

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 22 OF 2024**

[Arising out of Order dated 06.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in IA No.3416/2023 in CP(IB) No.398/MB-IV/2023]

**In the matter of:**

**Mr. Mohammad Moinuddin Khan**

**....Appellant**

**Vs.**

**M/s. Saraswati Wire & Cable Industries and Anr.**

**...Respondents**

**For Appellant:**

Mr. Sangram Patnaik, Mr. R Batra, Ms. Swyam Sidha Patnaik, Mr. M K Mathur, Mr. Sohel Rishab, Advocates

**For Respondents:**

Mr. Ankur Khandelwal, Mr. Himanshu Handa, Advocates for IRP  
Mr. Sahil Chawla, Mr. Akshay Sapre, Mr. Anupinder Jassal, Advocates for R-1

**JUDGMENT  
(13<sup>th</sup> March, 2024)**

**Ashok Bhushan, J.**

This Appeal by Suspended Director of the Corporate Debtor has been filed challenging the order dated 06.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV admitting Section 9 Application filed by the Respondent- Operational Creditor.

**2.** Brief facts of the case necessary to be noticed for deciding the Appeal are:-

2.1. The Corporate Debtor- 'Dhanlaxmi Electricals Private Limited' is a license contractor and engineer for carrying out various contract works awarded to the Corporate Debtor. It has issued purchase order to the Operational Creditor for supply of AB Cables for its different projects. The Operational Creditor sold wires and cables of the Corporate Debtor and raised invoices from 29.09.2019 to 06.10.2019. Account Manager of the Corporate Debtor issued an e-mail dated 04.08.2021 forwarding the ledger pointing out certain differences in the ledger in the account of the Operational Creditor and the account of the Corporate Debtor. As per e-mail dated 04.08.2021, ledger from 01.04.2020 to 30.03.2022 reflected as closing balance of Rs.1,79,93,690/-. Operational Creditor issued a demand notice dated 25.08.2021 to the Corporate Debtor claiming an amount of Rs.1,79,93,691/- + interest of Rs.85,27,110/- totalling Rs.2,85,20,800/-. Advance copy of Section 9 application was also forwarded to the Corporate Debtor vide letter dated 09.11.2021. Corporate Debtor after receiving demand notice dated 25.08.2021 as well as letter dated 15.11.2021 regarding the demand notice sent notice of dispute declining the demand in the letter dated 20.11.2021. Corporate Debtor raised various issues and issued debit notes for amount of Rs.67,96,800/- for 80 K.M faulty cable as well as amount of Rs.50 lacs for non-supply of G.I Pipe for Bill no.203. After receipt of the notice of demand, the Operational Creditor did not proceed to file Section 9 application. Corporate Debtor after receiving of the demand notice paid an amount of Rs.61 Lakhs between 30.08.2021 to 31.03.2022. Operational Creditor after receipt of the aforesaid amount of 61 Lakhs after sending the demand notice proceeded to file an application under Section 9 on 18.02.2023 claiming an

amount of Rs.1,79,93,691 + interest of Rs.85,27,110/- totalling Rs.2,85,20,800/-. In Section 9 application, the Operational Creditor has brought the copy of the reply to the demand notice dated 20.11.2021 as well as the details of the payments made after issuance of demand notice.

2.2. Adjudicating Authority issued notice in Section 9 application. Corporate Debtor did not file any reply and section 9 application proceeded *ex parte* and by order dated 06.12.2023 application has been admitted.

3. We have heard Shri Sangram Patnaik, Learned Counsel for the Appellant, Shri Akshay Sapre, Learned Counsel for the Respondent No.1 and Shri Ankur Khandelwal, Learned Counsel appearing for the IRP.

