TRANSMISSION CORPORATION OF ANDHRA PRADESH LIMITED

v.

EQUIPMENT CONDUCTORS AND CABLES LIMITED

(Civil Appeal No. 9597 of 2018)

OCTOBER 23, 2018

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Insolvency and Bankruptcy Code, 2016 – ss.8 and 9 – Insolvency and Bankruptcy (AAA) Rules, 2016 – r.6 – Appellant-Transmission Corporation awarded certain contracts to the respondent for supply of goods and services – Some dispute arose and the respondent initiated arbitration proceedings – Respondent filed 82 claims before Arbitral Council – Arbitral Council held that claims made on the basis of Invoice Nos.1-57 were barred by law of limitation and, therefore, no amount could be awarded against the said claims – In respect of Invoice Nos.58-82, the award was passed in favour of the respondent – Respondent filed execution petition seeking execution of amount in respect of Invoice Nos.1-57 and application was entertained – That order was challenged by the appellant by filing Revision petition before the High Court – High Court held that there was no award in respect of claim towards Invoice Nos.1-57 and, therefore, it was not permissible for the respondent to seek execution – Thereafter, respondent filed Company Petition u/s. 9 of IBC r/w. r.6 of Insolvency and Bankruptcy Rules against the Appellant – Petition was dismissed by the National Company Law Tribunal (NCLT) – However, National Company Law Appellate Tribunal (NCLAT) ordered one opportunity to the appellant to settle the claim of the respondent, failing which an order would be passed to initiate Corporate Insolvency Resolution Process (CIRP) against the appellant – On appeal, held: Existence of an undisputed debt is sine qua non of initiating CIRP – Adjudicating authority is required to satisfy itself that there is a debt payable and there is operational debt and the corporate debtor has not paid the same – In instant case, NCLAT had not discussed the merits of the case and also not stated how the amount was payable to the

A *respondent – There was no award of the Arbitral Council or order of any other Court with respect to invoice Nos.1-57 – Further, IBC is not intended to be substitute to a recovery forum and whenever there is existence of real dispute, the IBC provisions cannot be invoked – Therefore, order of the NCLT justified and order of the NCLAT set aside.*

B

Allowing the appeal, the Court

HELD: 1. Section 9 of the Insolvency and Bankruptcy Code, 2016 provides for initiation of corporate insolvency resolution process by operating creditor on the basis of application filed by such a creditor. It, inter alia, states that whenever a notice, demanding the payment as per notice or invoice, under sub-section (1) of Section 8 of IBC and the operational creditor does not receive payment from the corporate debtor, after the expiry of a period of 10 days from the date of delivery of such notice or invoice demanding payment operational creditor may file an obligation before the adjudicating authority for initiating CIRP. Section 8 deals with insolvency resolution. Sub-section (1) thereof stipulates that 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. Sub-section (2) puts an obligation upon the corporate debtor to respond to the said demand notice or copy of invoice within a period of 10 days of the receipt thereof by stating that dispute qua the said demand exists between the parties or by repayment of unpaid operational debt and sending proof thereof to the operational creditor. [Para 9][1074-E-G]

C

D

E

F

2. From the aforesaid, it follows that existence of an undisputed debt is *sine qua non* of initiating CIRP. It also follows that the adjudicating authority shall satisfy itself that there is a debt payable and there is operational debt and the corporate debtor has not repaid the same. [Para 10][1074-H; 1075-A]

G

3. Clause (ii) of sub-section (5) of s.9 stipulates the circumstances under which the application filed by the operational creditor can be rejected. Sub-clause (d) thereof stipulates the

H

eventuality where there is a notice of dispute sent by the corporate debtor to the operational creditor. [Para 11][1076-G-H]

