

32. It is necessary to notice Section 41 and still further Section 42.

> "41. Buyer's right of examining the goods. —
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> (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
>
> (2) Unless otherwise agreed, when the seller tender's delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."
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> "42. Acceptance. —The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

33. It is apposite also to look into Section 43.

> "43. Buyer not bound to return rejected goods. — Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

34. Chapter V deals with the rights of the unpaid seller against the goods. Apart from exercising the right of lien thereunder, Section 54(2), *inter alia*, entitles the unpaid seller in the circumstances mentioned therein to resell the goods. Chapter VI deals with suits for breach of the contract. Section 55 reads as follows:

> "55. Suit for price. — (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.
>
> (2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract."

35. It may also be necessary to notice Section 59, which reads as follows: -

> "59. Remedy for breach of warranty. — (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may— (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) sue the seller for damages for breach of warranty.
>
> (2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage."

36. An analysis of the provisions of the Act would reveal the following in a contract of sale of goods. A stipulation in regard to goods can be a condition or a warranty. A condition is put on a higher pedestal than a warranty. A condition is treated as essential to the main purpose of the contract. The breach of a condition gives rise to the right with the party to treat the contract as repudiated. In the case of the breach of a warranty which is a stipulation in a contract collateral to the main purpose of the contract, the party (buyer) cannot reject the goods. He cannot

repudiate the contract. Under Section 12(3), on the breach of the warranty, the buyer can sue for damages. As to whether a stipulation is a warranty or a condition is a matter to be decided on the facts of each case. The nomenclature 'warranty' cannot conclude the question as to whether in fact it is a 'condition'. Even though the breach of a condition entitles the buyer to repudiate the contract it is open to the buyer to treat the breach of the condition as a breach of warranty. [See Section 13 (1)]. Section 13 (2) then provides that the breach of any condition by the seller can be treated as only a breach of warranty and not a ground for repudiating the contract or rejecting the goods. This is in situations where the contract is not severable. Still further, for Section 13(2) to apply, the buyer must have accepted all or even part of the goods. This however is again made subject to an express or implied contract providing otherwise. Section 13(2) of the Act suffered an amendment by the Amending Act 33 of 1963. By the said amendment, the words "or where the contract is for specific goods the property in which has passed to the buyer" came to be omitted. Going by the objects and reasons of the Amending Act, it is found that the said words gave rise to some difficulty. It is, *inter alia*, stated in the objects and reasons that under Section 20 of the Act, property in specific goods in a deliverable state passes to the buyer when the contract is made. When there is a contract for sale of specific goods by sample, Section 17(2) of the Act provides for an implied condition that the bulk should correspond to the sample in quality. It is further indicated in the objects and reasons that when in such a case property is delivered subsequently which does not correspond with the sample, Section 13(2) obliged the buyer to treat the implied condition under Section 17(2) as a warranty, thus, robbing the buyer of the right to reject the goods and entitling him to claim damages only. The Law Commission also made a recommendation that in the case of sale of specific goods by sample it should be taken out of Section 13(2). Thus, the omission in Section 13(2) by the Amending Act 33 of 1963 confines the compelled treatment of a breach of a condition as a breach of a warranty to only cases where the contract is not severable and the buyer has accepted the goods or part thereof. No doubt, all of this is subject to a contract either expressly or impliedly otherwise.

37. Section 14 (a) of the Act provides for an implied condition, in the absence of circumstances indicating a different intention that the seller has a right to sell the goods. This is in a sale. In the case of the agreement to sell as would be the case of future goods, Section 14 (a)

A also provides that there is an implied condition that the seller 'will have' the right to sell the goods when the property is to pass. Section 14 (b) declares the existence of an implied warranty that the buyer will have and enjoy the right of quiet possession of the goods. Section 14 (c) provides for an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party not declared or known to the buyer before or at the time of the contract.

38. Section 15 creates an implied condition in the case of a sale by description interalia that the goods must correspond with the description. We may notice the following statements relating to 'Sale of Specific Goods by Description' and 'Conditions as to Quality' in The Sale of Goods Act by Pollock and Mulla [11th Edition]:

"Sale of Specific Goods by Description

It will be observed that the section applies where there is a "contract for the sale of goods by description", that is to say where the goods are described by the contract. This usually applies to a contract for the sale of unascertained or future goods, but it may apply to the sale of specific goods also, if the buyer contracts in reliance on that description. This may well occur in a case where the buyer has never seen the goods and may also occur where he has seen them, but in the latter case it is more difficult for the buyer to show that the sale was a sale by description, for usually the contract for the sale of a specific article is a contract for the article as it is and any description of it at the most amounts to a warranty, for the breach of which the buyer can only recover damages. Occasionally, where goods are sold over the counter to a customer who asks for the goods by their name, the sale may be a sale by description, but in general a customer who buys goods in a shop across the counter is not buying by description. It would appear that the only sales not by description are sales of specific goods as such. "Specific goods may be sold as such when they are sold without any description, express or implied; or where any statement made about them is not essential to their identity; or where though the goods are described, the description is not relied upon, as where the buyer buys the goods such as they are".