4. Learned Counsel for the Appellant challenging the impugned order submits that even though no reply of Section 9 application could be filed but reply to demand notice contains specific details by which Corporate Debtor has given notice of dispute. There being pre-existing dispute between the parties, the Adjudicating Authority ought not to have admitted Section 9 application. It is submitted that it was not only by reply to demand notice that Corporate Debtor has pointed out deficiency and faulty cable supplied by the Operational Creditor but there were correspondence materials including the e-mail sent by Corporate Debtor on 24.12.2018, 03.07.2019 and 19.11.2021. It is submitted that joint inspection was held where faulty cables were identified jointly by Operational Creditor and the Corporate Debtor and faulty cables were never replaced as was initially communicated by the Operational Creditor. Corporate Debtor has suffered due to faulty cables supplied and extra cables were used by the Corporate Debtor. It is submitted that with

regard to Invoice Nos. 203 and 205, no supply of appropriate material was placed, hence, it is submitted that the debit notes of Rs. 67,96,800/- and Rs.50,00,000/- which was issued by the Corporate Debtor on 20.11.2021 was never responded by the Operational Creditor which clearly indicate that dispute persisted. It is submitted that the Corporate Debtor bonafide after receiving the demand notice has made payment of Rs.61,00,000/- to the Corporate Debtor which according to the Corporate Debtor was the balance due. It is submitted that the Corporate Debtor is using Section 9 Application as recovery mechanism. It is submitted that the relevant e-mails have been brought along with the Appeal to establish pre-existing dispute between the parties. It is submitted that the acknowledgment dated 04.08.2021 cannot be treated to be acknowledgment on behalf of the Corporate Debtor, since the e-mail was sent by account manager and not by the Corporate Debtor.

**5.** Shri Akshay Sapre, Learned Counsel for the Operational Creditor refuting the submissions of the Counsel for the Appellant contends that there was no pre-existing dispute and the dispute sought to be raised by the Corporate Debtor by its reply to the demand notice dated 20.11.2021 is a frivolous dispute and with intent to avoid admitted liability. It is submitted that the e-mail dated 04.08.2021 was sent on behalf of the Corporate Debtor acknowledging the amount of Rs.1,79,93,690/- which was clearly ledger confirmation and the said amount is admitted amount. It is submitted that the said account confirmation issued much subsequent to supply of the materials which were supplied between May 2019 to October, 2019. It is submitted that the reply to the demand notice dated 20.11.2021 cannot be

an evidence of proof of pre-existing dispute between the parties and the Adjudicating Authority rightly admitted Section 9 application. It is submitted that the Adjudicating Authority observed that the Corporate Debtor has raised dispute regarding two Invoice Nos.203 and 205 totalling to Rs.57,23,944/- even if the said amount is not considered, the amount outstanding is more than the threshold amount and application has rightly been admitted. It is submitted that after issuing the balance confirmation on 04.08.2021, it is not open to the Corporate Debtor to contend that the amount admitted is not due. When the amount has been admitted to be due, any submission to deny the outstanding amount cannot be entertained.

**6.** Learned Counsel for the parties have relied on various judgments of the Hon'ble Supreme Court and this Tribunal in support of their respective submissions which we shall notice hereinafter.

**7.** We may first notice the statutory scheme delineated by Sections 8 and 9 of the IBC. Section 8(1) provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor. As per Section 8(2), the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor- existence of a dispute. Section 8(1) and (2) 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 3 [payment] of the operational debt in respect of which the default has occurred.”*

**8.** Section 9(1) empowers the Operational Creditor to file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process after the expiry of the period of ten days from the date of delivery of the notice in event operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8. Section 9(1) and (2) is as follows:-

**“9. Application for initiation of corporate insolvency resolution process by operational creditor. – (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.**  
**(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.”**

**9.** One more provision which need to be noticed is Section 9(3)(b) which require the Operational Creditor to file an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt. When we look in to the facts and sequence of the events, admittedly the notice of demand was issued by the operational creditor on 25.08.2021 and advance copy of Section 9 application was also sent by the operational creditor to the corporate debtor which was received by the corporate debtor on 15.11.2021. The corporate debtor sent his reply dated 20.11.2021 in reference to demand notice dated 25.08.2021 as well as application received on 15.11.2021.

