NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 768 of 2024

[Arising out of the Impugned Order dated 14.12.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Allahabad Bench, Prayagraj in C.P. (IB) No. 12/ALD/2021]

In the matter of:

M/s Morex Corporation Limited
Through its Authorized Representative
Mr. Kranthi Kumar Kare
Having its registered office at:
Workshop 06, II/ F, Lemmi Centre,
No. 50, Hoi Yuen Road, Kwun Tong,
Kowloon, Hong Kong
Email: kranthi@yamaribbon.com

...Appellant

Versus

Jindal Poly Films Ltd.
Having its registered office at:
Registered Number: - 3979,
19th, K.M. Hapur,
Bulandshahr Road, P.O. Gu1aothi,
Bulandshahr, UP- 245408
Email: csjpoly@jindalgroup.com

...Respondent

Present:

For Appellant : Mr. Gaurav Kejriwal, Mr. Gaurav Choudary, Mr. A.N. Purushotham and Mr. A.V. Subba Raju, Advocates.

For Respondent : Mr. Alok Dhir, Ms. Varsha Banerjee and Ms. Aishwarya Nabh, Advocates.

J U D G M E N T
(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 14.12.2023 (hereinafter referred to as '**Impugned Order**') passed by the

Adjudicating Authority (National Company Law Tribunal, Allahabad Bench, Prayagraj) in C.P. (IB) No.12/ALD/2021. By the impugned order, the Adjudicating Authority has rejected the Section 9 application filed by the Appellant-M/s Morex Corporation Limited. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

2. Putting the facts briefly, the Appellant-M/s Morex Corporation Limited had entered into a business understanding with the Respondent-M/s Jindal Poly Films Ltd. for supply of non-woven fabric (hereinafter referred to as "**contracted materials**") for export to a China based company. As part of this business arrangement, the shipping terms for the contracted material was on FOB basis and for this purpose, the Appellant had also booked a charter flight for the consignment to be shipped from India to China. The Appellant had issued a Purchase Order on 12.03.2020 for supply of contracted material and made an advance payment of Rs.1.61 crores and Rs.1.38 crores on 04.03.2020 and 12.03.2020 to the Respondent for performing their part of the contract. The Respondent was required to hand over the cargo to the Forwarder as designated by the Appellant on or before the 23.03.2020. In the meantime, the Government of India had issued a notification vide No. 52/2015-2020 dated 19.03.2020 prohibiting the export of the contracted materials due to Covid-19 and due to this ban notification, the Respondent purportedly could not deliver the goods. However, the Appellant by holding that the contracted material was not manufactured by the Corporate Debtor by the scheduled date of 23.20.2020 and the consignment was not ready for dispatch, terminated the contract on 01.04.2020 and requested the Respondent to refund the advance amount. The

Respondent did not reply to the email of the Appellant dated 01.04.2020 and not having delivered the consignment or refunded the advance, the Appellant thereafter issued a demand notice on 15.05.2020 under Section 8 of the IBC to the Respondent. A Notice of dispute was sent by the Respondent on 20.05.2020. The Appellant thereafter filed Section 9 application seeking admission of the Corporate Debtor into the rigours of CIRP. The Adjudicating Authority dismissed the Section 9 application and aggrieved by the same, the present appeal has been preferred by the Appellant.

3. Making his submissions, Shri Gaurav Kejriwal, Ld. Counsel for Appellant-Operational Creditor stated that though the Respondent-Corporate Debtor had received the full advance payment against the Purchase Order of 12.03.2020, they had failed to manufacture the goods within the scheduled time. The contracted materials were to be manufactured by 19.03.2020 and delivered by 23.03.2020 but were not delivered on that date to the designated Forwarder. It was strenuously contended that the Adjudicating Authority had failed to appreciate that the Respondent in their own mail on 18.03.2020 had admitted delay in the production of contracted goods and that they would not be in a position to supply the said material by 23.03.2020. Though the Respondent had failed to give credible and authentic proof that the contracted goods had been manufactured by them on or before the agreed date, the Adjudicating Authority relied on certain unauthoritative documents put forth before it by the Respondent in their Additional Affidavit basis which Adjudicating Authority erroneously held that the contracted material had been manufactured on time.

