

Davinder Kumar Singhal vs Mr. Sanjay Kumar Chetwani on 13 May, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1088 of 2021

(Arising out of Order dated 14.12.2021 passed by the Adjudicating
Authority (National Company Law Tribunal), New Delhi, Bench IV in C.P.
(IB)-2681/ND/2019)

IN THE MATTER OF:

Mr. Davinder Kumar Singhal
Director (Powers Suspended) of
M/s Medinnbelle Herbalcare Pvt. Ltd.
R/o: 13/35 First Floor,
West Punjabi Bagh,
New Delhi - 110026
Email: ddkkss@yahoo.com

...Appellant

Versus

1. Mr. Sanjay Kumar Chetwani
12/480, Aggarwal Farms,
Mansarovar, Jaipur,
Rajasthan - 302020
Email: npdhealthcare@gmail.com

2. M/s Medinnbelle Herbalcare Pvt. Ltd.
Through Its Interim Resolution Professional
Mr. Santanu Kumar Samanta,
C-170, Golf View Apartments,
Saket, New Delhi - 110017.
Email Id: santanukumar@yahoo.com

...Respondents

Present:

For Appellant: Mr. Saurabh Kirpal, Sr. Advocate with Mr. Madan
Verma, Mr. Harimohana N., Mr. Aditya Madaan,
Advocates.

For Respondents: Mr. Harsh Gokhale, Mr. Kunal Negi, Mr. Rohil
Pandit, Advocates for Respondent No.1.

Mr. Gautam Singhal, Advocate with Mr. Santanu
Kr. Samant, IRP in person for Respondent No.2.
Mr. Sumesh Dhawan, Ms. Vatsala Kak,
Advocates for Intervenor.

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JUDGMENT

ASHOK BHUSHAN, J.

This Appeal has been filed by a Suspended Director of the Corporate Debtor challenging the order dated 14.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench IV by which order Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') filed by Respondent No.1 - the Operational Creditor has been admitted. Aggrieved against the said order, the Appellant has come up in this Appeal. While issuing notice in this Appeal on 23.12.2021, an interim order was passed directing that the Committee of Creditors shall not be constituted.

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

The Corporate Debtor is a manufacturer of famous 'Endura' products since 1996 and has been using the renowned trademark 'Endura Mass A Weight Gainer' since 01.02.2001. The Respondent No. 1 got a trademark 'NPD Endura Mass' registered as Trademark No. 1858441 on 04.09.2009 by making false representation before the concerned registering authorities of Trademark and concealing the fact that Trademark of Corporate Debtor is already duly registered as 'Endura Mass a Weight Gainer'. One Mr. K. N. Mahesh Prasad came in contact with the Corporate Debtor and represented that M/s Piramal Enterprises Limited is interested in taking Company Appeal (AT) (Insolvency) No. 1088 of 2021 over the Trademark of the Corporate Debtor. Mr. K. N. Mahesh Prasad forwarded an email by one Mr. Jatin Lal of Piramal Group wherein it was stated that offer of purchase of Trademark is subject to resolution of trademark issue with NPD.

An Assignment Deed dated 19.01.2018 was executed between the Respondent No.1 and the Corporate Debtor for assignment of Trademark 'NDP Endura Mass' to Corporate Debtor for total consideration of Rs.4.40 Crores. The payment of entire consideration was made by two Demand Drafts by the Corporate Debtor after deduction of TDS. A post-dated Cheque of Rs.52,80,000/- dated 15.03.2018 was handed over by the Corporate Debtor in the name of Respondent to Shri K. N. Mahesh Prasad as security. By letter dated 12.03.2018, the Corporate Debtor informed that Cheque issued to Respondent No. 1 was only to help Respondent No.1 and on his request and not because of Corporate Debtor's liability to pay any amount

towards GST. Respondent No. 1 was communicated that the Board of Directors of the Corporate Debtor have not approved and declined the request of the Respondent No. 1 for GST payment. Respondent No. 1 was informed that the Corporate Debtor is instructing its Bank to 'Stop Payment' of Cheque No. 000696 dated 15.03.2018. On 21.05.2018, the Corporate Debtor filed complaint against Respondent No. 1, wife of the Respondent No. 1 Ms. Sonia Chetwani and Mr. K. N. Mahesh Prasad u/s 384, 403, 406, 420, 426, 467, 468, 471, 477A, 499, 120B r/w 34 of IPC with EOW, Delhi. Respondent No. 1 presented the Cheque in the month of Company Appeal (AT) (Insolvency) No. 1088 of 2021 June, 2018 which was dishonoured on 12.06.2018 on the instruction of 'Stop Payment'.