**10.** The Corporate Debtor in its reply to the demand notice dated 25.08.2021 raised two material issues. In paragraph 1, against Invoice Nos.203 and 205 amount, there was no material delivered, hence, the said

invoices cannot be paid. It was further stated that the material supplied were inferior materials as cables were found faulty. It was further pleaded that due to fault in cables approximately 80 Km extra cables were re-installed. Corporate Debtor stated that they shall debit extra charge paid for correction of the faulty cables. By the said letter, debit note were issued of Rs.67,96,800/- and Rs.50,00,000/- were forwarded. It is relevant to notice the reply to the demand notice dated 20.11.2021 which has been filed at Page Nos. 193 to 195 of the Appeal, which is as follows:-

*“Dated: 20/11/2021*

*To*

*M/s. Saraswati Wire & Cable Industries,  
Office No-101, Sagar Niwas, 'B' wing,  
Carter Road No 5, Opp. Neelkant Mahadev Mandir,  
Borivali (East), Mumbai-400066.*

*Subject: Declination of No: FORM 3 Demand Notice Dated 25<sup>th</sup> August, 2021 and the following letter received on 15<sup>th</sup> November, 2021.*

*Dear Sir,*

*We are writing this to ensure clarity on your letter reference Form No: 3 Dated 25<sup>th</sup> August, 2021 and letter received on 15<sup>th</sup> November, 2021 regarding the Demand Notice/Invoice Demanding Payment. We have decided not to move forward your request at this point of time due to the following facts enumerated below.*

*1- The submitted Invoice No: 203 dated 29<sup>th</sup> September, 2021 in tune of Rs. 33,42,527/- and Invoice no: 205, in tune of Rs. 23,81,417/- Dated and 6<sup>th</sup> October, 2021 towards the supply of G.I. cannot be forwarded for payment due to non-receive of your material Inline to your bill claimed. There is lack of supporting documents related to supply of materials such as LR Copy, Test Certificate of class B.G.I. Pipe as per the approved GA/GTP of MPKVVCL, Materials Delivery Receipt certified*



*from site etc., in this regards multiple correspondence was issued to your good self-office. Neither there is any proof or supporting documents of supplied materials nor any evidence or records of delivery at our store or execution sites. We have transferred amount of Rs. 50,00,000/ (Rupees Fifty Lakhs) towards the above mentioned Invoices as an advance and yet there is no material being delivered from your end. Therefore, we decided to keep your invoice in parking load at present and we anticipate speedy arrangement at your end to deliver the materials at site and share us the necessary supporting documents to enable us to address your request.*

*2- The material supplied to us was substandard materials not up to the required quality benchmark as marked by our clients against our purchase order for the supply of 2cx 4 sq. mm service cable. The issue of low quality cable material was informed to you and there is no prompt action to address the concern raised. We would like to understand your clear communication first on the issue of low quality material supplied because we are adding up more cost in rectification work after installation. The cables are found fault repeatedly and we have to keep reinstalling new cables since we deal with end consumer supply lines. Low standard cables cannot be acceptable and we experience lack of sensitivity and ethic in your dealing by not addressing the concern on time and there is no proactive approach of compensating us from your end against quality defect.*

*3- While laying the cable we found that the Length of the cables are missing as the reading was tempered in the drum length for example in one of the drum the initial cable length reading was noted 1094 mtr and the next reading length was 1097 mtr. (3 Mtr short length). We have noticed the same incident in our multiple cable drum. Hence, we observe that this act from your organization is not professional and unethical and it's indeed deliberate effort to mislead us by supplying short length cable and billing full cable drum length. The same information was communicated to you vide our email dated 24<sup>th</sup> December, 2018 (Copy Enclosed). We would be debiting from your bills for the insufficient cable lengths in actual not in line to reading length on the drum.*

*4. Due to the substandard materials supplied by you, we have incurred huge financial losses. As you are aware*

*that the warranty period for the supply of the cable is 5 years from the date of handing over the project. And we have been facing the cable fault immediately after erection of the cable due to your substandard supply of cable.*

*5- As on today we have installed approximately 80 Km extra Cable due to the faulty cable supplied by you. Hence, we hereby debit the extra charges paid for the rectification and reinstallation of the faulty cable.*