4. Emphasis was laid by the Appellant that present was a case of FOB contract where time was of essence. The Respondent had clearly breached in complying to the terms of contract by failing to deliver the contracted materials on time with the Forwarder and this default led to consequential termination of the contract by the Appellant. Reliance was placed on the judgement of the Hon'ble Supreme Court in ***M/s Bawa Paulins Pvt. Ltd. Vs UPS Freight Services (India) Pvt. Ltd. (2023) 2 SCC 330*** to assert that under FOB contract the seller's responsibility ends with putting the goods on board without any further responsibility of shipping of goods. Since the Respondent's obligation was only to deliver the goods to the Forwarder, the ban notification of 19.03.2020 is only an excuse to cover up their inability to manufacture the contracted goods on time. The Corporate Debtor was therefore liable to refund the amounts received as advance payment from the Operational Creditor. It is also contended that the termination of contract dated 01.04.2020 was not disputed by the Corporate Debtor until filing of reply to the Demand Notice on 20.05.2020. When the termination of contract was never opposed or challenged by the Respondent until receipt of the Demand Notice on 15.05.2020, the Adjudicating Authority committed a grave mistake in treating the termination of contract as a pre-existing dispute and for dismissing the Section 9 application on this ground.

5. Refuting the submissions made by the Appellant, it was contended by Shri Alok Dhir, Ld. Advocate that the Corporate Debtor is a reputed going-concern which was financially healthy and solvent. The Respondent had completed the manufacture of contracted material and was in a ready position to supply the same on the scheduled date as is borne out by the communications exchanged

with the Operational Creditor. However, the ban imposed by the Government of India vide its notification dated 19.03.2020 on the export of the contracted material came in the way of dispatch and delivery. The Appellant was also aware of this ban acting as a roadblock and both parties were trying to find out a solution to overcome the hurdle of exporting these goods because of ban. The Corporate Debtor was even ready to deliver the goods for local sale during the ban. However the Appellant was unwilling to accept the delivery of the contracted goods. Instead, the Corporate Debtor was asked on 20.03.2020 to hold on to the contracted materials but soon thereafter the Appellant on his own volition proceeded with termination of the contract. The Corporate Debtor having fulfilled their contractual obligations by manufacturing goods upon receipt of the advance payment, the unilateral termination of the contract by the Operational Creditor was illegal. This was a case where the Appellant had resiled from its obligation to perform the contract. Hence the Corporate Debtor refused to pay the amount claimed by the Operational Creditor in the Demand Notice on account of pre-existing dispute qua the unilateral termination of the contract. This was a clear case of commercial dispute which dispute was raised categorically in the Notice of Dispute sent by them in response to demand notice of the Operational Creditor.

6. Submission was pressed that the Section 9 petition filed by the Appellant-Operational Creditor is an abuse of the process of law which runs contrary to the objectives of the IBC as the forum of IBC and insolvency proceedings cannot be used to recover disputed contractual claims. The Appellant is legally entitled to seek remedies under appropriate law but not under IBC. Assertion was made

that the Appellant without taking recourse to remedies available to it before a court of competent civil jurisdiction came up before the Adjudicating Authority with ulterior motives and hence the Adjudicating Authority took a well-considered decision to dismiss the Section 9 application.

7. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

8. When we peruse the impugned order, we find that the Adjudicating Authority in the impugned order has *inter alia* observed that there is a pre-existing dispute in the present case as envisaged under Sections 8 and Section 9(5)(ii)(d) of the IBC which stems from the termination of the contract by the Operational Creditor. The Adjudicating Authority has further held that the ratio laid down by the Hon'ble Supreme Court in case of ***Mobilox Innovations Private Limited Versus Kirusa Software Private Limited (2018) 1 SCC 353*** is attracted in the facts of this case and on grounds of existence of pre-existing dispute, dismissed the Section 9 application.

9. The short point for consideration is whether the Adjudicating Authority was right or wrong in holding that the Section 9 deserved to be dismissed as this was a case of genuine pre-existing dispute arising out of the termination of the contract by the Operational Creditor in respect of the Purchase Order of 12.03.2020.

10. Before we return our analysis and findings, a look at the relevant statutory construct of IBC at this juncture would be useful. Section 8 of the IBC reads as follows:

"Section 8: Insolvency resolution by operational creditor.-
(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment]of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation-For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred."

11. A plain reading of Section 8 of the IBC shows that the Operational Creditor, on occurrence of a default by the Corporate Debtor, is required to deliver a Demand Notice in respect of the outstanding operational debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any.