The Respondent No.1 on 19.10.2018 sent an email to the Corporate Debtor demanding payment of GST amount of Rs.52,80,000/-. The Corporate Debtor replied the letter dated 19.10.2018 denying any liability to make payment of GST. The Corporate Debtor's reply dated 24.10.2018 mentioned the criminal conspiracy and fraud by Respondent No.1 and Mr. K. N. Mahesh Prasad. Respondent No.1 was further informed that criminal action for defrauding and misrepresentation against Respondent No.1 and Mr. K. N. Mahesh Prasad is already in process. The Criminal Complaint bearing Case No. 13731 of 2018 was again filed before the court of Hon'ble Chief Metropolitan Magistrate, Delhi - West, Tis Hazari Courts, Delhi under Sections 420, 426, 468, 471, 477A, 499, 120B r/w 34 of IPC, alongwith an application u/s 156(3) of Cr.P.C on 20.10.2018 against Respondent No.1 and other accused. The Respondent No. 1 also lodged a Police Complaint at Mansarovar, Jaipur against the Corporate Debtor in January, 2019, which complaint was appropriately replied by the Corporate Debtor. The Chief Metropolitan Magistrate, West Delhi, Tis Hazari Courts, New Delhi by order dated 15.04.2019 directed the Corporate Debtor to file the complaint before EOW, Police Station. On 31.05.2019, a complaint was lodged with EOW, Police Station by the Corporate Debtor.

The Respondent No.1 issued a Demand Notice under Section 8 of the Code dated 11.09.2019 demanding payment of Rs.52,80,000/- towards Company Appeal (AT) (Insolvency) No. 1088 of 2021 GST amount. The Corporate Debtor submitted detailed reply to the notice under Section 8 vide its reply dated 26.09.2019. The Corporate Debtor in its reply clearly stated that there is no liability of the Corporate Debtor to pay GST amount. Corporate Debtor stated that the Deed of Assignment dated 19.01.2018 signed between Respondent No.1 and the Corporate Debtor was for total consideration of Rs.4.40 Crores in full and final sale consideration and no amount thereafter was due or payable by the Corporate Debtor. Details of Criminal Complaint filed by the Corporate Debtor against Respondent No.1 and Mr. K. N. Mahesh Prasad has been mentioned, in the reply details of the dispute regarding the claim of the Applicant (Respondent herein) were also raised by the Corporate Debtor.

After receipt of reply of the notice, Application under Section 9 was filed by the Respondent No.1 to which detailed reply was submitted by the Corporate Debtor

dated 03.01.2020. In the reply, details of litigation between the parties including the Criminal Complaints filed by the Corporate Debtor prior to Demand Notice have been elaborated. The Adjudicating Authority by the impugned order admitted the Section 9 Application observing that the Corporate Debtor having issued a Cheque for payment of GST amount to the applicant, the Corporate Debtor has failed to prove that GST was not payable by him.