*6- Kindly note that our client M/s MSEDCL has examined and evaluated at site on your materials supplied and given us the remark of substandard quality. A proposal has been in process for black listing your organization from supplier and manufacturer list for all their projects across Maharashtra.*

*In view to the above substantiation we look forward to your understanding of holding back your invoice without forwarding it at our end and hence, you are requested to accept the following Debit charges in order to process the payment further, failing which may lead the legal process to recover losses followed by propelling blacklisting process based on evidence as per MSEDCL record.*

*a- Amount of Rs. 67,96,800/- For 80 K.M. Faulty Cable supplied for our Nagpur IPDS Project*

*b- Amount of Rs. 50,00,000/- towards the non-supply of G.I. Pipe for Bill number 203 dated 29<sup>th</sup> September, 2021.”*

**11.** As per the statutory scheme under Sections 8 and 9, we need to notice whether reply dated 20.11.2021 is a notice of dispute given by the Corporate Debtor or not. It is further relevant to notice that after receipt of the reply dated 20.11.2021 by the Corporate Debtor disputing the claim of the Appellant, the Operational Creditor did not proceed to file Section 9 application. The Corporate Debtor after sending the reply on 20.11.2021 has made payment of Rs.61,00,000/- to the Operational Creditor which fact is

admitted that after receipt of the demand notice dated 25.08.2021 has paid an amount of Rs.61,00,000/- which is from 30.08.2021 to 31.03.2022 which is admitted in Part IV of the application. It is relevant to notice that the debit note which was sent by letter dated 20.11.2021 was not responded by the Operational Creditor nor Operational Creditor proceeded to file Section 9 application and Section 9 application came to be filed by the Operational Creditor on 18.02.2023 i.e. after one year and four months from receiving the reply to the demand notice. The fact that Operational Creditor after receipt of reply to the demand notice did not proceed to file Section 9 application is clear indication of the fact that the dispute persisted between the parties regarding claim of the operational debt. Corporate Debtor paid an amount of Rs.61,00,000/- after receipt of the demand notice and thereafter on 18.02.2023 Section 9 application has been filed.

**12.** Under Section 9(3)(b), there is statutory requirement that the Operational Creditor shall, along with the application furnish an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt. Along with the Section 9 application, an Affidavit has been filed by the Operational Creditor as required by sub-section (3) (b) of Section 9. It is relevant to notice the contents of the said Affidavit. Affidavit filed along with Section 9 application by the Operational Creditor is part of Section 9 application. In the Affidavit, the Operational Creditor has referred to letter dated 20.11.2021 received from the Corporate Debtor and it was pleaded that the allegations raised in the letter are false,

fabricated, baseless and contrary to the fact. It is useful to notice paragraphs

5, 6, 7 and 8 of the Affidavit, which are as follows:-

*“5. In response to the Section 9 Application dated 9<sup>th</sup> November 2021 (Old Application), a letter dated 20<sup>th</sup> November 2021 was received from the Corporate Debtor raising certain false and baseless allegation;*

*6. The allegations raised in the above letter are false, fabricated, baseless and contrary to the fact that the Corporate Debtor vide its email dated 4<sup>th</sup> August 2021 (attaching a copy of the acknowledged Statement of Account) duly acknowledged a principal amount of Rs. 1,79,93,690.80 as due and payable to the Operational Creditor. The aforesaid email while highlighting certain differences in relation to the balance as per the books of accounts of the Corporate Debtor raised no concerns/ outstanding concerns in relation:*

*a. The alleged non receipt of the goods billed vide invoice no. 29<sup>th</sup> September 2019 and 6<sup>th</sup> October 2019 (both erroneously mentioned as 2021 invoice in the letter dated 20<sup>th</sup> November 2021;*

*b. Any outstanding quality/ quantity or other issues in relation to the material supplied to the Corporate Debtor;*

*c. Any reference to its email dated 24<sup>th</sup> December 2018 or any pending issues in relation to the same;*

*d. Any allegation of any loss incurred by the Corporate Debtor on account of any alleged fault supplied by the Operation Creditor.*