Whether statements with reference to the goods amount to a description of them depends upon the terms of the contract, but in

mercantile contracts they will usually amount to a part of the description."

"Conditions as to Quality

This section, it will be observed, deals only with the condition that the goods should correspond with the description. In the older cases stipulations, express or implied, as to the quality of the goods were treated as part of their description: the Act, however, deals with them as separate conditions in section 16(2) and section 17."

39. Section 16 declares that subject to the other provisions of the Act and of any other law in force, there can be no implied warranty or condition as regards the quality or the fitness of the goods for any particular purpose. This is subject to two exceptions. The exception in Section 16 (1) applies when the buyer expressly or by implication reveals to the seller, the particular purpose for which the goods are required. Intimation of this information to the seller brings in the belief that the buyer relies on the seller's skill or judgement. Furthermore, the goods must be of the description which must be in the course of the seller's business to supply. In such a situation there is an implied condition that the goods are to be reasonably fit for the stated/particular purposes. An implied warranty or condition regarding the quality or fitness of the particular purpose can be established by the trade practice or usage of trade. However, if specified goods are sold under trade name or patent name, there is no such implied condition. In this regard we may notice that Section 16 (2) provides for an implied condition regarding the goods being merchantable. The cardinal requirement to be satisfied in this regard is as follows. The goods must be bought by 'description' from a seller. The seller may be a manufacturer or a producer. He may not be either. In both of the cases, the only requirement for an implied condition to arise is that the seller must be one who deals in goods of 'that description'. This is made subject to the exception in the *proviso* namely that if the buyer has examined the goods, there shall be no implied condition as regards defects which the inspection should have revealed. This necessarily means that the proviso would not apply where the defects are latent. In other words, even in a case where goods are purchased after actual inspection of the goods if defects are not discovered then the implied condition would apply in the circumstances mentioned in Section 16 (2). Section 17 deals with sale by sample. Section 17(2) reads as follows:

A 17. Sale by sample:

(2) In the case of a contract for sale by sample there is an implied condition—

(a) that the bulk shall correspond with the sample in quality;

B (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

C Thus, the Act provides for certain implied conditions and warranties. The parties may further also provide for express conditions and warranties. Section 31 proclaims that it is the duty of the seller to deliver goods in accordance with the terms of the contract of sale. Equally, it is the duty of the buyer to accept the goods and to pay for them in accordance with the terms of the contract of sale. Delivery of D goods and payment of price are acts to be performed concurrently. In other words, the seller should be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price on receipt of the possession of the goods. It is significant, however, to notice that this obligation though E ordinarily concurrent is subject to a contract to the contrary. In other words, there can be a condition for payment of the price before the delivery of the possession. Equally the payment of the price can be postponed to a point of time after the delivery of possession. Such matters can be regulated by the contract between the parties. When goods are delivered to the buyer it does not mean that he has accepted the goods if F he has not previously examined the goods. In other words, if he (the buyer) has not previously examined the goods, the delivery of the goods to the buyer by itself will not be deemed to be acceptance of goods by him. He must be afforded an opportunity of examining the goods. The opportunity must be afforded for the purpose of finding out whether the G goods are in conformity with the agreed terms. Section 41 (2) declares that the seller when he delivers goods is bound on request of the buyer a reasonable opportunity of examining the goods. This is again subject to a contract to the contrary. In other words, unless there is a contract to the contrary if a demand is made by the buyer for an opportunity to examine the goods, when delivery is given, the seller is duty bound to afford such H

an opportunity. Section 42 specifically deals with when the goods are to be treated as having being accepted. There are three circumstances in which the law treats the goods as having been accepted:

(i) The buyer informs the seller that he has accepted the goods.

(ii) When after the delivery of the goods to the buyer, he does any act which is not consistent with the ownership of the seller. It includes a sale made by the buyer of the goods. It may include any other form of transfer of the goods. It may also include the consumption of the goods by the buyer. It may embrace the destruction of the goods.

(iii) The buyer retains the goods, even after a lapse of a reasonable time of the delivery of the goods and furthermore does not inform the seller that he has rejected the goods. As to what is reasonable time is a matter which is to be determined on the facts.

