

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

**Company Appeal (AT) (Ins)320 of 2019**

**IN THE MATTER OF:**

**K.K Capital Services Limited  
251, Amarkali Complex,  
Jhandewalan Extension,  
New Delhi-110 055**

**...Appellant**

**Versus**

**Sristi Hospitality Private Limited  
Liberty Lodge, D.J. Road,  
Vile Parle (West), Mumbai-400 056**

**...Respondent**

**Present:**

**For Appellant:- Mr. Gautam Singh, Advocate.**

**For Respondent: Mr. Piyush Bhardwaj, Advocate.**

**JUDGEMENT**

**(12<sup>th</sup> June, 2020)**

**Jarat Kumar Jain. J.**

The Appellant K.K. Capital Services Pvt. Ltd. filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code for Short) against the Sristi Hospitality Pvt. Ltd. (Corporate Debtor). The Adjudicating Authority(National Company Law Tribunal) Mumbai Bench, by the impugned order dated 31.01.2019 rejected the Application on the ground that the claim of the Appellant falls within the ambit of disputed claim.

2. Brief facts of this Appeal are that the Appellant is in business of Financial Advisor and Legal Consultancy Services. The Siristi Hospitality Pvt. Ltd. (In short Corporate Debtor) had a running loan account with JMFARC, however it was under great financial stress due to heavy interest being charged by the JMFARC. The Corporate Debtor approached the Appellant and requested to look for any other Bank or NBFCS which can take over its loan account running with JMFARC. A Mandate/Agreement dated 09.03.2016 was signed between the Appellant and Corporate Debtor which provided that an amount of Rs. 57.5 Lakhs would be paid by the Corporate Debtor to the Appellant on successful sanction of loan. The Appellant got the loan approved in favour of the Corporate Debtor by Indiabulls. The Corporate Debtor agreed to terms of loan of Indiabulls and happily accepted the loan which was 10 % cheaper than its running loan account with JMFARC. The Appellant after, successful sanctioned of the loan raised an invoice on 30.04.2016 and demanded its professional fees from the Corporate Debtor, for the same on 21.05.2016 ten post-dated cheques were issued by Corporate Debtor in favour of the Appellant. Out of which 3 cheques were taken back by the Corporate debtor and against each cheque paid cash Rs. 5 Lakh. Two cheques become stale and 5 cheques weredishonoured. The Appellant sent a demand notice under Negotiable Instruments Act, but no reply was ever received. Then appellant filed a Complaint under section 138 of NI Act. Thereafter, the Appellant for operational debt sent a demand notice under section 8(1) of I & B Code to the Corporate Debtor. In reply to the notice for the first time frivolous dispute was raised by

the Corporate Debtor. However, no payment was made then the Appellant has filed the Application under Section 9 of I&B Code, before Adjudicating Authority.

3. The Respondent, Corporate Debtor resisted the claim on the ground of pre-existing dispute.

4. Learned Adjudicating Authority rejected the Application on the ground of pre-existence of dispute between the parties. Being aggrieved Appellant has filed this Appeal.

5. Learned counsel for the Appellant submits that from the Application and the documents furnished with the Application it is apparent that there is an Operational debt of exceeding Rs.1 Lakh and the debt is due and payable and has not yet been paid. So far as the existence of dispute between the parties is concerned, the Respondent has raised the dispute for the first time in reply to the notice u/s 8(1) of I&B Code. However, the dispute is not supported by any document. The dispute is frivolous and vexatious. Learned Adjudicating Authority on the basis of some insignificant discrepancies which are not disputed by the Corporate Debtor, rejected the Application on the ground of pre-existing dispute.

6. On the other hand, Learned Counsel for the Respondent (Corporate Debtor) supports the findings of Learned Adjudicating Authority and submits that the Appeal be dismissed.