12. After issue of demand notice by the Operational Creditor, if the Operational Creditor does not receive payment from the Corporate Debtor or any notice of the dispute under Section 8(2), he may file an application under Section 9(1) of IBC which reads as follows:

"Section 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."

13. When we read Section 9 further, we find that Section 9(5)(ii) envisages that Adjudicating Authority shall reject the Section 9 application, if a notice of dispute has been received by the Operational Creditor or there is record of dispute in the Information Utility. Section 9(5)(ii) is as extracted below:

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

(i).....

(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 [payment] of the unpaid operational debt;

(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) 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(i) of the date of receipt of such notice from the adjudicating Authority."

14. From a plain reading of the above statutory provisions, it is clear that the existence of dispute and communication of such a dispute to the Operational Creditor is statutorily provided for in Section 8. It is an undisputed fact that in the present matter the Operational Creditor had issued a Demand Notice on 15.05.2020 following which the Corporate Debtor had sent a Notice of Dispute on 20.05.2020 highlighting inter alia the dispute surrounding the "illegal and unilateral contract termination". We also notice that the Corporate Debtor did not return the advance payment to the Operational Creditor by contending that the demanded amount was "not payable legally". The Appellant thereafter filed the Section 9 application before the Adjudicating Authority which has been rejected on grounds of pre-existing dispute.

15. Now that we have seen the statutory construct of the IBC which contemplates that Section 9 application can be rejected by the Adjudicating Authority if there is a pre-existing dispute, we proceed to analyse whether in the facts of the present case, the Adjudicating Authority had committed any infirmity in holding that the Section 9 application was not maintainable in view of pre-existing disputes.

16. It is the case of the Appellant that Section 8(2)(a) of the IBC provides that the Corporate Debtor in the event of raising the issue of a dispute to the Demand Notice issued by the Operational Creditor, that dispute should be pre-existing. The termination of the contract dated 01.04.2020 which has been held to be a ground of dispute by the Adjudicating Authority does not qualify to be a pre-existing dispute since the contract termination was never opposed or challenged by the Corporate Debtor any time before 15.05.2020 on which date the Demand

Notice was served upon the Corporate Debtor. It has been contended that the impugned order is contrary to the decision of the Hon'ble Supreme Court in ***Mobilox judgment supra*** where it has been held that the dispute must be raised prior to the issue of demand notice and the said dispute has to be real and ought to be supported by documents.

17. Adverting attention to the facts of the case leading to termination of the contract of 12.03.2020, it has been submitted by the Appellant that though adherence to the stringent time-lines was the bedrock of the instant FOB contract, the Respondent had failed in performing its obligation of dispatching the contracted material by the scheduled time-line of 23.03.2020. This incapacity to supply was clearly admitted by the Respondent in their email of 18.03.2020 wherein they have stated that production was delayed "due to production issues" and that they would be able to dispatch contracted goods only by 24th or 25th March, 2020 which was beyond the time-line. It was also emphasised that subsequent emails after 23.03.2020 are a pointer to the fact that the Respondent had admitted that the contracted material had neither been manufactured by them nor was it ready for dispatch as per agreed timelines. Respondent had sent an email on 13.04.2020 to the Appellant proposing to supply the material for sale locally in India and in subsequent emails sent on 21.07.2020 and 31.08.2020 expressing their willingness to manufacture alternate woven fabric product instead of supplying the original contracted material. All these communication show that the Respondent had breached the terms of the contract.

18. Submission was further made that parties to a contract have the right to cancel the contract. It was pointed out that in the present contract, timely performance was the underlying essence of the contract. Since advance payment had been made against purchase order but the contracted material was not ready for dispatch on the date of delivery, the contract was terminated. Hence, the advance payment made to the Corporate Debtor had become an outstanding debt. The Operational Creditor was fully entitled to recover the advance amount paid. The Adjudicating Authority has failed to notice the applicability of Section 65 of the Indian Contract Act, 1872 wherein it is the obligation of a person who has received advantage under a void agreement to return the benefits under the void agreement. The Corporate Debtor was bound to refund the amount received as advance from the Appellant. However, as they refused to refund the advance payment received by them from the Operational Creditor, the latter was justified in filing the Section 9 application.