Section 63 of the Act provides that when the Act refers to reasonable time, it is a question of fact.

40. If any of these three circumstances exist, then, the law provides that the buyer has accepted the goods. Section 43 deals with a situation where a buyer who is delivered the goods refuses to accept them. The law contemplates that if the buyer upon being delivered the goods ascertains and finds that the goods are not in conformity with the contract, then he is not duty bound to accept the goods. On the other hand, he is entitled to reject the goods. In such circumstances, subject to a contract to the contrary, the buyer who is entitled to reject the goods need not return the goods to the seller. The principle underlying Section 43 is that the buyer need not be saddled with the liability of expense to be incurred for returning of the goods. This is, however the case only when the buyer acquires a right to refuse to accept the goods. As we have noticed, Section 19 deals with the question as to when the property in the goods passes in a contract of sale of specific or ascertained goods. The property would pass according to the intention of the parties. Section 19 (2) provides for three criteria to ascertain the intention of the parties as to when the property passes. The court must bear in mind the following criteria: the terms of the contract, the conduct of the parties and the circumstances of the case.

41. Section 20 which in terms of Section 19 (3) is one of the rules to ascertain the intention of the parties provides that in an unconditional contract for sale of specific goods in a deliverable state, the property passes when the contract is made. Section 20 further declares that the postponement of the delivery of the goods or the payment of the price or both is immaterial to the passing of the property upon the making of the contract. Passing of property would lead to divesting of title of the seller and vesting the title with the buyer. The significance of the passing of the property is also that unless it is otherwise agreed the goods will remain at the seller's risk until the property is transferred. Equally, when the property is transferred, irrespective of whether delivery has been made to the buyer, the risk will be shouldered by the buyer. This is subject to the two provisos. On each we need not dilate. Section 55, which provides for an unpaid sellers' right to sue for the price also highlights the significance of the passing of property. Section 55(1) contemplates such a suit if property has passed.

Section 55 of the Act provides for a right to sue with the seller of goods for the price of the goods. Section 55(1) contemplates that property in the goods has passed to the buyer. It further contemplates that the buyer has wrongfully neglected or refused, to pay for the goods, according to the terms of the contract. Section 55(2) clothes the seller with a right to sue for the price, if the price is payable on a certain date. This right inheres in the seller, irrespective of the fact that delivery has not taken place, and what is more, the property in the goods has not passed. Even the appropriation of the goods to the contract is not necessary in such a case. The Section reaffirms the principle that the property can pass without there being delivery. Delivery of goods need not always result in passing of the property. However, what is important is dehors any of the aspects mentioned in Section 55(2), *viz*., delivery of goods, passing of property in the goods or appropriation of goods to the contract, the agreement between the parties, by which the buyer is obliged to pay the price on a certain date, would entitle the seller to sue for the price of the goods.

42. Section 59 of the Act deals with the remedies open to the buyer upon there being a breach of warranty. We have already noticed that a breach of warranty gives rise to a claim for damages. (See Section 12 (3)). Section 13 as noticed by us entitles the buyer to waive a condition or to elect or treat the breach of the condition as a breach of the warranty.

Section 13 (2) as noticed by us subject to a contract otherwise limits the right of the buyer even when there is a breach of condition to sue only for breach of warranty. Section 59, accordingly, applies in all the three situations, which are as follows. There occurs a breach of the warranty. Secondly, a condition is violated by the seller, but the buyer elects to treat the breach of the condition as a breach of the warranty. Thirdly, under Section 13 (2), in view of the buyer having accepted the goods, in circumstances described in Section 13 (2), the buyer is compelled to sue under Section 59, namely, on the footing that there is a breach of warranty. Thus, the word 'elects' in Section 59 is relatable to Section 13(1) whereas the words 'is compelled' in Section 59 is to be read with Section 13(2) of the Act.

43. It is clear that a breach of warranty does not entitle the buyer to reject the goods. The remedies which he can seek under Section 59 are as follows. He can seek the reduction (diminution) of the price. He may also seek to be freed from the liability to pay the price (extinction of the price). In other words, relying upon the breach of the warranty, he can refuse to pay the price or canvas for the reduction of the price. Section 59 further proclaims that the buyer may sue the seller for damages for breach of warranty. Section 59(2) declares that with respect to the same breach of warranty which is projected as the foundation for seeking diminution or wiping out of the liability to pay the price, the buyer can also seek damages.