7. After hearing Learned Counsel for the parties we have gone through the record.

8. The Hon'ble Supreme Court in the case of Mobilox Innovative Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. 2017 1 SSC Online SC 353 held as to what are the facts to be examined by the Adjudicating Authority while examining the Application under Section 9, which is as follows: -

*“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

- (i) Whether there is an “Operational Debt” as defined exceeding Rs. 1 Lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

*If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”*

9. The Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. (Supra) also held that at the stage of rejecting the Application what is the scope of enquiry in regard to any dispute raised by the Corporate Debtor which is as under: -

*“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 adjudicating authority has to reject the application.”*

10. In the light of the aforesaid decision firstly we would like to examine that whether there is any pre-existing dispute i.e., it must exist before the receipt of the demand notice or invoice. On 23.10.2017 Appellant sent a demand notice under Section 8(1) of I&B Code. The Corporate Debtor replied to notice on 31.10.2017 in the notice Corporate Debtor raised certain disputes which are as under: -

- i. There was no assistance nor any role played by the Appellant in availing the loan facility from Indiabulls.
- ii. The emails on record are between Indiabulls and the Corporate Debtor and not between the Appellant and Indiabulls.
- iii. Suresh Agarwal Director of Appellant has assured the Corporate Debtor that he can organised fundings from Nationalised or scheduled banks at a lower rate of interest. However the Appellant had never produced any document to show that he approached any Nationalised or scheduled bank for the same.
- iv. As per the mandate agreement the advance amount of Rs. 2 lakhs was supposed to be returned to Corporate Debtor.

v. The invoice No. 2016-17/SHPL/01 dated 30.04.2016 is fictitious and has never been received by the Corporate Debtor. The invoice is dated much prior to actual sanction of loan i.e. 10.05.2016 by Indiabulls.

vi. The cheques were security cheques issued by Corporate Debtor in order to organise unsecured loan for the Corporate Debtor.

vii. The Corporate Debtor also denied the payment of Rs. 15 lakhs (fifteen) to the Appellant as shown in demand notice dated 23.10.2017.

11. We have considered the dispute no. (i) & (ii). Admittedly the mandate letter was signed by the parties on 9.3.2016. The genuiness of the copy of the emails filed along with the application has not been challenged by the Corporate Debtor therefore we have considered the emails filed by the Appellant. Sandeep Gupta (Mumbai), S.K. Agarwal (Director of KK Capital New Delhi) Abhishek Agarwal (ACA New Delhi & Gurgaon) represents the Appellant. Santosh Shetty, Rakesh Kashimpuria, represents the Corporate Debtor (Sristi Hospital) and Vaibhav Gupta, Rajeev Gupta, Devender Singh represents the Indiabulls.

12. To appreciate the facts it will be fruitful to refer the emails exchanged between the parties. The mandate letter was signed by the parties on 9.3.2016 whereby the Appellant Company is engaged for availing the loan facility for the Corporate Debtor.

13. The factual position of email exchanged between the parties are as under:

Date	Sender	Recipient	Particulars	Page No. of Appeal Paper

				<b>Book</b>
10.3.2016	Santosh Shetty	Sandeep Gupta	photos of brands occupying the premises at liberty lodge building are attached with this email	75
12.3.2016	Sandeep Gupta	Vaibhav Gupta	Pfa, UCO Bank statement indicating hardcastal loan repayment of Rs.5 Lakhs is attached with this email.	77
17.3.2016	Sandeep Gupta	Vaibhav Gupta	For the first time shared the email ID of the Corporate Debtor with personal of Indiabulls.	78
20.3.2016	Sandeep Gupta	Santosh Shetty	Draft format of letter attached with email.	79
21.3.2016 22.3.2016	Santosh Shetty	Sandeep Gupta	Corporate Debtor provided the details to the appellant and same were forwarded to Indiabulls.	80-85
22.3.2016	Santosh Shetty	Sandeep Gupta	Forwarded the message received from IDBI Bank regarding the amount received from SanijaHotel Pvt. Ltd. into Sristi Hospitality Pvt. Ltd.	86
29.3.2016	Santosh Shetty	Sandeep Gupta	Corporate Debtor provided the details to the Appellant in regard to the amount paid to JM Financial from April 14 to March 16.	89-95
29.3.2016	Devender Singh	Sandeep Gupta	Informed that Indiabulls received the bank statement of Corporate Debtor-UCO Bank from 01.01.2015 to 29.02.2016	96-97
30.03.2016	Sandeep Gupta	Vaibhav Gupta	Forwarded the payment schedule made to JM Finance since April 2014 to March 2016. (which received from Corporate Debtor)	98
7.4.2016	Sandeep Gupta	Vaibhav Gupta	Balance Sheet of Mrs. Rani Shetty W/o Santosh Shetty Savings Bank A/c Statement with Challan and Shop & Establishment of Nidhi Restaurant	119
22.4.2016	Sandeep Gupta	Abhishek	Sandeep Gupta met with individuals of IndusindBank Vikas and Vivek in relation to the LRD proposal and inform about the status of chances of approval of loan.	120-121
28.4.2016	Sandeep Gupta	Santosh Shetty	Santosh Gupta first time informed the Corporate Debtor that their proposal for credit limit has been approved by Indiabulls and asked to provide few documents on	123-125