*7. The above allegation clearly are baseless and with an intent to create 'false dispute' in relation to the goods supplied by the Operational Creditor*

*8. Other than the Amount of Rs. 61,00,000/- which was received from the Corporate Debtor post the issuance of the Demand Notice and the Section 9 Old Application, which was apportioned towards the Interest Amount due and payable to us, neither we nor have any other person, by our order, to our*

*knowledge or belief, for our use, had or received any manner of satisfaction or security whatsoever in relation to the amount due and payable to us.”*

**13.** The Affidavit filed by the Operational Creditor under Section 9(3)(b), thus, clearly indicate that the notice was given by the Corporate Debtor relating to dispute. However, the Operational Creditor pleaded that the said notice is false, fabricated and baseless. Thus, present is the case that the notice of dispute was issued and question to be answered is whether notice of dispute is false and frivolous as contended by the Appellant. In the above context, we may notice the judgment of the Hon’ble Supreme Court in **“MobiloX Innovations (P) Limited vs. Kirusa Software Private Limited- (2018) 1 SCC 353”** where Hon’ble Supreme Court had occasion to consider the scheme under Sections 8 and 9 of the IBC. In paragraph 33, the Hon’ble Supreme Court noticing Section 9(3) made following observations:-

*“33.....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)].”*

**14.** In paragraph 34, the Hon’ble Supreme Court laid down what has to be examined by the Adjudicating Authority in Section 9, which 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.”*

**15.** The Hon’ble Supreme Court further observed that the Adjudicating Authority has to see as to whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble

legal argument or an assertion of fact unsupported by 9 evidence. Paragraph 51 of the judgment is as follows:-

*“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 futility. It is clear 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 argument or an assertion of fact unsupported by 9 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 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.”*

**16.** The law with regard to consideration of Section 9 application being well settled and contours of examination by the Adjudicating Authority having laid down by applying the ratio in the above judgment, we have to look into



whether in the present case dispute raised by the Corporate Debtor is patently feeble legal argument or an assertion of fact unsupported by any evidence as noted above. Present is a case where notice of dispute was clearly issued by the Corporate Debtor which has been acknowledged by the Operational Creditor. We have already noticed the affidavit filed along with the Section 9 application where acknowledgment of letter dated 20.11.2021 sent by the Corporate Debtor alleging the dispute.

**17.** We may first notice the reason given by the Adjudicating Authority for rejecting the plea of the Corporate Debtor as having no substance regarding pre-existence dispute. In paragraph 4.3, the Adjudicating Authority noticed the reply to demand notice dated 20.11.2021 and observed that the said reply only raises dispute regarding two Invoices Nos.203 & 205. Paragraph 4.3 of the order of the Adjudicating Authority is as follows:-

*“4.3. The Corporate Debtor through its reply to demand notice dated 20.11.2021 raised a dispute regarding only two Invoices dated 29.09.2019 and 06.10.2019 Invoice No. 203 and Invoice No. 205 totalling to Rs. 57,23,944/-. In the instant case, going by the aforesaid test of the 'pre-existence of dispute' it is clear that the Corporate Debtor has not raised any plausible contention nor there is a supporting document/evidence placed on record with reference to any pre-existing dispute on the above-mentioned invoices. In that view of the matter, this bench is of the considered view that plea raised by the Corporate Debtor has no substance; hence, the said submission cannot be taken into consideration.”*

**18.** The observations made by the Adjudicating Authority in the above paragraph is clearly contrary to the averments made by the Corporate Debtor in letter dated 20.11.2021. The Adjudicating Authority has said that only dispute was raised with regard to two invoices whereas it fails to notice that there is clear and categorical dispute with regard to faulty cables of approximately 80 KM and debit note issued by letter, to recapitulate the issues other than issue of Invoices 203 & 205. In paragraphs 4, 5 and 6, following has been pleaded by the Corporate Debtor:-

*“4. Due to the substandard materials supplied by you, we have incurred huge financial losses. As you are aware that the warranty period for the supply of the cable is 5 years from the date of handing over the project. And we have been facing the cable fault immediately after erection of the cable due to your substandard supply of cable.*