3. Shri Saurabh Kirpal, learned counsel appearing for the Appellant challenging the impugned order submits that the Assignment Deed dated 19.01.2018 was entered between the parties for full consideration of Rs.4.40 Crores. The Corporate Debtor has the Trademark of the Company Appeal (AT) (Insolvency) No. 1088 of 2021 Respondent No.1 after payment of Rs.4.40 Crores (less Tax Deduction at Source @10%) as full consideration for the assignment, there is no liability to pay GST on the Corporate Debtor. The Corporate Debtor has issued post-dated Cheque dated 15.03.2018 as a security to Shri K. N. Mahesh Prasad, which in no manner amount to admission of liability of GST by the Corporate Debtor. Further, on 12.03.2018, by a detailed letter, Corporate Debtor has communicated to the Respondent No.1 that there is no liability of payment of GST on the Corporate Debtor and Corporate Debtor is issuing instruction to its Bank to 'Stop Payment' of Cheque of Rs.52,80,000/-. On 13.03.2018, instruction was issued to the Bank to 'Stop Payment' of the Cheque. The Corporate Debtor has also initiated criminal proceeding against Respondent No.1 by filing criminal complaint on 21.05.2018 which complaints have been transferred to EOW, Police Station. Email dated 19.10.2018 was sent by Respondent No.1 asking the Corporate Debtor to make payment of Rs.52,80,000/- towards GST amount but the same was denied and refuted by letter dated 24.10.2018. The Notice under Section 8 was issued on 11.09.2019, which too was duly replied by Reply dated 26.09.2019. There being pre-existing dispute having raised by the Corporate Debtor in its reply to the Notice as well as Reply to Section 9 Application, the Adjudicating Authority committed error in admitting the Application under Section 9. The observation of the Adjudicating Authority that since the Cheque was issued by the Corporate Debtor for the aforesaid amount, the liability of GST is admitted by the Corporate Debtor, are incorrect and erroneous. Even much prior to issuance of Notice under Company Appeal (AT) (Insolvency) No. 1088 of 2021 Section 8, the Appellant has denied its liability and issued instructions for Stop Payment of the Cheque, hence, pre-existence of dispute was very much there prior to Section 8 notice, which has been ignored by the Adjudicating Authority. The Assignment Deed was of total consideration of Rs.4.40 Crores and in addition to that no further payment including GST was to be made by the Corporate Debtor.

4. Shri Harsh Gokhale, learned counsel appearing for the Respondent submitted that although in the Assignment Deed dated 19.01.2018 there was no mention of payment of GST but in view of the fact that Cheque was issued by the Corporate Debtor for Rs.52,80,000/- dated 15.03.2018 with endorsement on the Cheque, the Corporate Debtor has admitted its liability to make payment towards GST. The Respondent No.1 has issued an Invoice on 06.02.2018, in response to which Cheque was issued which prove that Cheque was issued to clear the GST liability.

5. We have considered submissions of learned counsel for the parties and perused the record.

6. The Deed of Assignment dated 19.01.2018 following statement has been made in the beginning and in Para 11:-

"NOW IT IS HEREBY AGREED AS FOLLOWS that for good and valuable consideration of INR 4,40,000/- (Rupees Four Crores And Forty Lakhs only) ("Consideration") the receipt and sufficiency whereof the Assignor hereby acknowledges:"

Company Appeal (AT) (Insolvency) No. 1088 of 2021 X X X "11. That Consideration is the full and final purchase consideration and by agreeing to the said Consideration, the Assignor agrees to give up forever any right to seek further monetary and/or other relief and will not have any further right (whether directly or indirectly) to claim and/or seek any recourse of claiming any additional consideration over and above he agreed Consideration, for any reason whatsoever."

7. A receipt was also issued by Respondent No.1, where it was clearly mentioned that the amount has been received in full and final consideration of the assignment of the Trademark. The thrust of submission of learned counsel for the Respondent is on Cheque dated 15.03.2018 issued by the Corporate Debtor for Rs.52,80,000/-. There is no dispute that Cheque was issued by the Corporate Debtor in the name of Respondent No. 1 in which following endorsement was made:-

"This cheque will be cleared subject to G.S.T paid by Sanjay Kumar Chetwani for the invoice No. NPDTMOO1 dt. 6th Feb., 18 raised in favour of Medinn Belle Herbal Care Pvt. Ltd., Delhi."