19. Per contra, it was submitted by the Respondent that the contracted material had been manufactured by the Corporate Debtor on time as per schedule and was ready for dispatch on 23.03.2020. Thus, having manufactured the goods, the Corporate Debtor had already performed their part of the contract. However, on account of Covid-19 pandemic, Government of India had issued a notification dated 19.03.2020 prohibiting the export of the contracted material. It is on account of this notification imposing a ban that the Corporate Debtor was precluded from supplying the material for export. It was contended that the Appellant being fully aware of the ban orders and its ramifications had requested the Corporate Debtor to hold on to the contracted goods until further directions

from them but soon backtracked suddenly on 01.04.2020 by unilaterally terminating the purchase order in breach of the contractual terms.

20. Submission was made that since the goods were already manufactured and ready for shipment, there was no ground for the Appellant to terminate the contract. It was contended that in the present case the Respondent had duly discharged their contractual obligation on the part of the Corporate Debtor, the termination of the contract by the Appellant was wrongful. It was only on account of the prevailing prohibition imposed on the export of goods by the Government of India that the contract had become impossible to be completed. Thus, this was a case of frustration of contract for which no amount was recoverable by the Appellant from the Corporate Debtor. It is the contention of the Respondent that since the dispute arises from the wrongful termination of contract on 01.04.2020 which pre-dated the sending of the Demand Notice on 15.05.2020 this was a case of pre-existing dispute. The parties being already in dispute regarding unilateral cancellation of the purchase order, this was a case of pre-existing dispute for which a Section 9 application could not have been filed by the Operational Creditor particularly so since CIRP cannot be initiated to penalize a solvent company with healthy financial parameters when there is a pre-existing dispute between the parties. Even if the Corporate Debtor was responsible for the purported loss suffered by the Appellant, then at best the Appellant is entitled to claim damages under the provisions of Indian Contract Act, 1872, the quantification of which damages can be done only by an appropriate court of competent jurisdiction and not under IBC. Hence, the Adjudicating Authority had rightly dismissed the Section 9 application.

21. For a proper appreciation of the issue at hand, it may be useful at this stage to peruse the emails exchanged between the two parties on 18.03.2020 and the WhatsApp messages exchanged on 20.03.2020 with regard to supply and dispatch of the contracted material while also keeping in mind that Government of India in the meantime had issued a ban notification on 19.03.2020.

22. We first come to the two emails of 18.03.2020 which are as extracted below. The first email was from the Corporate Debtor to the Operational Creditor:

"From: M Mallyah
Sent: 18 March 2020 19:40
To: jathin@yamaribbon.com
Subject: RE: Required quotation for Air charter
Dear Jatin

Due to production issues, we can dispatch your material 24th and 25th."

23. The response email from Operational Creditor to Corporate Debtor is as follows:

"From: jathin@yamaribbon.com<From: jathin@yamaribbon.com >
Sent: 18 March 2020 19:51
To: M Mallyah <mmallyah@globalnonwovens.in>
Dear mallyah,

I will face a big loss if material is not dispatched on 23rd kindly stick to the date. I cannot afford for delayed delivery as the flight is on 27th ."

24. A plain reading of the first email dated 18.03.2020 from Corporate Debtor to Operational Creditor reveals that the Corporate Debtor has admitted its difficulty in making good the supply by 23.03.2020. The reply email from Operational Creditor to Corporate Debtor makes it clear that the Operational Creditor was emphatic that the supply is to be completed by 23.03.2020.

25. When we look at the material placed on record at page 108 of Appeal Paper Book, we find that there is an e-mail on 19.03.2020 wherein the Corporate Debtor has informed the Operational Creditor regarding how the cargo would be packaged by them to accommodate higher volume in the carrier. At para 9.8 of the impugned order, reliance has been placed by the Adjudicating Authority on this e-mail of 19.03.2020 to hold that the contracted material had already been manufactured and ready for dispatch. The Operational Creditor has however held that this communication is only a discussion on cargo dimension and cannot be read to mean that cargo was ready. Hence, it was contended that it was erroneous for Adjudicating Authority to hold that the contracted material was ready basis the e-mail of 19.03.2020.