*5- As on today we have installed approximately 80 Km extra Cable due to the faulty cable supplied by you. Hence, we hereby debit the extra charges paid for the rectification and reinstallation of the faulty cable.*

*6- Kindly note that our client M/s MSEDCL has examined and evaluated at site on your materials supplied and given us the remark of substandard quality. A proposal has been in process for black listing your organization from supplier and manufacturer list for all their projects across Maharashtra.*

*In view to the above substantiation we look forward to your understanding of holding back your invoice without forwarding it at our end and hence, you are requested to accept the following Debit charges in order to process the payment further, failing which may lead the legal process to recover losses followed by propelling blacklisting process based on evidence as per MSEDCL record.*

*a- Amount of Rs. 67,96,800/- For 80 K.M. Faulty Cable supplied for our Nagpur IPDS Project*

*b- Amount of Rs. 50,00,000/- towards the non-supply of G.I. Pipe for Bill number 203 dated 29<sup>th</sup> September, 2021.”*

**19.** Thus, the reply dated 20.11.2021 was not confined only to Invoice Nos. 203 and 205 as was observed by the Adjudicating Authority rather said reply refer to issues regarding faulty cables and two debit notes of Rs.67,96,800/- and Rs.50,00,000/- which has been completely ignored by the Adjudicating Authority. We, thus, are of the view that the Adjudicating Authority has not noticed the contents in the reply to demand notice given by the Appellant fully and the observation that reply raises issue only two invoices 203 and 205 is incorrect. It is true that the Corporate Debtor could not file reply to Section 9 application although in the appeal, Suspended Director of the Corporate Debtor has sought to given reason as to why it could not appear and file reply, it is not necessary for us to enter into the said issue. The fact remain that no reply has been filed. The Corporate Debtor, however, has filed certain other correspondences between the parties prior to demand notice to which reply has also been filed by the Operational Creditor. The correspondence which was brought on the record in the appeal prior to demand notice has not been denied. We, thus, in appeal proceeded to consider the materials brought by the Appellant on record i.e. which is correspondences between the parties prior to date of demand notice. The submission which has been much pressed by the Counsel for the Respondent is that dispute sought to be raised by the Corporate Debtor is frivolous dispute which has been raised only to deny the rightful claim of the Operational Creditor, hence, we need to consider as to

whether there was any material to indicate that there was dispute between the parties.

**20.** We may proceed to notice few of the e-mails which have been brought on record by the Appellant which was sent by the Corporate Debtor to the Operational Creditor. E-mail dated 03.07.2019 was sent by the Operational Creditor to Corporate Debtor where complaints was raised with regard to melting of insulation of service cables. E-mail dated 03.07.2019 sent by the Corporate Debtor to Operational Creditor is as follows:-

*"From: Dhanlasmi Electrical  
<dhanlasmielectrical.[kamptee@gmail.com](mailto:kamptee@gmail.com)>*

*Date: Wed, Jul 3, 2019 at 5:47 PM*

*Subject: Regarding Insulation Failure of Service cable industries*

*To: [dhanlasmielectrical\\*\\*@gmail.com](mailto:dhanlasmielectrical**@gmail.com)*

*Dear Sir*

*We have received the 306968 Mtrs. quantity of service cable from M/s. Saraswati wire and cable industries.*

*After charging of service cable after few days it seems that of insulation of service cable has been melt and cable was short. The quantity of fault cable is approximately 200000 mtrs.*

*Hence it is requested to you please look into the matter and do the needful.*

*Thanks and Regards,*

*Pankaj Palaskar  
Assistant Manager  
Kamptee*

*Thanks and regards*

*DHANLAXMI ELECTRICALS PVT. LTD*

*Site-Nagpur”*

**21.** The above email clearly pointed out deficiency in the quality of the material supplied. We may also notice that after receiving of the complaints regarding cables, a letter dated 05.12.2019 was sent by the Operational Creditor to the Corporate Debtor which is filed as Annexure A-9 to the Appeal, which is as follows:-