8. The Cheque issued was a post-dated Cheque dated 15.03.2018 and much prior to 15.03.2018, the Corporate Debtor has issued letter dated 12.03.2018 to Respondent No.1. It is useful to extract entire letter dated 12.03.2018 issued by the Corporate Debtor to the Respondent No.1:-

Company Appeal (AT) (Insolvency) No. 1088 of 2021 "To Mr. Sanjay Chetwani, 35-Shopping Centre, Shastri Nagar, Near Peetal Factory, Jaipur - 302016 (Rajasthan) 12, March 2018 We had issued you a post dated cheque dated 15 March 2018 for Rs.52,80,000/- lakhs (Rs. Fifty Two Lakhs and Eighty Thousand Only) vide cheque number 000696 drawn on ICICI Bank, Punjabi Bagh Branch, New Delhi, on your request for payment of your liability of GST. If any, on the purchase of the Trademark "NPD Endura Mass".

This cheque was issued to you only and entirely to help you based on your request and not because of our liability to pay any amount to you. As per our assignment deed and agreements we had not agreed to pay this amount to you. There was and is no obligation, whether contractual or otherwise for Medinnbelle Herbalcare Pvt. Ltd. to pay you this amount.

Your request for GST payment was put up to our Board and Our Board of Directors have not approved and declined your request for GST payment.

Accordingly, we are instructing our Bank to 'Stop Payment' of this Cheque.

Company Appeal (AT) (Insolvency) No. 1088 of 2021 You are advised not to deposit the cheque and you are requested to return our above post dated cheque, issued to you, at the earliest.

For Medinnbelle Herbalcare Pvt. Ltd.

(Mr. D. K. Singhal) Director"

9. After the aforesaid letter, instruction was given by the Corporate Debtor to the Bank on 13.03.2018 to 'Stop Payment' and consequently, Cheque was not honoured by the Bank with the endorsement 'Stop Payment'.

10. The Corporate Debtor on 21.05.2018 has filed criminal complaint against Respondent No.1 and other accused. Subsequently, Application under Section 156(3) of Cr.P.C. before the Chief Metropolitan Magistrate, Delhi West, Tis Hazari Courts, Delhi has been filed, which was directed to be filed before EOW, Police Station. On 19.10.2018, an email was issued by the Respondent No.1 claiming payment of GST from the Corporate Debtor. The email dated 19.10.2018 is as follows:-

"BY E-MAIL Dated: 19.10.2018 Shri D. K. Singhal, Director M/s Medinnbelle Herbalcare Pvt. Ltd., 12/35, 1st Floor, Main Rohtak Road, West Punjabi Bagh, New-Delhi Company Appeal (AT) (Insolvency) No. 1088 of 2021 Sub: Regarding want of release of IGST of Rs.52,80,000/-

Sir, This is with reference to purchases as made by you from me of "Trademark - 1858441" of "NPD Endura Mass" wherein sale invoice no. NPDTM001 dt. 6.2.2018 of Rs. 4,40,00,000/-+ IGST @ 12% of Rs.52,80,000/-, total Rs.4,92,80,000/- was raised by me on your company and copy of which is also attached herewith. That out of above invoice a sum of Rs.3,96,00,000/- (Rs.3,55,00,000/- + Rs.41,00,000/-) have only been released by you. Still IGST of Rs.52,80,000/- have not been released to me. Further TDS amount of Rs.44,00,000/- as deducted from above sales have invoices is still not showing in Form 26AS.

Thus you are requested to kindly release the IGST of Rs.52,80,000/- immediately and also deposit TDS of Rs.44,00,000/- in my PAN Number.

Thanking you, Yours faithfully, M/s Sanjay Kumar Chetwani Encl: As Above (Sanjay Kumar Chetwani) Proprietor

11. The email dated 19.10.2018 was immediately replied claiming that Corporate Debtor is not liable to pay amount of Rs.52,80,000/-. It was Company Appeal (AT) (Insolvency) No. 1088 of 2021 claimed that fraud has been practiced on the

Corporate Debtor. The Reply dated 24.10.2018 is as follows:-

"Oct. 24, 2018 Mr. Sanjay Kumar Chetwani 124/480, Agarwal Farm Mansarovar Jaipur- 302020 Dear Sir This has reference to your letter dt 19/10/2018 regarding release of GST of Rs. 52,80,000. The contents of your letter are noted and perused by us and the same are responded as under:

Firstly it is regretfully stated that you have committed a fraud upon us in connivance with your wife and Mr. K.N Mahesh Prasad by hatching a criminal conspiracy against us in a preplanned manner, that in fact you have by practicing a fraud upon us and made us to make the payment of Rs. 3,96,00,000 to you and Rs. 10,00,000 to your associate Mr. K.N Mahesh Prasad. We have already initiated criminal action against you for defrauding us in the courts of law. We are also in the process of initiating the proceedings for revocation of Assignment Deed and recovery of said amount from you. That it seems that in furtherance of illegal and malafide intention, you have lately deposited a sum of Rs. 52,80,000 towards GST despite knowing the fact that we have initiated legal proceedings in this regard. Malafides on your part can be gauged from the fact Company Appeal (AT) (Insolvency) No. 1088 of 2021 that the alleged invoice is dt 6/2/2018 but the GST is allegedly deposited on 20/10/2018.

It seems that you have deposited this amount to put a curtain on your illegality with the tax payment. So far as the TDS deposit is concerned no final transaction was arrived as your fraud surfaced immediately.

It is clarified to you that we are claiming this GST amount without prejudice to any of our rights and without admitting in any manner whatsoever bindingness of the alleged transaction. This is for your information.

For Medinnbelle Herbalcare Pvt ltd Director"

12. Further, when notice under Section 8 was issued by the Respondent No.1, the same was replied by the Corporate Debtor by Reply dated 26.09.2019. In the reply to the Section 8 Notice, the Corporate Debtor has given details of proceedings initiated by the Corporate Debtor against the Respondent No.1. The entire correspondence which took place between the parties before filing of the Demand Notice was mentioned including that the 'Stop Payment' issued by the Corporate Debtor. It was specifically stated the Cheque of Rs.52,80,000/- was handed over to Shri K. N. Mahesh Prasad as a security and after payment of Rs.4.40 Crores, no further payment was required to be made by the Corporate Debtor to the Respondent No.1. Further, after filing of Section 9 Application, detailed Company Appeal (AT) (Insolvency) No. 1088 of 2021 reply was filed by the Corporate Debtor and in the Reply details of pre- existence of dispute has been narrated in Para 11, which is to the following effect:-

"11. Admitted pre-existence of the dispute:

That the OC has filed his email dated 19.10.2018 along with the Application by which OC had first time demanded alleged amount of GST as annexure-F at page 47 of Application. It is pertinent to mention that in the letter dated 19.10.2018, the OC has not mentioned about the cheque no. 000396 dated 15.03.2018 for Rs.52,80,000/- or its dishonoring, which proves that said cheque was not given to the OC directly by the CD, but handed over to the OC by Mr. K. N. Mahesh Prasad, who in criminal breach of trust had handed over the same to the Applicant.

Thereafter, CD had sent his reply dated Oct. 24, 2018 informing OC about his criminal acts of fraud, criminal conspiracy. The said letter dated 24th Oct. 2018 of the CD filed with the above mentioned application is at Annexure-G, page 48 of application. The contents of the reply dated Oct. 24, 2018 are reproduced below: -

"Firstly, it is regrettably stated that you have committed a fraud upon us in connivance with your wife and Mr. K. N. Mahesh Prasad by hatching a criminal conspiracy against us in a preplanned manner, that in fact you have by practicing a fraud upon us and Company Appeal (AT) (Insolvency) No. 1088 of 2021 made us to make the payment of Rs.3,96,00,000/- to you and Rs.10,00,000/- to your associate Mr. K. N. Mahesh Prasad. We have already initiated criminal action against you for defrauding us in the courts of law.

We are also in the process of initiating the proceedings for revocation of Assignment Deed and recovery of said amount from you. That it seems that in furtherance of illegal and malafide intention, you have lately deposited a sum of Rs.52,80,000/- towards GST despite knowing the fact that we have initiated legal proceedings in this regard. Malafides on your part can be gauged from the fact that the alleged invoice is dt 6/2/2018 but the GST is allegedly deposited on 20/10/2018.