4. Here, the matter was taken up before the Arbitral Council insofar as claim under Invoice Nos. 1-57 is concerned, the same was specifically rejected by the Arbitral Council on the ground that it had become time barred. The respondent challenged the said part of the award of the Arbitral Council, but was not successful. Thereafter, the respondent attempted to recover the amount by filing execution petition before the Civil Court, Hyderabad. However, that attempt of the respondent was also unsuccessful inasmuch as the High Court of Judicature at Hyderabad categorically held that since that particular amount was not payable under the award, execution was not maintainable. After failing to recover the amount in the aforesaid manner, the respondent issued notice to the appellant under Section 8 of the IBC treating itself as the operational creditor and appellant as the corporate debtor. The appellant specifically refuted this claim. In spite thereof, application under Section 9 was filed before the NCLT, Hyderabad which was dismissed. The NCLAT has not discussed the merits of the case and also not stated how the amount is payable to the respondent in spite of the aforesaid events which were noted by the NCLT as well. Notwithstanding, it has given wielded threat to the appellant by giving a one chance, 'to settle the claim with the appellant (respondent herein), failing which this Appellate Tribunal may pass appropriate orders on merit'. It has also stated that though the matter is posted for admission on the next date, the appeal would be disposed of at the stage of admission itself. There is a clear message in the aforesaid order directing the appellant to pay the amount to the respondent, failing which CIRP shall be initiated against the appellant.[Paras 12, 13][1077-A-F]

5. IBC is not intended to be substitute to a recovery forum. Whenever there is existence of real dispute, the IBC provisions cannot be invoked. On merits, the order of the NCLT is justified. [Paras 15 and 16][1078-B-C; 1083-D]

Mobilox Innovations Private Limited v. Kirusa Software Private Limited **(2018) 1 SCC 353 – held applicable.**

A **Case Law Refrence**

(2018) 1 SCC 353 held applicable Para 15

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9597 of 2018.

B From the Judgment and Order dated 04.09.2018 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 366 of 2018.

Basava Prabhu S. Patil, Sr. Adv., Nishant, Rakesh K. Sharma, Geet Ahuja, Advs. for the Appellant.

C S. Hari Haran, Sriram P., Advs. for the Respondent.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. The order of the National Company Law Appellate Tribunal, New Delhi (for short, 'NCLAT) dated September 04, 2018 is the subject matter of challenge in the present proceedings. It D is a short order, which is reproduced herein its entirety.

> "Having heard learned counsel for the parties and being satisfied of the grounds shown, six days delay in preferring the appeal is condoned. I.A. No. 973 of 2018 stands disposed of.
>
> E Prima facie case has been made out by the Appellant in view of the part decree awarded by the competent court under Section 34 of the Arbitration and Conciliation Act, 1996 and the review application under Section 37 preferred by the Respondent having rejected on 29th January, 2016.
>
> F However, taking into consideration the fact that if appeal is allowed and Corporate Insolvency Resolution Process is initiated against the Respondent – "Transmission Corporate of Andhra Pradesh Ltd.', the government undertaking may face trouble. Therefore, by way of last chance we grant one opportunity to respondents to settle the claim with the appellant, failing which this Appellate G Tribunal may pass appropriate order on merit.
>
> Post the case 'for admission' on 4th October, 2018. Appeal may be disposed of at the stage of admission."

2. Though, in the first brush, it appears that matter is still at the H stage of admission and the aforesaid order is an interim order, a careful

reading thereof would clearly bring out that the NCLAT perceives that the appellant herein owes money to the respondent and for this reason a chance is given to the appellant to settle the claim of the respondent, otherwise order would be passed initiating Corporate Insolvency Resolution Process (for short, 'CIRP'). According to the appellant, no amount is payable and the order in question is causing serious prejudice to the appellant which is asked to settle the purported claim, failing which, to face insolvency proceedings. It may also be recorded at this stage itself that the appeal pending before NCLAT is filed by the respondent herein which is against the Orders dated April 09, 2018 passed by the National Company Law Tribunal (for short, 'NCLT'), Hyderabad. By the said order, the NCLT has dismissed the petition filed by the respondent herein under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC'). To put it briefly at this stage, the NCLT, after detailed deliberations, has come to the conclusion that the Company Petition filed by the respondent was not maintainable as the claims which were preferred by the respondent against the appellant and on the basis of which respondent asserts that it has to receive monies from the appellant are not tenable and in any case these are not disputed claims. This assertion is based on the fact that these very claims of the respondent were subject matter of arbitration and the award was passed rejecting these claims as time barred. Moreover, the company petition itself suffers various fundamental defects. On that basis, NCLT held that there is a valid dispute, rather no dispute as issue in question was substantially dealt with by various courts as mentioned in the order passed by NCLT.