44. A question may arise as to whether after the delivery of the goods by the seller and what is more, even after acceptance of the goods by the buyer, whether the provisions of Section 59 can be invoked by the buyer? If the property has passed to the buyer within the meaning of Section 19 which on the one hand entitles the seller to sue for the price of the goods, in view of the word 'wrongfully' neglects or refuses to pay under Section 55 read with Section 59, cannot the buyer in a suit for the price filed by the seller, 'set up' a breach of warranty within the meaning of Section 59 and persuade the court to either decree a reduction in the price or extinguish the liability of the buyer to even pay any part of the price. To put it differently, if the goods are delivered and accepted within the meaning of Section 42 of the Act, will the right of the buyer arising out of breach of warranty under Section 59 be extinguished? If the mere acceptance of the goods results in depriving the right of the buyer to invoke Section 59 of the Act, then, undoubtedly, the buyer would

A be liable to pay the price. Let us assume that there is delivery and acceptance in a given case. If parties intended that the property in the goods would pass only after delivery is effected and acceptance is made and if the case falls under Section 13 (2) of the Act and the buyer sets up a compelled breach of warranty though in fact a condition was violated, it may not be legal to deny the benefit of the range of remedies open to a buyer under Section 59. Acceptance of goods at any rate within the meaning of Section 13(2), if it does not constitute passing of property would not also deprive the buyer of the right under Section 59 of the Act. As long as a condition is violated, be it implied or express, and it is not waived, then, present other elements of Section 13(2), Section 59 applies.

45. What would be the position if, after there is acceptance of the goods, under Section 42 even if it be a case of express intimation of acceptance, that events occur which lead to the creation of circumstances attracting Section 14? As for instance, the buyer is confronted with a situation where he finds that the goods were in fact stolen and the seller had no right to sell the goods. A third party comes forward and substantiates his case that the goods were never the property of the seller. Would it not be a condition under Section 14 (a) which has been observed in its breach by the seller? Let us further assume that the buyer has not yet paid the price. Can he not despite having accepted the goods exercise his right under Section 59 and seek extinction of the price apart from claiming damages?

46. Under the law, namely the Act, if a suit for price were brought in similar circumstances, the question would arise squarely, whether the second respondent as buyer could defend the action by 'setting up' diminution or extinction of the price. Could the second respondent as defendant seek to non-suit the first respondent by establishing a breach of a warranty. Undoubtedly, ordinarily acceptance of the goods by the buyer, a matter which falls to be decided with reference to Sections 41, 42 and 43 would conclude the matter in favor of the seller. What however would be the position where after acceptance, circumstances exist which justify the buyer in pleading a breach of a condition which is treated as a warranty or a breach of warranty which is found after acceptance. Take for example breach of a condition under Section 14 (a). In case where the price has not been paid and suit is brought under Section 55 (1), where the buyer has found that the seller has no right to sell the

goods, can the buyer be robbed of his right to refuse to pay the price vouchsafed for a buyer under Section 59 of the Act? The answer would appear to us to be in the negative. No doubt in such a case it would be said that there is no passing of property or that the seller had no property to pass. Equally, if after acceptance of the goods, the quiet possession of the goods within the meaning of Section 14 (b) is thwarted by third party claims, the implied warranty for such possession would stand violated giving rise to the buyer a right under Section 59 to seek such diminution of the price or even extinction of the price. Even a claim for damages over and above the relief of diminution and even extinction of the price is permitted under Section 59 (2).

47. It is to be remembered, that under Section 31 of the Act it is the duty of the buyer to pay for the goods in terms of the contract. Delivery and payment of price are made concurrent conditions, unless otherwise agreed. This means with possession of the goods being obtained, the buyer becomes obliged to pay the price. [See Section 32]. In this case, the contract obliged the second respondent to pay the price within seven days, according to the first respondent as per the purchase order.

THE DECISION IN MOBILOX

48. After an exhaustive survey of the legislative history of the IBC, and case law, this Court, speaking through R.F. Nariman J., held *inter alia*:

> "32. In the passage of the Bills which ultimately became the Code, various important changes have taken place. The original definition of "dispute" has now become an inclusive definition, the words "bona fide" before "suit or arbitration proceedings" being deleted. In Section 8(1), the words "through an information utility, wherever applicable, or by registered post or courier or by any electronic communication" have been deleted. Likewise, in Section 8(2), the period of "at least 60 days … through an information utility or by registered post or courier or by any electronic communication" has also been deleted. In Section 9(5), the absence of a proviso similar to the proviso occurring in Section 7(5) was also rectified. Further, the time periods of 2 and 3 days were uniformly substituted, as has been seen above, by 7 days, so that a sufficiently long period is given to do the needful.
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A 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)

B (*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 C 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 D or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

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E 38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the F notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(*a*) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as G "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court.