			priority basis.	
28.4.2016	Vaibhav Gupta	Sandeep Gupta	Vaibhav Gupta informed the final terms and conditions of the sanction letter to the Appellant and the Appellant informed the same to the Corporate Debtor.	127
30.4.2016	Sandeep Gupta	Santosh Shetty	Appellant after sharing the final terms of the credit facility and confirmation from Indiabulls raised invoice for the services provided by it as per mandate letter dated 9.3.2016.	129
2.5.2016	Sandeep Gupta	Santosh Shetty	Appellant informed that he has sent the invoices to the Corporate Debtor and requested to remit the fee ASAP.	133
11.5.2016	Sandeep Gupta	Santosh Shetty	Appellant emailed to Corporate Debtor to meet and to confirm that loan amount by Indiabulls would be disbursed by 13.5.2016.	134

14. With the above facts it is clear that the Appellant has actively rendered his services in availing the loan facility from Indiabulls. It is also clear that emails on record are between Appellant and Indiabulls, therefore the contention of the Corporate Debtor is not acceptable that Appellant has not played any role in availing the loan facility from Indiabulls.

15. For deciding the dispute no.(iii) we have gone through the mandate agreement dated 9.3.2016 which is an admitted document and the terms and conditions of services rendered by the Appellant is explicitly written. In this agreement in clause 4 break up of services and the scope of services provided by the Appellant is mentioned in detail. Clause 4 (f) provides that obtaining appropriate sanction from bank/NBFC. In this agreement it is nowhere mentioned that the Appellant will organise funding from Nationalised or



scheduled bank at low rate of interest. Thus the dispute is not supported by any document. Therefore, we find no basis for such dispute.

16. In regard to dispute no.(iv) it is to be seen that in the clause 7 of mandate agreement total fees payable to the Operational Creditor and schedule for all payments are described. It is mentioned in clause 7(d) that on signing of the mandate for assigning the contracts Rs. 2 lakhs out of the total fee will be payable with the condition that the advance amount of Rs. 2 lakhs are subject to success of the assignment otherwise; it is fully refundable.

17. For this dispute, we have considered the email dated 21.03.2016 sent by Santosh Shetty (Corporate Debtor) to Sandeep Gupta (Appellant) in which Santosh Shetty requested that attached letter be forwarded to Indiabulls, the letter (see at page 82 of Appeal Paper Book) is as under:-

*“ To, 21 March, 2016*

*The Manager,*

*Indiabulls Housing Finance Ltd.*

*We are very much thankful for considering our proposal for credit facility of Rs. 16.70 Cr.*

*We are submitting the following information as desired:-*

*We hope you will find in order and proceed with sanction followed by disbursement of loan before 31<sup>st</sup> March, 2016.*

*Thanking you*

*For M/s Srishti Hospitality Private Limited*

*Director”*

18. With the above letter and above referred exchange of emails between Appellant, Corporate Debtor and Indiabulls it is apparent that Appellant has made sincere efforts and got the loan sanction for Corporate Debtor from Indiabulls. That is why, the Corporate Debtor never called upon the Appellant to refund the advanced fee Rs. 2 lakhs.