3. Before going into the details of the said order passed by NCLT it would be appropriate to refer to some important events in chronological order, which have a bearing on the present case.

4. The appellant is a Transmission Corporation of Andhra Pradesh Government and is successor of Andhra Pradesh State Electricity Board (for short, 'APSEB') and is in the activities relating to transmission of electricity. It had awarded certain contracts to the respondent herein for supply of goods and services. Some disputes arose and the respondent initiated arbitration proceedings. As many as 82 claims were filed by the respondent before Haryana Micro and Small Enterprises Facilitation Council (hereinafter referred to as 'Arbitral Council'). These proceedings culminated into Award dated June 21, 2010. The Arbitral

A Council came to the conclusion that the claims made on the basis of Invoice Nos. 1-57 were barred by law of limitation and, therefore, no amount could be awarded against the said claims. In respect of Invoice Nos. 58-82, the award was passed in favour of the respondent. In these proceedings, we are not concerned with the award in respect of Invoice Nos. 58-82.

B

5. Against the aforesaid award rejecting claims in respect of Invoice Nos. 1-57 as time barred, the respondent herein filed an application under Section 34 of the Arbitration and Conciliation Act before the Additional District Judge, Chandigarh. The Additional District Judge passed the order dated August 28, 2014 in the said application thereby C remanding the case back to the Arbitral Council for fresh decision. Against this order, the appellant filed the appeal before the High Court of Punjab and Haryana at Chandigarh. This appeal was allowed by the High Court by its order dated January 29, 2016 thereby setting aside the direction of the Additional District Judge remanding the matter to Arbitral D Council for fresh consideration.

6. It may be mentioned at this stage that when the appeal was pending before the High Court, the respondent had moved an application for clarification/review of order dated August 28, 2014. This application was, however, dismissed on August 27, 2015. It may also be mentioned E that insofar as order dated January 29, 2016 of the Punjab and Haryana High Court setting aside the order of the Additional District Judge remanding back the matter to the Arbitral Council is concerned, the appellant herein had filed an application for clarification of the said order under Section 151 of the Civil Procedure Code. That application was, however, dismissed by the High Court.

F

7. The respondent herein filed execution petition under Order XXI Rule 21 of the CPC for execution of judgment dated January 29, 2016 passed by the High Court of Punjab and Haryana as well as the award dated June 21, 2010 passed by the Arbitral Council. Insofar as award of Arbitral Council is concerned, as noted above the respondent's claim G pertaining to Invoice Nos. 58-82 was allowed and the execution thereof was sought. The respondent, however, filed another execution petition seeking execution of amount in respect of Invoice Nos. 1-57 also. This application was entertained and both the petitions were directed to be dealt with simultaneously vide orders dated August 17, 2016. That order

H

was challenged by the appellant herein by filing Revision Petition before the High Court of Judicature at Hyderabad. The High Court vide its order dated November 08, 2016 allowed the said Revision Petition holding that there was no award in respect of claim towards Invoice Nos. 1-57 and, therefore, it was not permissible for the respondent to seek the execution. The relevant portion of the orders passed by the High Court of Judicature at Hyderabad is reproduced hereinbelow:

> "17. From the above, once there is no re-determination of the disallowed claim, much less by allowing the claim in respect of Item Nos. 1 to 57 of annexure-1 by the Arbitration Court-cum-Additional District Judge Chandigarh under Section 34 of the Act in the Arbitration Case No. 361 of 2010 for review also ended in dismissal and appeal only set-aside to the extent of remand in practically directing instead of remanding for determination only by the arbitration court. Once it requires determination and there is no determination, then there is no final award for execution much less to enforce under Section 36 of the Act.
>
> 18. Once such is the case, the objection filed by APTRANSCO before executing Court for numbering as unsustainable for no enforceable award, so far as item Nos. 1 to 57 are concerned and before the executing Court, even filed objections by the APTRANSCO, the executing Court did not discuss and even ignored the submissions, simply from the impugned order referred supra perused only the execution petition and considered only the submissions of the D.Hr, in passing the order, which is uncalled for, for not a judicial adjudication in passing the order in the eye of law and thereby same is unsustainable and prone to revision jurisdiction of this Court to sit against and to set-aside.
>
> 19. It is made clear from the above, thereby that there is no enforceable award to execute under Section 36 of the Arbitration Act from the arbitration proceeding so far as the claim of Items 1 to 57 is concerned for what arbitrator held the claim as barred by law and the objecting Court-cum-arbitration Court in A.C. No. 361 of 2010 even held not barred by law, did not determine, but for remanded to re-determine in tis regard and same was even questioned in review, the review petition was dismissed and other side when questioned what was held by the High Court is that

A remand is not correct for lack of jurisdiction, thereby practically for re-determination and once it is not re-determined, there is no award and when there is no award, there is no question of execution and where there is no question of execution, there is not question of entertaining the unnumbered E.P. much less to number the same or even to pass any consequential pro-order that are impugned in the revision."

B

8. When the things rested at that, the respondent approached the NCLT by means of a Company Petition under Section 9 of IBC, 2016 read with Rule 6 of Insolvency and Bankruptcy (AAA) Rules, 2016. In this petition, the respondent stated that it had served demand notice dated C October 14, 2017 upon the appellant under the provisions of the IBC, thereby claiming the amount of Rs. 45,69,31,233/- which was not paid by the appellant. As mentioned above, this petition was dismissed by the NCLT vide its order dated April 09, 2018. Against this order, the respondent has filed appeal before the NCLAT in which impugned orders D dated September 04, 2018 have been passed.

9. Section 9 provides for initiation of corporate insolvency resolution process by operating creditor on the basis of application filed by such a creditor. It, inter alia, states that whenever a notice, demanding the payment as per notice or invoice, under sub-section (1) of Section 8 E of IBC and the operational creditor does not receive payment from the corporate debtor, after the expiry of a period of 10 days from the date of delivery of such notice or invoice demanding payment operational creditor may file an obligation before the adjudicating authority for initiating CIRP. Section 8 deals with insolvency resolution. Sub-section (1) thereof stipulates that an operational creditor may, on the occurrence of a default, F 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. Sub-section (2) puts an obligation upon the corporate debtor to respond to the said demand notice or copy of invoice within a period of 10 days of the receipt thereof G by stating that dispute qua the said demand exists between the parties or by repayment of unpaid operational debt and sending proof thereof to the operational creditor.

10. From the aforesaid, it follows that existence of an undisputed debt is *sine qua non* of initiating CIRP. It also follows that the adjudicating H authority shall satisfy itself that there is a debt payable and there is

operational debt and the corporate debtor has not repaid the same. For the purpose of clarity, it would be apt to reproduce Section 9 in its entirety.

"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 sub-section (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.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

A (a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

B (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

C (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

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

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

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

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days

F of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

G

11. Clause (ii) of sub-section (5) stipulates the circumstances under which the application filed by the operational creditor can be rejected. Sub-clause (d) thereof stipulates the eventuality where there is a notice of dispute sent by the corporate debtor to the operational creditor.

H

12. Here, the matter was taken up before the Arbitral Council insofar as claim under Invoice Nos. 1-53 is concerned, the same was specifically rejected by the Arbitral Council on the ground that it had become time barred. The respondent challenged the said part of the award of the Arbitral Council, but was not successful. On the basis of certain observations made by the High Court of Punjab and Haryana in its decision dated January 29, 2016**,** the respondent attempted to recover the amount by filing execution petition before the Civil Court, Hyderabad. However, that attempt of the respondent was also unsuccessful inasmuch as the High Court of Judicature at Hyderabad categorically held that since that particular amount was not payable under the award, execution was not maintainable. After failing to recover the amount in the aforesaid manner, the respondent issued notice to the appellant under Section 8 of the IBC treating itself as the operational creditor and appellant as the corporate debtor. The appellant specifically refuted this claim. In spite thereof, application under Section 9 was filed before the NCLT, Hyderabad which was dismissed by it vide order dated April 09, 2018. It is in appeal against the said order, the NCLAT has now passed the impugned order.