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Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

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44. We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined "dispute" as meaning a "bona fide suit or arbitration proceedings…". In its present avatar, Section 5(6) excludes the expression "bona fide" which is of significance. Therefore, it is difficult to import the expression "bona fide" into Section 8(2)(*a*) in order to judge whether a dispute exists or not.

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48. To similar effect is the judgment of the Chancery Division in *Hayes* v. *Hayes* [*Hayes* v. *Hayes*, 2014 EWHC 2694 (Ch)] under the UK Insolvency Rules. The Chancery Division held:

"I do not think it necessary, for the purposes of this appeal, to embark on a survey of the authorities as to precisely what is involved in a genuine and substantial cross-claim. It is clear that on the one hand, the court does not need to be satisfied that there is a good claim or even that it is a claim which is prima facie likely to succeed. In *Bayoil S.A., In re* [*Bayoil S.A., In re*, (1999) 1 WLR 147 (CA)] itself, Nourse, L.J. referred, at WLR p. 153, to what Harman, L.J. had said in *L.H.F. Wools Ltd., In re* [*L.H.F. Wools Ltd., In re*, 1970 Ch 27 : (1969) 3 WLR 100 (CA)] where Harman, L.J., having referred to a previous case, said: (Ch p. 36 E-F)

A '… The majority decided in that case that, shadowy as the cross-claim was and improbable as the events said to support it seemed to be , there was just enough to make the principle work, namely, that it was right to have the matter tried out before the axe fell.'

B On the other hand, the court should be alert to detect wholly spurious claims merely being put forward by an unwilling debtor to raise what has been called "a cloud of objections" as I referred to earlier."

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C 51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(*d*) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear
D that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal
E argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of
F the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

(Emphasis supplied)

THE PURCHASE ORDER

G 49. The purchase order dated 27.10.2016 reads, *inter alia*, as follows:

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"PURCHASE ORDER

XXX XXX XXX

Dear Sir,
This has reference to you offer and subsequent discussion had with you, we are pleased to place our purchase order no. the following terms and conditions.

SL. NO.	Description of Goods	Quantity	Rate	Per	Disc. %	Amount
1.	Imp.Coal GCV (ADB) - 5400 KCAL TOTAL MOISTURE (ARB) -40% BY WT (+-2%) Inherent Moisture (ADB) 12%by W (+/-2%) Volatile Matter (ADB) -38-40% ASH (ADB) 5- 7% BY WT Sulfur (ADB) 1% by Wt. Fix Carbon - by Difference Size-0-50 MM Shortage Allowed - 1% INPUT CST @ 2% AGST C-FORM	5,00,000.00 Kgs	3.14 2	Kgs %		15,70,0 00.00 31,400.00
	Total	5,00,000.00 Kgs				INR 16,01,4 00.00

Amount Chargeable (in words): Indian Rupees Sixteen Lakh One Thousand Four Hundred Only

Terms & Condition With Statutory Details

Note: 1. Certificate of Analysis is required along with Material
Note: 2. All necessary document should be mention our P.O. Number compulsory otherwise Material is not Unloading at our site
Note: 3. Courier Name : - Professional Courier - Kindly Mention on your envolope - Delivered to Jamner Professional Courier Branch Office

Price Basis : EX-HAZIRA
Payment Terms : Receipt of material with in 7 days
Freight :
Transportation : JILANI LOGISTICS
Insurance : NIL
Delivery : IMMEDIATE
Guarantee : We will reserve the right to reject the material at our ground site towards any quality of manufacturing defect

"

A 50. The purchase order is dated 27.10.2016. The quotation is described as telephonic and dated 27.10.2016. It is specifically mentioned as against the query where to be used as follows: FBC Boiler. The goods were described as imported coal. Apart from mentioning the quantity and the price, it is indicated that the coal must be of a certain quality in terms of its characteristics which we have already noticed. B Under the terms and conditions with statutory details, Note 1 indicated that the material should be accompanied with a certificate of analysis. Payment terms provided that it was to be paid within seven days of the receipt of materials. Delivery must be immediate. Under the heading 'Guarantee', it is mentioned that the second respondent would reserve C the right to reject the material at its ground site towards any quality of manufacturing defect. The supply commenced immediately as contemplated in the purchase order, namely, from 28.10.2016. Indisputably, the goods were imported coal. This could be treated as a sale of goods by description as the contract for sale related to 500 MT of Indonesian coal.

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51. In this case, a perusal of the notice sent by first respondent and the application under Section 9 of the IBC would show that the case is premised on there being a sale, and there was a 'debt' owed by the second respondent under the sale. It means that the cause of action in general law would have been a suit for the price of the goods sold within E the meaning of Section 55 of the Act.