19. In regard to dispute No. (V) in reply to the notice Corporate Debtor raised a dispute that the invoice No. 2016-17/SHPL/01 dated 30.04.16 is factitious and has never been received by the Corporate Debtor. It seems that this invoice (see page 129 of Appeal Paper Book) was never delivered to the Corporate Debtor. Actually, this invoice was not as per the mandate letter. Hence, two invoices were prepared and by hand delivered to Corporate Debtor's Office by Sandeep Gupta. (See email page 131 of Appeal paper book) Therefore it may be correct that above referred invoice dated 30.04.2016 was never delivered to the Corporate Debtor. However, it is not correct that the invoices are prepared much prior to actual sanction of loan. On 02.05.2016 Vaibhav Gupta (Indiabulls) sent an email to Rakesh (Corporate Debtor) the email is as under:- (see page 130 of Appeal Paper Book)

*"Dear Rakesh,*

*As advised earlier, we, indiabulls have approved the takeover of the JM Facility availed by Mr. Shetty for Sristi Hospitality and the same stands sanctioned/ Approved from our committee.*

*As discussed with Mr. Shetty, we shall be looking at the takeover of this either by the 6<sup>th</sup> of this month or by the following Monday, 9<sup>th</sup> May 2016, subject to our legal clearance which should take another 2-3 days.*

*I thus request your team to have a meeting with Mr. Shetty and provide us with the final revised FC Amount/letter in concurrence with Mr. Shetty.*

*Regards,*

*Vaibhav Gupta”*

20. Thereafter 11.05.2016 Sandeep Gupta sent an email to Santosh Shetty (Corporate Debtor) “we have sent invoices to you and request you to remit our fee asap”.

21. Thus, we find no substance in the dispute raised by the Corporate Debtor that the invoices were issued much prior to the actual sanction of loan by Indiabulls. It is also pertinent to note that when the Appellant has raised invoices then Corporate Debtor has asked the Appellant about the Tan Number and Pan Numbers. The Appellant vide email dated 21.05.2016 mailed the Corporate Debtor its Tan and Pan Numbers (See at Page 135 of Appeal paper book) on the same day i.e., 21.05.2016 the Corporate Debtor has handed over ten post-dated cheques to Sandeep Gupta (Appellant) at his Mumbai Office. Then scan copy of the 10 cheques were shared by him vide email (see page 131 to 140 of Appeal paper book).

22. In regard to dispute No. (VI) Corporate Debtor in reply to notice raised a dispute that he has given the cheques to the Appellant as a security in order to organise unsecured loan for the Corporate Debtor.

23. In the mandate agreement there is no such clause that the Appellant will organise unsecured loan for the Corporate Debtor and for the same the

Corporate Debtor will hand over post-dated cheques as security. Such dispute was first time raised in reply to notice and not supported by any documentary evidence.

24. In regard to dispute No. (VII) The Corporate Debtor denied the payment of Rs. 15 lakhs to the Appellant shown in the demand notice dated 23.10.2017. In this regard, the Appellant has explained that Corporate Debtor has handed over ten cheques out of these, at the request of Corporate Debtor the Appellant has not presented three cheques in Bank for encashment. These cheques were issued after TDS amounting of Rs. 4,30,000/-, 4,50,000/- and 4,50,000/-. Subsequently, the Corporate Debtor has made payment in cash on 08.06.2016, 13.07.2016 and 25.08.2016 total 15 lakhs. The Appellant has explained that the Corporate Debtor has not sufficient funds in the Bank and therefore, at his request Appellant has not presented these three cheques and received the cash amount, this fact is mentioned in the Cashbook of the Appellant, Copy of which filed along with the Application. In such circumstances, no one can believe that without getting 15 lakhs the Appellant has wrongly, mentioned in the Cashbook that they received payment of Rs. 15 Lakhs from the Corporate Debtor.

25. With the aforesaid, we are of the view that disputes raised by the Corporate Debtor in the reply to the notice, not supported by any documentary evidence, are spurious, Hypothetical and illusory. Therefore, we are unable to convince that there is any pre-existing dispute.

26. The Adjudicating Authority rejected the Application on following grounds:-

a. Two cheques issued by the Corporate Debtor were never presented for encashment poses a serious doubt whether the cheques were for payment for services provided by the Operational Creditor or not.

b. Appellant in form No. VI says that seven cheques were issued and only a payment of Rs. 2 lakhs has been received whereas, in the rejoinder, Appellant submits that ten cheques have been received out of which three have been cleared two were not deposited and five were dishonoured. It is seems that the appellant is not clear regarding the debt to be claimed and kept on changing it is stance time and again.

c. Appellant stated in demand notice that 15 Lakhs have been received, however, there is no mention of this receipt of payment in form no. (V) annexed to the Application.

d. The Appellant did not deposit three cheques is unacceptable as no sane person would wait for 9 months to deposit the cheques for their clearance.

e. The claims made by the Appellant do not corroborate to its own financial statements for the financial year 2016-17. Therefore, it

can be noticed that the present case in hand clearly falls under the dispute as to the existence of amount of debt.