26. More importantly, we find a spate of messages exchanged between the Corporate Debtor and Operational Creditor on 20.03.2020. The series of conversation which took place between the Operational Creditor and the Corporate Debtor over WhatsApp on 20.03.2020 regarding the production, delivery and dispatch of the contracted material is as extracted below. For convenience the messages have been serially numbered:

1.	***Operational Creditor:***	*Is this applicable to us...Wats our product code*
2.	***Corporate Debtor:***	*Yes. Our code Is 560031100*
3.	***Operational Creditor:***	*So now wat is the solution*
4.	***Corporate Debtor:***	*Please decide your course of action and let us know. We can sell in local also*
5.	***Operational Creditor:***	*Ok.. I'll let u know in few minutes time ... So, in case if the order is cancelled... There will be refund from your end?*
6.	***Corporate Debtor:***	*Unfortunately, material has been already produced. We are trying to lift this embargo. We can keep your stock in our warehouse till the ban is lifted and ship it for exports*

7.	***Operational Creditor:***	*Ok... No issue.. Let us proceed as discussed wait till Monday 23rd..we shall update you on further proceedings*
8.	***Corporate Debtor:***	*Ok*
9.	***Operational Creditor:***	*Yea..Keep the material ready for 23rd... Thankyou*
10.	***Corporate Debtor:***	*Ok*

27. When we look at the tone and tenor of the WhatsApp messages from Sl. No. 1 to 4 exchanged between the two parties, it becomes clear that both the parties were aware of the Government of India notification banning export of contracted material and were mulling on how to tackle the unexpected roadblock which had come up on account of the said notification. We also notice that the Corporate Debtor has made a categorical statement at Sl. No. 6 on 20.03.2020 that the contracted material had already been produced and that they had kept the stock in their warehouse to ship it for exports when the ban is lifted. The bonafide of the Corporate Debtor is also manifested from a statement made by them in the same message that they were trying to lift this embargo. It is equally noteworthy that the Operational Creditor in these messages did not controvert or raise any doubts on the claim made by the Corporate Debtor that they had already produced the contracted material. Instead it appears that implicitly they had accepted that the goods had been produced as they requested the Corporate Debtor to keep the material ready for dispatch on 23.03.2020 besides assuring to update the Corporate Debtor on the future course of action as is seen at messages at Sl. No. 7 and 9. Neither has any document or material put on record by the Appellant to show that they had offered any clarity on the cargo despatch. Given this backdrop of e-mails and WhatsApp messages we are therefore of the considered view that the reliance placed by the Adjudicating Authority on the

aforementioned communications to conclude that the Corporate Debtor had already produced the contracted material was not premised on wrong assumptions.

28. We would now like to focus on the Notice of Dispute raised by the Corporate Debtor on 20.05.2020 in response to the Demand Notice served by the Operational Creditor on 15.05.2020. The relevant extracts of the said letter is as reproduced below:

> *Sub.: Reply to Demand Notice under the provisions of Insolvency and Bankruptcy Code, 2016 on behalf of M/s. Morex Corporation Ltd., Workshop-6, 11/F, Lemmi Centre, No.50, Hoi Yuen Road, Kwun Tong, Kowloon, Hong Kong.*
> *Dear Ms. Sonali,*
>
> *We are in receipt of your subject demand notice dated 5 May 2020 issued on behalf of your client M/s. Morex Corporation Ltd. Hong Kong under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC). At the very outset, we deny the contents of your demand notice, being baseless and false and far from the facts of the matter. The present notice itself is not maintainable as there exists a dispute qua the illegal and unilateral contract termination request dated 01.04.2020, which is not acceptable to us.*
>
> *We deny the demanded amounts including the interest and other charges etc. as mentioned in your demand notice being not payable legally or otherwise. The alleged claim amount cannot be treated as a Default in terms of the provisions of IBC, as we are still ready to deliver the goods to your client against which the advance money is received, subject to lifting of the prohibition as imposed vide notification dated 19.03.2020 by Government of India due to COVID-19. The facts regarding the present contract with your client are elaborated hereunder-*
> *.....*
> ***2.*** *After receipt of the advance from your client, as agreed, we started manufacturing the ordered quantity of goods to be supplied to your client as per the terms of Proforma Invoice dated 09.03.2020. The said goods which were manufactured by us are currently lying at our warehouse. However, before the said goods could be shipped, the Government of India*

vide its notification dated 19 March 2020, prohibited the export of such goods due to COVID-19 pandemic.

.....