52. On 30.10.2016, an email was indeed dispatched to the first respondent [See paragraph 4 of this Judgment]. The email was sent by STDPL, the sister concern of the second respondent. This email has been brushed aside by the NCLAT in the impugned order on two grounds. F In the first place, the NCLAT has proceeded on the basis that there was no reference to purchase order dated 27.10.2016 and the concern raised in the email was qua purchase order dated 11.10.2016 which related to the sister concern of the second respondent namely, STDPL. The second reason for refusing the appellant to draw support from the said email is G that there is no reference to email dated 30.10.2016 in the reply to the statutory notice under the IBC.

53. We are of the view that the approach of the NCLAT cannot be sustained. A perusal of the email would clearly indicate that though it was sent by STDPL express reference is made to the second respondent

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also, and thereafter, the issues relating to the quality of the coal are articulated. We also notice that pictures were attached for the reference.

54. The further fact that there is no express reference to email dated 30.10.2016 in the reply notice given by the second respondent to the statutory notice under Section 8 of the IBC given by the first respondent will not, in our view, detract from the impact of the communication dated 30.12.2016. It is not as if there is a dispute about the sending and receipt of the communication dated 30.10.2016. Therefore, we are of the view that the NCLAT has clearly erred in refusing to lay store by the said communication. On 03.11.2016, undoubtedly, the second respondent in its own name has ventilated its complaint about the inferior and the poor quality of the Indonesian coal. The impact of using such coal on the boiler and about the damage being done to the boiler has been specifically articulated. Further, a request was made to stop delivery of the goods. Even advice was sought as to what is to be done about the loss. Thereafter, it is stated that for any more losses occurred due to the poor inferior quality of the coal, the second respondent may debit the same in the account of the first respondent. On the very next day, that is, 04.11.16, the first respondent wrote back by pointing to the improbability about the deviation from the quality of the coal but it was indicated that the further supply was being stopped. Thus, the supply was effected of 412 MT out of the contracted quantum of 500 MT. The supply was stopped on the basis of the communication dated 04.11.16.

55. This is a case where there was a contract for sale of goods. The contract as gleaned from the purchase order related to goods which were sold by description, namely, Indonesian coal. Parties clearly contemplated that the coal was to be a certain quality, the details of which are expressly enumerated in the purchase order. The purpose for which the coal was purchased was also indicated, namely, it was to be used in a boiler. Therefore, it formed a part of the raw material for the second respondent. Pursuant to the purchase order, it is undoubtedly true, that 412 MT was delivered at the factory site of the second respondent. It is beyond challenge that no part of 412 MT has been returned by the second respondent to the first respondent. It would be safe to proceed on the basis that the goods so delivered may have been used or consumed. It may constitute acceptance of the goods within the meaning of Section 42 of the Act. But then the case of the appellant is

A anchored in Section 13(2) of the Act. The case is that the characteristics of the coal or quality of the coal with reference to certain objective criteria were indeed specified and was understood as a condition to be fulfilled by the seller and that those conditions were not fulfilled by the first respondent-seller. It is, therefore, the case of the appellant that the acceptance of the goods under Section 42 may not detract from Section
B 13(2) of the Act applying to the facts. In other words, treating the quality of the coal with reference to certain standards as conditions to be fulfilled by the seller, the mere acceptance of the goods by the buyer may not prevent the buyer from still contending that there has been a breach of the condition, but since the law permits the buyer to treat such breach of
C the condition when there is acceptance of the goods as only a breach of a warranty, Section 59 of the Act immediately gets attracted. Section 59 of the Act contemplates a buyer 'setting up' a breach of a warranty to diminish or reduce the price or even extinguish it. If this line is accepted, it could indeed be said that the decks are not cleared for the first respondent-seller for its claim under Section 8.
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56. However, the objections of the first respondent may be noticed. Apart from supporting the order of the NCLAT with reference to its contents, it is pointed out that the case of the appellant is a mere ruse, and that no complaint was raised on the ground and though there was
E guarantee under the purchase order, nothing prevented the second respondent from rejecting the goods. The second respondent not only accepted the supply of the goods but proceeded to consume the goods. A huge quantum of 412 MT was supplied from 28.10.2016 to 03.11.2016. No debit was made in the accounts in keeping with the intimation in the email dated 03.11.2016. This rules out the case of any loss. There is no
F evidence of any loss. The case of the appellant would fall under a mere bluster.