27. First of all, none of these discrepancies are disputed by the Corporate Debtor. What are the facts to be examined by the Adjudicating Authority while examining an application under Section 9 of I&B Code, is held by Hon'ble Supreme Court in the case of Mobilox Innovative Pvt. Ltd. (Supra) are referred in Para 8 of this Judgement. The Corporate Debtor in reply to the notice has mentioned that the Corporate Debtor made an advance payment of Rs. 2 lakhs by cheque to the Appellant this cheque was given at the time of signing of the mandate letter and subsequently, when the loan was sanctioned by the Indiabulls then 10 cheques were issued by the Corporate Debtor in favour of Appellant. Photo copy of these cheques is annexed with the application u/s 9 of I&B Code. The Corporate Debtor is not disputing that it has not issued 10 cheques in favour of Appellant. Out of these 10 cheques three cheques (No. 72 dated 30.05.2016 for Rs. 4,30,000/-, cheque No. 73 on 30.05.2016 for Rs. 4,50,000/- and cheque No. 74 on 30.05.2016 for Rs. 4,50,000/-) were returned to the Corporate Debtor and Corporate Debtor has made cash payment on 08.06.2016, 30.07.2016 and 25.08.2016. Therefore, it is not correct that the Appellant has waited for 9 months for encashment of these cheques. The reason for not presenting these cheques is mentioned in the Cashbook that 'since client requested for not depositing the cheque in Bank'. (Please see copy of Cashbook at Page 175, 176 and 177).

28. The Corporate Debtor is in financial crises therefore, at the request of Corporate Debtor if Appellant has not presented two cheques for encashment before the Bank on this ground the conduct of Appellant cannot be doubted.

29. Ld. Adjudicating Authority while examining the Application if found some discrepancies in the documents and the Application then instead of rejecting the Application he should have sought clarification from the Appellant. Unfortunately, in this case, Ld. Adjudicating Authority has considered the discrepancies which are not disputed by the Corporate Debtor. The Dispute raised by the Corporate Debtor in reply to the notice are not considered at all, in the light of the documents annexed with the Application by the Ld. Adjudicating Authority.

30. We are of the view that Learned Adjudicating Authority has erroneously, rejected the Application at the time of admitting the Application the Adjudicating Authority has only to see whether there is an Operational Debt exceeding Rs. 1 lakh as defined in Section 4 of the I&B Code, and whether the documentary evidence furnished with the Application shows that the aforesaid debt is due and payable and has not yet been paid.

31. The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing the claim cannot be ground, as held by Hon'ble Supreme Court in the case of Innovative Industries Ltd. Vs. ICICI Bank and Anr. (2018) 1 SCC 407 wherein it observed that claim means a right to

payment even if its disputed. The Code gets triggered the moment default is of Rs. 1 Lakh or more.

32. The Adjudicating Authority failed to appreciate the documents placed on record alongwith Application under Section 9 of I&B Code.

33. From the record, as we find that the Corporate Debtor has defaulted to pay more than Rs. 1 lakh and in absence of any pre-existing dispute, and the record being completed, we hold that the application under Section 9 preferred by the appellant was fit to be admitted.

34. For the reasons of aforesaid we set aside the impugned judgment dated 31.01.2019 and remit the case the Adjudicating Authority for admitting the application under Section 9 of I&B Code, after notice to the Corporate Debtor to enable the Corporate Debtor to settle the matter prior to the admission.

The Appeal is allowed with aforesaid observations and directions.No order as to costs.

**Justice Jarat Kumar Jain)**  
**Member (Judicial)**

**(Balvinder Singh)**  
**Member (Technical)**

**(Dr. Ashok Kumar Mishra)**  
**Member (Technical)**

**NEW DELHI**

SC

**Company Appeal (AT) (Ins) 320 of 2019**