It seems that you have deposited this amount to put a curtain on your illegality with the tax payment. So far as the TDS deposit is concerned no final transaction was arrived as your fraud surfaced immediately. It is clarified to you that we are claiming this GST amount without prejudice to any of our rights and without admitting in any manner whatsoever bindingness of any alleged transaction. This, is for your information."

Company Appeal (AT) (Insolvency) No. 1088 of 2021 It is submitted that above contents of the said letter are clear and admitted evidence of existing and pre-existing disputes and is on record. Thus, the Affidavit filed by the OC/ Applicant u/s 9(3) (b) of IBC, 2016 is false, and has been filed knowingly and willingly. Moreover, it appears that the Affidavit u/s 9(3) (b) is got attested in back date. This Hon'ble Tribunal should take the note of the false affidavit to curb such tendencies in the interest of justice.

The copy of the letter dated 19.10.2018 of the Applicant/OC is annexed as Annexure R-4". The copy of reply/ letter dated 24.10.2018 of the Respondent/ CD is annexed as Annexure R-5".

13. The Notice under Section 8 was issued by the Corporate Debtor on 11.09.2019 prior to which there has been following written communication sent by the Corporate Debtor to the Applicant (Respondent No.1), which evidences pre-existing dispute:-

(i) Letter dated 12.03.2018 informing the Respondent No. 1 that Corporate Debtor is not liable to pay any further amount apart from Rs.4.40 Crores and with regard to post-dated Cheque of Rs.52,80,000/- the Corporate Debtor issued instruction to the Bank to Stop Payment.

(ii) Further, demand of GST payment of Rs.52,80,000/- by email dated 19.10.2018 was specifically denied by the Corporate Debtor Company Appeal (AT) (Insolvency) No. 1088 of 2021 vide reply letter dated 24.10.2018 (which has already been extracted above).

The Criminal Complaint filed by the Corporate Debtor on 21.05.2018 against Respondent No.1 and other accused also give credence to the pre- existing dispute between the parties.

14. Learned counsel for the Respondent No. 1 - Shri Harsh N. Gokhale has emphatically submitted that issuance of Cheque is equivalent to admission of liability by the Appellant. He has relied on Section 139 of the Negotiable Instruments Act, 1881 (for short 'NI Act') and submitted that Section 139 raises a presumption in favour of the holder of the Cheque that the same has been issued for discharge of any debt or other liability. He submits that even when the Cheque was dishonoured by reasons of Stop Payment, the presumption under Section 139 has to be drawn. He has placed reliance on the judgment of Hon'ble Supreme Court reported in (2002) 1 SCC 234 - 'M.M.T.C. Ltd. vs. Medchi Chemicals & Pharma (P) Ltd.'. In para 19, the Hon'ble Supreme Court laid down following:-

"19. The authority shows that even when the cheque is dishonoured by reason of stop payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability."

15. In the above case, the Hon'ble Supreme Court was considering an Appeal against a judgment by which complaint filed under Section 138 of Company Appeal (AT) (Insolvency) No. 1088 of 2021 NI Act had been quashed. The observations made in Para 19 have been made in the above context. In the present case, the issue is not as to whether the Appellant has committed an offence within the meaning of NI Act and whether he has been able to dislodge the presumption drawn under Section 139 of NI Act. The question for consideration is as to whether there was a pre-existing dispute prior to service of Notice under Section 8 dated 11.09.2019.

16. In the present case, a post-dated Cheque was given by the Appellant bearing date 15.03.2018 and before 15.03.2018 could arrive or the Cheque was presented, Respondent No.1 was communicated by letter dated 12.03.2018 that the Appellant does not accept any liability to make payment of GST and instructions are being issued to the Bank to Stop Payment.

17. As noted above, further by letter dated 19.10.2018 Respondent No.1 demanded payment of GST amount of Rs.52,80,000/- by the Appellant which was denied by the Appellant by its reply dated 24.10.2018. In the reply it was clearly mentioned that fraud was committed on the Appellant.

