

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

Company Appeal (AT) (Ins.) No. 1234 of 2023

IN THE MATTER OF:

Sanam Fashion & Design Exchange Ltd.
FLAT/RM 7, 23/F, Enterprise Square Three,
39, Wang Chiu Road Kowloon, Hongkong.

...Appellant

Versus

Ktex Nonwovens Pvt. Ltd.
Plot No. 33-A/2, Sharda Nagar,
Street 8, Shree Rampark Main Road,
Kalawad Road, Rajkot, Gujarat- 360005.

...Respondent

Present:

For Appellant: Mr. Manu Chaturvedi, Ms. Priyanka Sinha, Zalak Mody, Advocates.

For Respondent: Mr. Malak Bhatt, Ms. Ananya Kanoria, Mr. Ketan Parikh, Advocates.

J U D G E M E N T
(6th May, 2024)

INDEVAR PANDEY

This appeal arises from the order passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Bench-2) (in short “Adjudicating Authority”) in C.P.(IB)/182/(AHM)2023 in the matter of Sanam Fashion & Design Exchange Ltd. (Appellant/Operational Creditor) Vs. Ktex Nonwovens Pvt. Ltd. (Corporate Debtor) for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor under Section 9 of the Insolvency & Bankruptcy Code (IBC), 2016. Adjudicating Authority vide its order dated 10.08.2023 had rejected the prayer of Operational Creditor to initiate the CIRP against the Corporate Debtor/ Respondent. Hence this appeal.

Cont'd.../

2. The order passed by Adjudicating Authority is a short 2 page order and the same is reproduced below:

"This application is filed under Section 9 of the IBC, 2016, seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the corporate debtor. The case of the applicant is that it has given 100% advance of USD 200000 to the corporate debtor for purchase of goods, which it had failed to deliver and has refused to pay back the advance.

Ongoing through the application, we find that the Invoice annexed at page No.9 in the terms of delivery and payment clearly states that the goods were to be lifted from "Ex-Plant Rajkot", India. We also find from the email dated 18.04.2023, sent by Mr. Nimesh Sanghrajka to Mr.Navin Alwani, the Director of the alleged Operational Creditor, that the goods are ready at his warehouse and the applicant can lift the goods at any time. In her oral submissions Ms. Zalak, Ld. Counsel states that the goods were supposed to be delivered at Hongkong. There is no evidence annexed with the application to show that the goods were to be delivered at Hongkong. The so-called purchase order given at Annexure-1 page No.8 of the application only has Bank details and there are no terms and conditions of the purchase or delivery.

In the absence of any other terms and conditions of purchase and delivery, we have no option but to rely on the terms of delivery and payment stated in the revised Proforma Invoice dated 12.03.2020 annexed at page No. 9 of the application, which were supply of goods at "ex-plant Rajkot". The Corporate Debtor was willing to supply goods at "ex-plant Rajkot". On our specific query. the Ld. Counsel was not able to show any documents wherein the respondent had agreed to deliver the goods at Honkong.

Even otherwise, the applicant had not provided any goods and services to the corporate debtor and had only given an advance,

and therefore is not covered by the definition of operational debt as stated in Sub-Section 21 of Section 5 of IBC, 2016

Considering the above facts, we are not inclined to entertain this application.

In view of the above, CP(IB)/ 182(AHM)2023 stands rejected.”

3. The brief facts of the case are that the Appellant is engaged in the business of general trading. The appellant had given 100% advance of USD 200,000 to the Corporate Debtor for supply of 10 tonnes of non-woven fabric, during March 2020, which it had failed to deliver and has refused to pay back the advance.

4. In and around March 2020, during the onset of Covid-19, the Appellant placed an order for supply of 10 tons (i.e. 10000 kg) of non-woven fabric white colour with the Corporate Debtor and accordingly, issued a Purchase Order dated 16th March 2020.

5. Upon executing the said PO and sharing the same with Corporate Debtor for execution vide email dated 16th March 2020, the Operational Creditor immediately issued a debit advice to its bank in India being Bank of India for crediting an amount of USD 200,000 (the said-payment") in the Bank Account of the Corporate Debtor. The said goods in terms of the purchase order and invoice were to be delivered on 19.03.2020. Around the same time due to out-break of Covid-19 the export of this material from India was banned.

6. After the end of Covid-19 epidemic there were emails exchange of between both the parties regarding supply, terms of delivery, refunds of the deposit and related issues.

7. The Appellant thereafter issued statutory demand notice under Section 8 of the IBC on 9th May 2023 ("the said notice"). The Respondent did not respond to the demand notice under Section 8 of the IBC.