*“Date: 05/12/2019*

*To*

*Dhanlaxmi Electricals Pvt. Ltd.*

*Kamptee*

*Kind Attn: Mr. Abhishek, Mr. \* Bhai & Mr. Sohail Singh*

*Dear Sir,*

*With reference to your complain regarding the failure of 2cx4 Sqmm Copper Arm Service cable, we will attend without testing team to resolve the issue at your site on Dated 8<sup>th</sup> December 2019.*

*We assure you that we have supplied the cable as per MSEDCL-IPDS specifications and the cables were dispatched after inspection done by Department. However, if any problem found we will provide replacement of the supplied cables.*

*Hence we request you to kindly co-operate with us by explaining the issue you have been facing during the visit at your site.*

*Thanking You*

*Yours Faithfully,*

*Saraswati Wire & Cable Ind.”*

**22.** After the letter dated 05.12.2019 received from operational creditor, a joint inspection was done by the corporate debtor and the operational creditor of fault locations and a letter dated 09.12.2019 which is brought on record at page 231 of the appeal, which is as follows;-

*“Date:- 09.12.2019*

*To,*

*The Project Manager  
Dhanlaxmi Electricals Pvt. Ltd.  
Nagpur*

*Sub:- Location wise service cable fault location under  
Kamptee Town.*

*Due to the insulation fault and the internally damages of  
the 2C\*4sq.mm cable make by SARASWATI WIRE &  
CABLE INDUSTRIES, we have faced the cable fault in so  
many locations.*

*Yesterday we have done joint fault locations survey with  
SARASWATI WIRE & CABLE INDUSTRIES cable  
representative.*

*Service cable fault locations are-*

<i>Sr. No.</i>	<i>Location</i>	<i>Meter Approx.</i>	<i>Remarks</i>
<i>1</i>	<i>Goyal Takies Road</i>	<i>4140</i>	
<i>2</i>	<i>Monda</i>	<i>1330</i>	
<i>3</i>	<i>Ajay Kadam Gali</i>	<i>3500</i>	
<i>4</i>	<i>Lakadganj</i>	<i>3270</i>	
<i>5</i>	<i>Ismilpura</i>	<i>4320</i>	
<i>6</i>	<i>Bhoi Line</i>	<i>2700</i>	
<i>7</i>	<i>JP Nagar</i>	<i>3500</i>	
<i>8</i>	<i>Rama Nagar</i>	<i>2600</i>	
<i>9</i>	<i>Yadav Nagar</i>	<i>3660</i>	
<i>10</i>	<i>Modi Padav</i>	<i>3730</i>	

11	Hamalpura	3420	
12	Anand Nagar	3830	
13	New Khalasi Line	2860	
14	Jai Bhim Chouk	2960	
15	Choudhary Hospital Road	4900	
16	Kolsa tal	3250	
17	Sailab Nagar	450	
18	Bajrang Park	1170	
19	Chhatrapati Nagar	3790	
20	Warispura	880	
21	Sonar oli	3790	
22	Juni Oil	2410	
23	Kate Oli	3880	

*Hence it is requested to you please look into the matter and do the needful.*

*Thanks and Regards*

*Dhanalaxmi Electricals Pvt. Ltd.”*

**23.** The above clearly indicate that on joint inspection by the parties, service cables fault locations were identified along with the approximate meter of the cables. There is no indication that any steps were taken by the operational creditor for replacement of cables as was represented on 05.12.2019 or any other resolution between the parties. The operational creditor did not take any steps for the entire year 2020 till August 2021. Demand notice was issued by the operational creditor when he received e-mail dated 04.08.2021 sent by account manager of the corporate debtor sending the ledger confirmation for amount of Rs.1,79,93,691/-.

**24.** Learned Counsel for the Corporate Debtor has submitted that the said ledger confirmation was not sent by authorised person nor there is any acknowledgment by the Corporate Debtor of outstanding balance but without

entering into the said issue, we proceed on the basis of ledger confirmation as contended by Counsel for the operational creditor.

