NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 718 of 2020

[Arising out of Order dated 29 May 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Bengaluru Bench, Bengaluru in Company Petition (IB) No. 324/BB/2019]

IN THE MATTER OF:

Mr Joseph Jayananda
R/o No. 8/1, The Angel, Bazar Street
Abbaiah Garden, Vannarpet
Vivekanagar, Bangalore – 560047 **...Appellant**

Versus

1. **Navalmar (UK) Ltd**
   2, Beulah Road, Wimbledon
   London – SW19 3 SB **...Respondent No.1**

2. **Navalmar Shipping (India) Pvt Ltd**
   Through Resolution Professional
   Mr Ritesh Aditya
   401, The First, B/h ITC Hotel
   B/s Keshavbaugh Party Plot
   Vastrapur, Ahmedabad – 380015

   Also at:

   No. 207/208, Sunrise Chambers
   2nd Floor, #22, Ulsoor Road
   Bangalore – 560042 **...Respondent No.2**

Present:

For Appellant : Ms. Vatsala Kak, Advocate

For Respondent : Mr Sankar N Swamy, Mr Salim A Inamdar, Advocates for R-1.
Mr Modassir Husain Khan, Advocate for R-2

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Order dated 29 May 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Bengaluru Bench,

Bengaluru in Company Petition No. CP (IB) 324/BB/2019 under Section 9 of the Code by which the Petition was admitted for Initiation of Corporate Insolvency Resolution Process of the Corporate Debtor. Feeling aggrieved by the said Order, one of the suspended Director has filed this Appeal. The parties' original status in the Company Petition represents the parties in this Appeal for the sake of convenience.

2. **Appellants Contention;**

a. Brief facts giving rise to the present Appeal are that the Appellant happens to be the suspended Director of the Respondent No.2 Company (from now on referred to as 'R-2'), i.e. Corporate Debtor. The Respondent No.1 (from now on referred to as 'R-1') Company is involved in the sea and coastal freight water transport and operates its fleet of owned and time chartered handy size breakbulk dry cargo vessels on its linear cargo trades. The Respondent No.2 Company M/S Navalmar Shipping (India) Private Limited was set up to carry on the business of booking cargo on a commission basis for its principal, i.e. the Respondent No.1, Company, to manage Respondent No.1 Companies work more effectively. Respondent No.2 Company/ Corporate Debtor, is registered under the Companies Act 1956 since 16 January 2002. Respondent No.2 Company's main object was to carry on the business of booking cargo on a commission basis.

b. Mr Andrea Colombo, who was holding a position as Director from 18 March 2002 till 1 April 2019, removed from the directorship of Respondent No.2 Company with effect from 1 April 2019 for the non-

compliances as he absented from all the meetings of the Board of Directors held during 12 months commencing from 1 April 2018 to 31 March 2019. Mr Andrea Colombo is at present the Director of the Respondent -1 Company since 16 February 2001. Mr Fernando Poletti was also a Director of Respondent No.2 Company from 18 March 2002 till 15 February 2019. However, he was also the authorised representative of Respondent No.1 Company. All the Respondent No.2 Company's decisions from 18 March 2002 till 15 May 2019 were being taken by Mr Andrea Colombo and Mr Fernando Poletti. Mr Andrea Colombo, who was managing the financials of Respondent No.2 Company.

c. Under the General Agency Agreement dated 31 August 2003 between Respondent 1 and 2, the Respondent No. 2 was appointed as authorised representative and an exclusive protective agent in respect of the vessels, cargos, and services about Indian and far Eastern Ports, whether owned, chartered or managed by Respondent No.1. The said Agreement was renewed from year to year and was signed by Mr Andrew Colombo till 2017. During business, Respondent No.2 Company raised the freight invoices in Indian Currency on behalf of Respondent No.1 Company and collected the freight invoice amounts from the shippers/exporters in Indian Currency. Respondent No.2 Company maintained the Ledger account of freight payables of the Respondent No.1 Company from 2005 to 2016. To facilitate the cargo loading activities of Respondent No.1, they sent two second-hand cranes in the

year 2005 to the Indian ports of Chennai & Tuticorin. The then Director's Mr Andrew Colombo and Mr Fernando Poletti arranged to pay the customs duty from the freight payable amount lying in accounts of Respondent No.2 Company which paid a sum of ₹ 3,38,29,915/- towards the customs duty payable for such import of the cranes. Despite the payment of the customs duty by the Respondent No.2 Company, and also by using the Import-Export License which was obtained for custom clearance of the cranes as mentioned earlier, the Respondent No.1 Company continued to be the owner of the said cranes, since the Respondent No.2 Company was unable to pay the cost of the cranes.