8. Thereafter, the Appellant filed the Company Petition No. 182 of 2023 ("Company Petition") under Section 9 of the IBC against the Corporate Debtor for default by the Corporate Debtor in refunding the advance payment made by the Appellant of an amount of USD 200,000 (Two Hundred Thousand Dollars) in accordance with the said PO which was for the delivery of the said goods on 19th March 2020.

9. The Adjudicating Authority rejected the application for initiation of insolvency proceedings against the Corporate Debtor. The order of Adjudicating Authority was passed on the very first date of hearing after hearing the appellant (Operational Creditor). The respondent (Corporate Debtor) was not present in the hearing.

Submission of the Appellant

10. The Appellant has assailed the impugned order of the Adjudicating Authority on the following grounds:

- (i) The Adjudicating Authority wrongly held that "Operational" Debt does not cover "advance" paid.
- (ii) It was not the petitioner's duty to lift the goods.
- (iii) Respondent raised no dispute by virtue of a reply under Section 8 (2) to the demand notices under Section 8 (1) of the IBC.

- (iv) The Adjudicating Authority overlooked the fact that the goods were not ready by 19.03.2020 as per the contract.
- (v) The order of the Adjudicating Authority violates the principle of natural justice.
- (vi) Appeal is not banned by limitation due to “excluded period” of Covid-19 as granted by Hon’ble Supreme Court.

11. The Counsel for the appellant has submitted that the finding of the Adjudicating Authority regarding the aforesaid advance not being treated as operational debt under Section 5 (21) of the IBC is erroneous. In this regard has cited the Judgment of Hon’ble Supreme Court in ‘*Consolidated Construction Consortium Ltd. Vs. Hitro Energy Solutions Pvt. Ltd.*’ [(2022) 7 SCC 164] which clarifies that the definition of Operational Debt encompasses amount paid in advance for the purchase of goods and services. The appellant highlighted the key points of the aforesaid Judgment:

“4. The key points from the aforementioned judgment are as follows:

a. Section 5(21) of the IBC defines 'operational debt' as "a claim in respect of the provision of goods or services". Thus, there must be some nexus of the claim with the provisions of goods and services.

b. Section 8(1) of the IBC in conjunction with Rule 5(1) and Form 3 of the 2016 Application Rules specifies that an operational creditor (Appellant herein) may issue a notice regarding an operational debt through either a demand notice or an invoice. Thus, the presence of an invoice for goods or services supplied is not essential, as a demand notice alone is sufficient to establish the existence of a debt.

c. There exist two options for an operational creditor seeking to claim an operational debt in CIRP as per Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations:

i. Relying on a contract for the supply of goods and services with the corporate debtor

ii. Presenting an invoice demanding payment for goods and services supplied to the corporate debtor.

The former is wide enough to encompass all types of contracts for the supply of goods and services between the operational creditor and the corporate debtor. Thus, a debt arising from advance payment made to a corporate debtor for the supply of goods or services qualifies as an operational debt.”

12. The appellant has submitted that it was not his duty to lift the goods from the warehouse and in this regard, he relies on email dated 14.03.2020 from Sarju (from KTEX) wherein the terms of delivery and other relevant details are shown to have been confirmed by the respondents.

In particular, the mail highlighted the following:

- “a. The 'Delivery Schedule' clearly shows that the Respondent was to prepare the consignment by 19.03.2020 after which they would inform about dispatch.*
- b. Column pertaining to "Transportation' shows that the Respondent was supposed to inform the Appellant about the charges for the transportation of the consignment from the Rajkot Plant to the Mumbai/Delhi Airport. Therefore, it is clear that the Respondents were aware that the consignment was to be sent to Mumbai/ Delhi Airport and not picked up*

from their plant by the Appellant as contended by the Respondent.

- c. The 'Price' is to be 'Ex Plant- Rajkot' which implies that the cost of goods will be ascertained as per the Seller's place of manufacture in Rajkot.*
- d. KTEX had confirmed that they would arrange the English Stickers and that the Appellants would provide the Chinese Stickers. Thus, showing that they knew the consignment was to be shipped to China."*

13. It is further stated that pursuant to the above, the purchase order was executed between the parties on 16.03.2020 and the appellant remitted USD 200,000 to the respondent for delivery of 10 tonnes of Non-Woven white fabric. It is further mentioned that the mode of delivery was by Air. The appellant submits that a conjoint reading of email and the PO dated 16.03.2020 makes it evident that the appellant was to receive the goods from the Respondent.

14. In this verbal submission the counsel for the appellant submitted that the goods were to be delivered at Hong Kong by the respondent. The same plea was also made before the Adjudicating Authority.