57. We are not dealing with a suit under the Act either by the seller or the buyer. We are not oblivious to the fact that the suit has already been laid by the second respondent seeking damages. The factum
G of the filing of the suit, however, cannot be taken into consideration for the purpose of deciding whether there is a preexisting dispute under the IBC. This is for the simple reason that the suit was not filed before the receipt of the demand notice under Section 8 of the IBC. No doubt, the documentary evidence furnished by the first respondent, namely, the purchase order indicates that the price is to be paid within seven days of
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receipt of the goods. It is true that Section 55(2) of the Act speaks about a contract of sale where the price is payable on a day certain entitling the seller to sue for price. This is irrespective of the fact that the property in the goods has not passed and the goods have not been appropriated to the contract and whether delivery has been made or not. We may notice, for the purpose of the limited inquiry we can do, for deciding, whether there was a pre-existing dispute, to apply Section 55(2) a certain day must be fixed for payment of price. In this case, the payment terms speak about 'within seven days of delivery'. We may incidentally notice that though in the context of Article 54 of the Indian Limitation Act, 1963, a bench of three learned Judges in *Ahmadsahab Abdul Mulla (2) (dead) v. Bibijan and others*[3] has with reference to the requirement in Article 54 held that the date for performance which is refused must be a fixed date. In this case, Section 55(2) speaks about a certain date which must be fixed in the contract. The clause in the purchase order refers to payment of the price being effected within seven days of delivery. It could, no doubt, be said that the date of payment cannot go beyond a period of seven days at any rate of the delivery, and therefore, the seventh day could be treated as a day which is certain. We need not explore the matter further particularly having regard to the pendency of the suit, and also, the nature of the limited inquiry to be conducted under the IBC. We may further note, however, that Section 55(2) also contemplates that the buyer must wrongfully neglect or refuse to pay the price. Interestingly, it will be noticed that the law-giver has in Section 55(1) also used the words "and the buyer wrongfully neglects or refuses to pay for the goods" but the law-giver has further added the words "according to the terms of the contract" which words are not found in Section 55(2). Even proceeding on the basis that under Section 55(2) of the Act, this is a case where there is a certain day fixed for the payment of the price irrespective of the passing of the property *inter alia,* the law does clothe the buyer with the right to resist the suit on the basis that the refusal to pay the price is not wrongful. In other words, he can lean on Section 59 and set up a breach of warranty and seek at least the diminution of the price if not extinction of the same. That apart, he has a right to seek damages even on the same breach.

58. Section 4 of the Act, *inter alia*, contemplates that an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled

[3] (2009) 5 SCC 462

A subject to which the property in the goods is to be transferred. As far as Section 55(1) of the Act, it clothes a seller with a right to sue for the price of the goods when a property in the goods has passed. The suit can be resisted by the buyer on the basis that the refusal to pay the price is not wrongful having regard to the terms of the contract. As to when property passes and transforms a contract for sale into a sale is largely a matter of intention. The rules as contained in Sections 19 to 24 of the Act would be employed. The task, however, remains to find out the intention of the parties. We may notice that a Division Bench of the High Court of Nagpur in the judgment in *Mangilal Karwa v. Shantibai*[4] has made the following observations in an appeal by the defendant-buyer who had agreed to purchase 503 bags of Masur but found that the goods were not of merchantable quality and were rotten:

> "11. The question whether the Defendant-purchaser had an option to reject the goods because what he bargained for was masur and not some rotten stinking stuff which was once masur of that year's harvest does not arise for consideration in this case. For, even if there be a breach of a condition, the Defendant by taking delivery has, under Section 13 of the Act, elected to treat it as a breach of warranty which under Section 59 entitles him to a diminution or extinction of the price.
>
> It is settled law that even after the goods have been delivered into the actual possession of the buyer, the performance of the seller's duties may still be incomplete by reason of the breach of some of the conditions or warranties - express or implied - whether as to title, or quality, or fitness to Which he has bound himself by the contract: (Benjamin on Sale, Page 984).
>
> The question then is what is the diminution in price to which the Defendant is entitled under Section 59 of the Act?
>
> xxx xxx xxx
>
> In the instant case the Defendant has set up the breach of warranty of quality in order to claim a diminution of price under Clause (a) of Sub-section (1). He is therefore entitled to such damages as are available to him under Clause (a) which would be all damages resulting as a natural and ordinary consequence of his breach of

[4] AIR 1956 Nag 221.

contract in supplying a damaged article or an article of an inferior quality than the one contracted for."

No doubt, the Court found, in the facts therein, that the property had not passed. For the purpose of this case, we may not have to adjudicate and find that the property has passed in the goods to the second respondent.