18. There were further in the complaint which was filed on 21.05.2018 containing the details of allegations against the Respondent No.1 and other co-accused which clearly mentioned that the Appellant refuted any liability to make payment of GST. Learned counsel for the Respondent has also placed reliance on the judgment of this Tribunal in Company Appeal (AT) (Ins) No. 366/2020 - 'Rajendrakumar Kundanmal Jain vs. Vijal A. Jain & Company Appeal (AT) (Insolvency) No. 1088 of 2021 Anr.', which was a case where Cheque was dishonoured due to stop payment, where it was observed that issuance of Cheque on 12.01.2016 amount to acknowledgment of debt although the Cheque was dishonoured for reason of stop payment. The above observations were made in the facts of the said case. The issue before this Tribunal was not regarding a pre-existing dispute nor before date of presentation of the Cheque any intimation was given refuting the entitlement to pay liability. The said judgment, thus, does not help Respondent in the facts of the present case.

19. Learned counsel for the Respondent also relying on the judgment of Hon'ble Supreme Court in 'MobiloX Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.' sought to contend that the defense taken by the Appellant is only moonshine and is not a bonafide dispute. When we look into the facts in the present case and sequence of events, we are satisfied that the dispute raised by the Appellant (Corporate Debtor) claiming to be a pre-existing dispute cannot be said to be a patently feeble legal argument, nor assertions made by the Corporate Debtor were unsupported by evidence. There are ample evidence to support the submission of the Appellant that there was a pre-existing dispute which dispute truly exists and was not spurious, hypothetical or illusory. Adjudicating Authority, in the facts of the present case, committed error in not rejecting the Application.

20. From the aforesaid it is clear that there is pre-existing dispute with regard to the Operational Debt claimed by the Respondent No.1 in its Section 9 Application. The Notice under Section 8 was replied and in the Company Appeal (AT) (Insolvency) No. 1088 of 2021 reply pre-existence of dispute has been claimed and referred which was neither spurious nor illusory, hence, the Adjudicating Authority was obliged to reject the application. We may refer to the Judgment of Hon'ble Supreme Court in (2018) 1 SCC 353, 'MobiloX Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.', wherein in Para 51 following has been laid down:-

"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 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 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 Company Appeal (AT) (Insolvency) No. 1088 of 2021 adjudicating authority has to reject the application."

21. The Adjudicating Authority relying on the post-dated Cheque dated 15.03.2018 observed that the said Cheque prove that the Corporate Debtor has accepted his liability and agreed to pay GST additional over amount of consideration, which observation is erroneous. Even before the date of the post-dated Cheque i.e. 15.03.2018, the Corporate Debtor informed to the Respondent No.1 on 12.03.2018 that there is no liability to pay GST by the Corporate Debtor and instruction of Stop Payment is being issued to the Bank. Thus, the issue of issuing Cheque became redundant and further when Cheque was presented in June, 2018 it was dishonoured as per instructions dated 13.03.2018. Thus, giving Cheque in the name of Respondent No.1 by the Corporate Debtor has no bearing and dispute was in existence even before the date of presentation of Cheque. The pre-existing dispute was demonstrated in correspondence as above and complaints filed by the Corporate Debtor against the Respondent No.1.

22. We, thus, are of the view that the Adjudicating Authority has committed error in admitting the application under Section 9 there being pre-existing dispute between the parties which dispute was in existence even prior to the date of issue of Notice under Section 8. The impugned order passed by the Adjudicating Authority is unsustainable and is hereby set aside. The amount of Rs.52,80,000/- deposited by the Appellant in pursuance of order of this Court dated 21.02.2022 be returned to the Company Appeal (AT) (Insolvency) No. 1088 of 2021 Appellant. The Appeal is allowed. The order impugned is set aside. The Application filed under Section 9 by the Respondent No.1 is rejected.

The parties shall bear their own costs.

[Justice Ashok Bhushan] Chairperson [Shreesha Merla] Member (Technical) NEW DELHI 13th May, 2022 Archana Company Appeal (AT) (Insolvency) No. 1088 of 2021