15. Appellant has admitted that he inadvertently did not submit the complete PO before the Adjudicating Authority.

16. The Appellant further submits that the Respondent did not raise any dispute by virtue of a reply under Section 8 (2) to the Demand notice under Section 8 (1) of IBC. The demand notice was issued on 17.04.2023 under Section 8 (1). The Respondent only as an afterthought sent an email dated

18.04.2023 levelling curtain allegations against the applicant regarding the Appellant's alleged inability to left the goods from respondent's warehouse.

17. The submission of appellant is that the Adjudicating Authority overlooked the fact that the goods were not ready by 19.03.2020 as per contract, when the appellant's representative went to Respondent's plant to check the same on 19.03.2020. He submits that the goods were not even manufactured, which is evident from e-mail of appellant on 18.04.2023 sent at 18.54 hours. He submits this is sufficient ground for Respondent to refund the advance of 200,000 USD paid by it to the appellant.

18. The Appellant submits that this petition was dismissed by the Adjudicating Authority without affording the counsels for appellant an opportunity of being heard. The Respondent was yet to enter appearance and the petition was dismissed on the very first day of hearing. The Adjudicating Authority wrongly interpreted the PO and held that provision of delivery of consignment to Mumbai/Delhi Airport is nowhere mentioned in the PO. Further, the words "ex-plant Rajkot" were wrongly interpreted to mean that the delivery was to be picked from the plant.

19. Lastly, the appellant has submitted that the Appeal is not barred by limitation due to the "excluded period" of Covid-19 as granted by Hon'ble Supreme Court from 15.03.2020 to 14.03.2021.

20. The appellant further submits that the reliance placed by the Respondent on this Appellate Tribunal Judgment is *Sh. Mohan Lal Goel Vs. National Skill Development Corporation* (2022) SCC online NCLAT 2020 has

no applicability to the present matter in the light of Hon'ble Supreme Court's aforesaid Judgement.

Submission of the Respondent

21. The Respondent has made 4 submissions before us. These in brief are:

- (i) Terms of purchase order prove that the appellant has breached the terms.
- (ii) Email communication shows goods were ready and stored at the warehouse.
- (iii) Adjudicating Authority has rightly relied upon the documents produced with the petition to conclude that no debt is proved.
- (iv) The appellant is trying to change its case by producing a different purchase order before this Appellate Tribunal.

The detailed submission of the Respondent on these points are given in subsequent paras.

22. The respondent has stated that:

- i. In accordance with the Purchase Order, the Respondent issued a Proforma Invoice dated 12.03.2020 with the total agreed amount being USD 2,00,000, date of shipment being 19/03/2020, and terms of delivery as Ex-works Rajkot. It is prima facie evident that the Respondent was required to prepare and keep the goods ready for it to be collected by the Appellant from their warehouse.
- ii. As per the terms of the Purchase Order, the Respondent manufactured the goods and accordingly prepared the consignment,

and thereby informed the Respondent about the same. This further establishes their willingness and bonafide in having completed their part of the order.

- iii. It is pertinent to mention here that the Appellant had successfully collected the goods of the second consignment after the Covid-19 ban was lifted, but intentionally failed to pick the first lot. This reflects the wilful failure on the part of the Appellant in carrying out the terms of the contract and fulfilling their contractual obligations.

23. It is submitted that the Respondent was under the bonafide belief that the Appellant would collect the goods from ex-works Rajkot and thereby it continued to store the goods manufactured specifically for the appellant in their warehouse for a period of 3 years as shown through the email exchanges between the parties from March, 2020 onwards.

24. The Adjudicating Authority held in favour of the Respondent by giving a reasoned order after duly considering the material on record, thereby holding that the Appellants failed to demonstrate or bring forth any evidence to show that the parties had agreed to deliver the goods in Hong Kong. Infact as per the Revised Proforma Invoice dated 12.03.2020, the place of delivery is stated to be "Ex-plant Rajkot".

25. The Appellant is conveniently trying to shift his own burden onto the Respondent, as a means to escape their liability and is further misusing the provisions of the Code as a recovery mechanism to extract undue and

unjust amounts from the Respondent, despite the lack of compliance on his part.

26. The Appellant had attached a one-page Purchase Order as part of his Application before the Adjudicating Authority, which had no mention of the place or date of delivery and only specified the bank details of the parties. However, the Purchase Order attached to the present Appeal is a completely different document with 2 extra pages as annexures, which is being presented for the first time before this Appellate Tribunal. The Appellant raised no such request at the time of hearing before the Adjudicating Authority to amend or replace the aforesaid purchase order, consequently leading to the Application being dismissed on the first hearing itself.