59. In *Mobilox* (supra), this Court took the view that one of the objects of the IBC in regard to operational debts is to ensure that the amount of such debts which is usually smaller than the financial debts does not enable the operational creditor to put the corporate debtor into the insolvency resolution process prematurely. It is further declared that it is for this reason that it is enough that a dispute exists between the parties. It is further the law as declared in *Mobilox* (supra) that Section 5(6) of the IBC excludes the expression *bona fide* which qualified the words suit or arbitration proceedings in Section 5(4) under the Bankruptcy Law Reforms Committee Report. All that is required is to see whether there is a plausible contention which must be investigated. This Court has gone on to declare that a 'patently feeble' legal argument may not be a plausible dispute. We respectfully agree. We are unable to find that in the facts of this case, that the case set up by the second respondent was a patently feeble legal argument. Again, following what this Court held in *Mobilox* (supra), we do not have to go to the extent of finding that the second respondent is likely to succeed. Still further, finding guidance from *Mobilox* (supra), the examination of the merits need not transcend the limited extent which we have undertaken which is to find that the case of the second respondent is not to be brushed aside as spurious, hypothetical or illusory. We cannot find that the dispute as projected by the appellant on behalf of the second respondent does not exist. In the teeth of the emails which we have adverted to, and the inference sought to be drawn in particular as also the Lab Reports produced, no doubt, from the second respondent's Labs, we cannot also find that the case of the corporate debtor is wholly unsupported by evidence. As to the acceptability of these materials and the weight to be attached to them, needless to say, we have not pronounced on the same.

60. When we speak about evidence, we must not overlook the law laid down in *Mobilox* (supra) that the court need not be satisfied that the defense is likely to succeed. The standard, in other words, with reference to which a case of a pre-existing dispute under the IBC must

A be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit. Once this subtle distinction is not overlooked, we would think that the NCLAT has clearly erred in finding that there was no dispute within the meaning of the IBC.

B 61. On the one hand the case of the appellant appears to be that the boiler can be used by putting in large quantities of raw material (300 MT approximately) and this justified the consumption of the supplied goods over a period of a few days, and yet, justifying the complaint about the quality of the raw material and its impact on the boiler. The stand of the first respondent is that there is no material to justify such a C claim. We are of the view that this would involve the court making a deeper foray into the merits and attempting to find whether the dispute is *bona fide* as against it being a plausible contention. We cannot be unmindful about the impact of Section 13(2). In other words, the delivery of the goods and the acceptance of the goods by use of the goods by the D corporate debtor being not in dispute, the impact of Section 13(2) read with Section 59 cannot at least for the purpose of determining whether there is a pre-existing dispute be ignored.

62. No doubt, the first respondent lays store by the purchase order requiring certificate of analysis in that in view of there being no challenge E to the said certificate of analysis and there being no rejection of the goods which was contemplated under the purchase order at the ground site, it is contended that the dispute cannot be countenanced. The appellant would, on the other hand, seek to buttress his case with reference to the lab reports, no doubt, procured from the labs which the second respondent has set up. The appellant, it must not be overlooked has a definite case F that, only upon use of the goods, the defect in the goods came to be discovered. No doubt, the lab reports may support the appellant. It is not the case of either party that the quality of the coal as set out in the purchase order is something which could be established on mere physical examination. As far as the contention that no debit note was raised in G respect of supplied goods and that the accounts may not bear out the case of the appellant about the alleged loss, as a result of the use of the goods in question, we feel that while they may indeed have lent assurance to the case of the corporate debtor, their absence may not clinchingly rule out the existence of a 'pre-existing dispute' under the IBC. Here, we must not be oblivious to the limited nature of examination of the case H

of the corporate debtor projecting a pre-existing dispute. Overlooking the boundaries of the jurisdiction can cause a serious miscarriage of justice besides frustrating the object of the IBC. The NCLAT, has clearly erred in not appreciating the issue, bearing in mind the principles in the Act.

63. In view of our finding that the NCLAT has erred in its finding about the existence of a pre-existing dispute, the impugned order merits interference. In the said view, we need not pronounce on the aspect about the effect of Rule 150 being breached by the NCLT.

64. We make it clear, however, that as far as the suits filed by the second respondent are concerned, we must not be treated as having pronounced on any factual issues and observations made in this regard must be treated as having been made for the purpose of deciding this appeal. We also make it clear that since Section 13 of the Act permits the buyer to waive a condition, it will be open to the first respondent to canvass that at any rate the second respondent has waived the alleged condition.

65. The appeal is allowed. The impugned order will stand set aside. The application filed by the first respondent against the second respondent under Section 9 will stand rejected. In view of the fact that the appellant succeeds on the basis that there is a pre-existing dispute within the meaning of IBC, we leave open all the remedies and contentions available to the first respondent in law. Parties are left to bear their respective costs.

Bibhuti Bhushan Bose Appeal allowed.
(Assisted by : Preetam Bharti, LCRA)