6. *Under the present notice, on the one hand your client alleges that they have already terminated the contract vide their email dated 01.04.2020 and on the other hand they were following up for the material till 14.05.2020, which is evident from the regular exchange of messages on WhatsApp from Mr. Jathin S. Amin, the presentative of M/s Yama Ribbons and Bows India Pvt. Ltd. with our representatives wherein he is rigorously asking about lifting of ban by Government of India so that the goods can be dispatched to your client. In any case, one sided correspondence on closure of contract by one party cannot be treated as termination until and unless it is accepted by the other party in terms of the contract. Hence, your client cannot claim that the contract stands terminated. Even a bare perusal of the contents of said email dated 01.04.2020, it doesn't qualify for termination of the contract. Despite the above, if your client still claims that they have terminated the contract, in such case it would be treated as an illegal termination and we object to such termination.*

7. *It may further be pertinent to point that as all the said goods have already been manufactured timely as per the specifications provided by your client, no cause of action arises for your client to issue such demand notice or initiate any proceedings against us in any manner. On the contrary, refusal by your client to take delivery of the goods once the ban is lifted or unilaterally terminating the contract shall itself amounts to dispute between the parties. Hence, even otherwise, if such dispute persists between the parties, the provisions of IBC cannot be invoked as there exists a dispute between the parties.*

....

Mr. Mallyah Marimuthu
For Jindal Poly Flims

(Emphasis supplied)

29. It is an undisputed fact that the Reply to Demand Notice was served upon the Operational Creditor. When we look at the Notice of Dispute, we find that the Corporate Debtor has categorically denied its liability to pay the demanded amount including interest. The alleged default has also been denied by them and assertion made that the contracted goods had already been manufactured and

kept in the warehouse ready for delivery subject to the lifting of the imposition of ban by the Government of India. The Reply Notice also categorically mentions that the closure of contract by the Operational Creditor cannot be treated as termination of the contract as it is a unilateral decision without notice or discussion between the parties. In the absence of this closure of contract being accepted by the Corporate Debtor, it was clearly spelt out in the Notice of Dispute that the unilateral termination of contract is illegal and tantamount to a dispute between the parties.

30. Coming to the ratio contained in the ***Bawa Paulins judgment supra,*** which has been relied upon by the Appellant, we have no quarrel with the principle laid down that under the FOB contract, the seller is not under any duty to make advance arrangements for shipping the goods beyond placing the goods on board the carrier. However the facts and contextual situation of the present case is clearly distinguishable as in this case a supervening impossibility had been triggered by a ban on exports by virtue of a valid notification issued by the Government of India and in the wake of the ban, even placement of goods on board the carrier for shipment would have entailed the possibility of risk of violating the ban. We are therefore not impressed by the argument canvassed by the Appellant of the applicability of the above judgment in the facts of the present case.

31. We are satisfied with the finding returned by the Adjudicating Authority that the Corporate Debtor has raised genuine pre-existing dispute of illegal termination of the contract in the Reply Notice to the Demand Notice. It is well settled that in a Section 9 matter, the Adjudicating Authority is only to take

notice that a dispute was in existence prior to issue of Section 8 Demand Notice but is not required to enter into final adjudication with regard to existence of dispute. All that is required to be seen is whether the defence taken by the Corporate Debtor raises a dispute which needs further adjudication by the competent court and that the defence taken is not orchestrated or a moonshine defence unsupported by evidence. Given the background of communications exchanged between the Corporate Debtor and the Operational Creditor which have been referred to in details in the preceding paragraphs coupled with the ban notification issued by the Government of India, we are of the considered view that the Adjudicating Authority has not committed any error in holding the contract termination to be a pre-existing dispute which contractual dispute figures prominently in the Notice of Dispute issued by the Corporate Debtor. Keeping in view that the time span being only about 45 days from the date of cancellation of the contract on 01.04.2020 to the issue of Demand Notice on 15.05.2020, we are of the view that raising the ground of cancellation of contract as a pre-existing dispute in the Notice of Dispute of 20.05.2020 suffices for the purpose of Section 9(5)(ii)(d) of IBC. The Adjudicating Authority did not commit any error in taking cognisance of the termination of the contract as ground of pre-existing dispute. The reliance placed on the principles of ***Mobilox judgment supra*** by the Adjudicating Authority is therefore found to be in order.

32. IBC is a remedy of last resort intended for resolution of genuine insolvency and not for recovery proceedings. The present is not a case where there is any insolvency resolution of the Corporate Debtor. We are thus of the view that the Adjudicating Authority has rightly rejected the Section 9 application filed by the

Appellant which warrants no interference in this Appeal. The Appeal being devoid of merit is dismissed. We also observe that in the event the Appellant seeks remedy before the appropriate forum, it shall be open for the Appellant to raise all pleas as permissible in law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 24.07.2025

Harleen/Abdul