27. **Analysis and Findings**

We have gone through the detailed submission of Appellant and Respondent and the material on record. There are two issues which need to be decided.

- (i) Whether the appellant is an Operational Creditor as per IBC?
- (ii) Whether there has been a breach of terms and conditions of the contract leading to pre-existing dispute?

28. We take up the issue relating to Operational Creditor first. Here the Appellant has relied on Judgment of Hon'ble Supreme Court in *Consolidated Construction Consortium Ltd. (supra)*.

29. In the case referred above M/s Consolidated Construction Consortium Ltd. (supra) (The Appellant therein) had placed an order for supply of light

fittings to M/s Hitro Energy Solutions Private Ltd. (the Respondent therein). The appellant had got the contract from Chennai Metro Rail Corporation (CMRL) and for completing the said work he has placed an order with respondent. On behalf of the appellant, CMRL had paid a sum of Rs. 50 lakhs to the Respondent as an advance for fulfilling the supply of fittings.

30. The relevant paragraphs of M/s Consolidated Construction Consortium Ltd. (supra) are:

“D Whether the appellant is an Operational Creditor

21. The primary submission of the respondent, which was accepted by the NCLAT, is that the appellant is not an Operational Creditor within the ambit of the IBC, and therefore its application under Section 9 of the IBC was not maintainable.

39. In the present case, there are few undisputed facts: (i) the appellant and the Proprietary Concern entered into a contract for supply of light fittings, since the appellant had been engaged for a project by CMRL; (ii) CMRL, on the appellant's behalf, paid a sum of Rs 50 lakhs to the Proprietary Concern as an advance on its order with the appellant; (iii) CMRL cancelled its project with the appellant; (iv) the Proprietary Concern encashed the cheque for Rs 50 lakhs anyways; and (v) the appellant paid the sum of Rs 50 lakhs to CMRL.

42. It is then that we come to the core of the dispute – while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent's submission, which was accepted by the NCLAT, seeks to narrowly define operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the

corporate debtor. For reasons which shall follow, we reject this argument.

43. First, Section 5(21) defines ‘operational debt’ as a “claim in respect of the provision of goods or services”. The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Finally, the judgment of this Court in *Pioneer Urban* (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that “[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation

and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.

45. *Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.*

46. *In doing so, we are cognizant of the observations of this Court in judgments such as Swiss Ribbons (supra), that IBC proceedings should not become recovery proceedings. However, in the present case, the dispute is not in relation to the quality of the services provided by the Proprietary Concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project."*


31. In the present case, the appellant had placed an advance with the respondent for supply of goods, it does not matter who is the supplier or the receiver of goods and services as laid down in the M/s Consolidated Construction Consortium Ltd. (supra). The present case is squarely covered by the above discussed Judgment, as there is a clear nexus between

payment made and supply of goods and services. Accordingly, we decide that the appellant is to be treated as Operational Creditor in the instant case.

32. The second issue relates to 'whether there has been a breach of terms and conditions of the contract leading to pre-existing dispute'. The appellant has relied on purchase order, revised proforma invoice dated 12.03.2020 and emails to established that the respondent has failed to deliver the goods on time and on being issued demand notice has not refunded the amount of advance to the appellant. They have submitted a different copy of purchase order in their appeal which was not submitted before the Adjudicating Authority. A copy of the same is placed below:

Exhibit C

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Sanam Fashion & Design Exchange Ltd.
FLAT/RM 7, 23/F, ENTERPRISE SQUARE THREE,
39 WANG CHIU ROAD KOWLOON,
HONGKONG
TEL:+852 3904 2462 FAX:+852 3904 2461

PURCHASE ORDER

CONTRACT NO.: SNM20200310
DATE: MAR 16TH, 2020

Buyer: Sanam Fashion & Design Exchange Ltd.
Representative: Navin Alwani
Telephone: +852 3904 2462
Email: navin@sanamfashion.com



Seller: KTEX NONWOVENS PRIVATE LIMITED
ADDRESS: 148 VYAS BHUVAN HINDU COLONY RD, NO.6, DADAR (E), MUMBAI, INDIA
Representative: SARJU DOSHI
Telephone: +91 98201 06962

Terms of delivery: Ex-works Rajkot

Terms of payment: 100% PREPAID
Rupees 10,000,000
One Crore to be given as deposit which will be returned once US dollar payment is received.

Mode of Transport: BY AIR

Description: NON WOVEN FABRIC WHITE COLOR



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Sanam fashion & design exchange ltd.