**25.** We have noted that the demand notice dated 25.08.2021 was sent on the basis of ledger confirmation treating to be principal amount due as Rs.1,79,93,691/-. The demand notice was replied on 20.11.2021 and with regard to faulty cables, the Corporate Debtor has issued a debit note for Rs.67,96,800/- and further stated debit note for amount of Rs.50,00,000/- towards non-supply of G.I. Pipe for Bill number 203. The above reply to demand notice clearly indicate the dispute regarding the claim of the Appellant. There is no response given to the debit note issued by the said letter for a period of one year and eight months and it was only on 25.08.2021 that demand notice was issued after receiving a ledger confirmation of account manager of the corporate Debtor. As noted above, after receipt of the said reply to demand notice dated 20.11.2021, operational creditor did not proceed to file its application for which notice under Section 8 was issued and application came to be filed only on 18.02.2023 i.e. after more than 1 ½ year. This sequence of events clearly indicate that the dispute persisted between the parties regarding the claim, as noted above, after receipt of the demand notice, amount of Rs.61,00,000/- was paid by the Corporate Debtor which according to the Corporate Debtor is a balance due as per the claim of the Operational Creditor. We, thus, are satisfied that there are ample materials on record to indicate that there was pre-existing dispute between the parties and reply dated 20.11.2021 replying the demand notice was not disputed, reply cannot be said to be based on no material or no evidence nor the defence



raised by the corporate debtor in the reply to demand notice can be said to moonshine dispute or frivolous dispute as contended by the counsel for the Appellant. Issue of faulty cables between the parties was going on immediately after supply of the goods and joint inspection was also done on 08.12.2019 but there is no redemption was seen when faulty cables was measured. The fact thus, clearly indicate that dispute persisted between the parties and reply to the demand notice was clearly notice of dispute and, therefore, pre-existing dispute between the parties, Section 9 application ought not to have been admitted.

**26.** We may also notice a recent judgment of the Hon'ble Supreme Court in **“S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. and Ors.- 2022 SCC OnLine SC 1385”** where the Hon'ble Supreme Court was hearing the Appeal filed by the operational creditor arising out of Section 9 proceeding. The Hon'ble Supreme Court in the above case had occasion to consider the statutory scheme delineated under Sections 8 and 9. Hon'ble Supreme Court after noticing the earlier judgment in **“MobiloX Innovations (P) Limited”** (supra) laid down following in paragraphs 30, 31 and 32:-

*“30. This Court finds that there was a pre-existing dispute with regard to the alleged claim of the appellant against HPCL or its subsidiary HBL. The NCLAT rightly allowed the appeal filed on behalf of HBL. It is not for this Court to adjudicate the disputes between the parties and determine whether, in fact, any amount was due from the appellant to the HPCL/HBL or vice-versa. The question is, whether the application of the Operational Creditor under*

*Section 9 of the IBC, should have been admitted by the Adjudicating Authority. The answer to the aforesaid question has to be in the negative. Adjudicating Authority (NCLT) clearly fell in error in admitting the application.*

*31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.*

*32. There are noticeable differences in the IBC between the procedure of initiation CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”*

**27.** The Hon’ble Supreme Court clearly held that the operational creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is

undisputed and the operational debt remains unpaid, CIRP must commence. However, if the debt is disputed, the application of the operational creditor for initiation of CIRP must be dismissed.

**28.** Present is a clear case where claim raised by the operational creditor where payment was disputed, notice of dispute was given on 20.11.2021 which we have already extracted above. We have also noticed the correspondences between the parties prior to issuance of demand notice which indicate that the dispute persisted between the parties with regard to default in cable supplied. We, thus, are satisfied that there is pre-existing dispute between the parties and the Adjudicating Authority committed error in admitting Section 9 application.

**29.** In result, we allow the Appeal, set aside the order passed by the Adjudicating Authority and dismiss Section 9 application filed by the operational creditor. The IRP shall be paid his fee and expenses as fixed by the Adjudicating Authority by the operational creditor.

Parties shall bear their own cost.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**[Arun Baroka]  
Member (Technical)**

**New Delhi**  
Anjali