13. The NCLAT has not discussed the merits of the case and also not stated how the amount is payable to the respondent in spite of the aforesaid events which were noted by the NCLT as well. Notwithstanding, it has given wielded threat to the appellant by giving a one chance, 'to settle the claim with the appellant (respondent herein), failing which this Appellate Tribunal may pass appropriate orders on merit'. It has also stated that though the matter is posted for admission on the next date, the appeal would be disposed of at the stage of admission itself. There is a clear message in the aforesaid order directing the appellant to pay the amount to the respondent, failing which CIRP shall be initiated against the appellant.

14. The only argument advanced by learned counsel for the respondent before this Court was that the High Court of Punjab and Haryana while setting aside the remand order passed by the Additional District Judge did not hold that Invoice Nos. 1-57 are time barred. Therefore, the respondent had a valid claim under those invoices. This argument cannot be countenanced. As of today, there is no award of the Arbitral Council with respect to invoices at Sl. Nos. 1-57. There is no order of any other court as well *qua* these invoices. In fact, Arbitral

A Council specifically rejected the claim of the respondent as time barred. It is pertinent to mention that respondent had moved an application before the Arbitral Council for determination of amount to be paid by the appellant. However, this application was specifically dismissed by the Arbitral Council as not maintainable.

B 15. In a recent judgment of this Court in ***Mobilox Innovations Private Limited*** vs. ***Kirusa Software Private Limited***[1]**,** this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. We would like to reproduce the following discussion from the said judgment:

C

> "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
>
> D 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
>
> E 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.
>
> F it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the
>
> G corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(*b*)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor

H [1] (2018) 1 SCC 353

or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [Section 9(5)(*i*)(*b*)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [Section 9(5)(*i*)(*c*)], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [Section 9(5)(*i*)(*d*)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [Section 9(5)(*i*)(*e*)], it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7

A 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*)].

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.

xx xx xx

37. It is now important to construe Section 8 of the Code. The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law

for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject-matter of the judgment delivered by this Court on 31-8-2017 in *Innoventive Industries Ltd.* v. *ICICI Bank* (Civil Appeals Nos. 8337-38 of 2017). In this judgment, we had held that the adjudicating authority under Section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact. This Court then went on to state: (SCC p. 440, paras 29-30)

"*29*. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing — i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

xx xx xx

A

42. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist?

43. It is important to notice that Section 255 read with the Eleventh Schedule of the Code has amended Section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is no longer a ground for winding up a company. The old law contained in*Madhusudan* has, therefore, disappeared with the disappearance of this ground in Section 271 of the Companies Act.

B

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

C

D

45. The expression "existence" has been understood as follows:

"*Shorter Oxford English Dictionary* gives the following meaning of the word "**existence**":

E

(*a*) Reality, as opp. to appearance.

(*b*) The fact or state of existing; actual possession of being. Continued being as a living creature, life, esp. under adverse conditions.

F

Something that exists; an entity, a being. All that exists. (P. 894, *Oxford English Dictionary*)"

xx xx xx

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.

G

H

> 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 adjudicating authority has to reject the application."

A B C

The aforesaid principle squarely applied to the present case.

16. As a result, we allow this appeal and set aside the impugned order dated September 04, 2018 passed by the NCLAT. In a normal course, the matter should have been remanded back to the NCLAT for deciding the appeal of the respondent herein filed before the NCLAT, on merits. However, as this Court has gone into merits and found that order of the NCLT is justified, no purpose would be served in remanding the case back to the NCLAT. Consequence would be to dismiss the Company Appeal (80) (Insolvency) No. 366 of 2018 and miscellaneous applications filed by the respondent before the NCLAT. No order as to costs.

D

Ankit Gyan Appeal allowed.