FLAT/ RM 7, 23/F, ENTERPRISE SQUARE THREE,
39 WANG CHIU ROAD KOWLOON,
HONGKONG

TEL:+852 3904 2462 FAX:+852 3904 2461

Qty: 10ton=10000kg

Price: Ex-works Rajkot USD\$20.00/KG

Total amount: USD\$200000.00

Say US Dollars: TWO HUNDRED THOUSAND ONLY.

Shipment date : March 19, 2020.

Packing:

| |
|----------------|
| shipping marks |
| Net Wt : |
| Gross Wt : |

GSM : 25 gsm

Colour : White

Width : 175 MM

Roll length : 4300 Meters / Roll

Roll Nett Wt : 18.81 Kgs

Roll Gr Wt : 19.05 Kgs

Roll OD : 750 MM

Total Roll / Pallet : 7 Rolls

Pallet Wt : 7 Kgs to 8 kgs

Total Wt / Pallet - 140 kgs to 142 kgs



33. The purchase order which was placed before the Adjudicating Authority was only a bank statement showing the bank details of both appellant and respondent. It has no details of place and mode of delivery. The revised proforma invoice dated 12.03.2020 gives the terms of delivery and payment as “Ex-Plant Rajkot, India”.

34. The third document which has been introduced directly in the appeal before us is a purchase order dated 16.03.2020 where terms of delivery has been mentioned as “Ex-Works Rajkot”. The price also is quoted “Ex-Works Rajkot”.

35. The appellant had pleaded before the Adjudicating Authority that the goods were to be delivered at Hong Kong based on the so-called purchase order, which only had bank details. The revised proforma invoice dated 12.03.2020 relied on by appellant mentioned place for supply of goods as “Ex-Plant Rajkot, India”. The Appellant could not produce any document before the Adjudicating Authority that the Respondent had agreed to deliver the goods at Hong Kong.

36. While making his submission before us, the appellant submitted that the goods were to delivered at Hong Kong. He relied on the purchase order which was filed with the appeal but not before the Adjudicating Authority. This purchase order also shows terms of delivery – Ex-Works Rajkot. The mode of transport is mentioned as by Air.

37. It is clear from all the documents on record that the delivery was to be made Ex-plant Rajkot and not at Hong Kong as submitted by the appellant

before the Adjudicating Authority and before us. The appellant had tried to mislead both the forums regarding the same.

38. The respondent on the other hand has stated that material was ready and lying in his warehouse but the same was not picked up by the appellant. The respondent vide their email dated 18.04.2023 requested the appellant's to pick up, the lot of said goods from their warehouse, after the ban was lifted. There has been exchange of email between both the parties before the appellant filed the C.P.(IB) No.182/(AHM)2023 under Section 9 of IBC, 2016. All these events reflect clearly that there was a pre-existing contractual dispute between both the parties, which the appellant is trying to settle through IBC mechanism.

39. In this regard we rely on 'Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.' [(2018) 1 SCC 353], where the Hon'ble Supreme Court explained the process for an operational creditor initiating CIRP in respect of a corporate debtor. The Court held:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the

*existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. **What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be....***

(Emphasis supplied)

40. It further noted in paragraph 38 of ‘MobiloX Innovations (P) Ltd. v. Kirusa Software (P) Ltd.’ (supra) it was held that when a notice is received by a corporate debtor under Section 8(2) of the IBC, it is enough that a dispute is pending and it is not necessary that a suit/arbitration also be pending:

“38.....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.”

41. The final observation of the Hon’ble Supreme Court in MobiloX Innovations (supra) has also been reiterated by Hon’ble Supreme Court in the case of Kay Bouvet Engg. Ltd. v. Overseas Infrastructure Alliance (India) (P) Ltd. [(2021) 10 SCC 483], where the Hon’ble Supreme Court observed:

“19. It could thus be seen that this Court has held that one of the objects of IBC 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 has been held that it is for this reason that it is enough that a dispute exists between the parties.”

42. In the instant case, there was a pre-existing dispute between the parties regarding contractual conditions relating to place of delivery and obligation of parties for transport of goods and therefore the application for CIRP against Corporate Debtor cannot be allowed. The matter has been correctly decided by the Adjudicating Authority in this regard.

43. Accordingly, with regard to the two issues framed in this matter our findings are as follows:

- (i) The appellant is an operational creditor under the IBC, since an ‘operational debt’ will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor;
- (ii) There is a pre-existing dispute between the appellant and Corporate Debtor, in view of which application under Section 9 of the IBC cannot be admitted against the Corporate Debtor.

44. The appeal fails and stand dismissed. There would be no order to costs. Interlocutory Application, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

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