d. Respondent No.2 Company vide its notice dated 5 September 2018, unilaterally terminated the General Agency Agreement. The entire operations and financials of the R-2 Company from 2002 to 2019 were managed by Mr Andrew Colombo and Mr Fernando Poletti, the then directors of Respondent No. 2 and the representative of Respondent No.1 Company. Every sale and purchase of Respondent No.2 Company's assets during the year 2002 till 2019 was managed by the Respondent 2 to benefit Respondent No.1. They have taken the decisions to purchase various assets by using the freight payable amount lying in Respondent No.2 Company's accounts. During those years, the said directors have mismanaged the finances of Respondent No.2. When Mr Andrea Colombo was removed from the directorship of the Company with effect from 1 April 2019 for the act of non-

compliance, on the ground of his being absent from all the meetings of the Board Of Directors held during 12 months commencing from 1 April 2018 to 31st of 2019, the demand notice dated 12 June 2019 was issued.

3. **Grounds:**

The Appellant has challenged the impugned Order on the following grounds;

- Respondent No.1 is not an Operational Creditor. No liability arises in the form of future payments in exchange for goods or services. Respondent No.1 has not provided any goods and services to Respondent No. 2. Hence, Respondent No. 1 is not an Operational Creditor as its liability does not come from a transaction on operations.

- The Debt is not an Operational Debt and is also barred by Limitation as alleged in part A of the demand notice dated 12 June 2019. Further, the Debt, as mentioned in part B and part C of the demand notice, are forged. No debt arises from any transactions of operations.

- The proceedings against Respondent No. 2 were initiated to defraud the Respondent No. 2 Company because Mr Andrea Colombo and Fernando Poletti, the then directors, were themselves managing Respondent -2 Company's operations during the year 2002 to 2019.

As mentioned above, all the sales and purchase of the assets during the said period were managed by the then directors. The alleged claim of the Respondent -1 Company is fabricated and also time-barred.

- During the years 2002 to 2019, the said directors have mismanaged the money from Respondent No.2. When Mr Andrea Colombo was removed from the Company's directorship with effect from 1 April 2019 for his act of non-compliance, as a counterblast to his removal, he issued the alleged demand notice dated 12 June 2019.

- The proceeding to initiates the CIR Process of the Respondent No.2 was initiated to manipulate the CIR Process fraudulently and mismanage the outcome of the CIRP as Respondent No.1 holds the majority of the voting powers, i.e. 91.78%.

- Respondent No.1 has claimed a sum of USD 12,23,927 towards the freight from 2004 to 2016, and the Yacht purchase invoice was raised in 2015, which is a time-barred claim of Respondent No.1.

- Respondent No.1 has raised a false claim by producing fabricated freight invoice copies, forged copies of the debit note with the very intent to file the Petition. Further, to facilitate the cargo loading activities of Respondent No.1, it had sent two second-hand cranes in the year 2005 to the Indian ports of Chennai & Tuticorin. After that, the directors Mr Andrea Colombo and Mr Fernando Poletti arranged to pay the customs duty from the freight payable amount

from the accounts of Respondent No.2, i.e. Corporate Debtor. Although, the said cranes are in possession of Respondent No. 1 itself.

4. **Respondent No. 1/Operational Creditor's contention**:

a. The present Appeal is filed by one of the Corporate Debtor's suspended Director, who does not own any shares in the Corporate Debtor and was an employee Director/nominated Director. The Company's only shareholders, Mr Fernando Poletti and Rosy Rego, have not challenged the impugned Order dated 29 May 2020.

b. The Appellant has taken a stand in this Appeal that is contradictory to the Corporate Debtor's stand before the NCLT. The objections filed on behalf of the Corporate Debtor before the NCLT was affirmed by the Appellant in his capacity as Director. The Appellant had thus clearly tried to mislead this Appellate Tribunal.

c. The present proceedings are occasioned by non-payment of Operational Debt by Respondent No.2/Corporate Debtor to Respondent No. 1/Operational Creditor. The Debt accrued under the General Agency Agreement dated 31 August 2003, and both the Respondents are bound by it.

d. Given the terms of the Agreement, the Corporate Debtor was to act as a cargo booking agent for the Operational Creditor (R-1) in India, on a commission basis, which carries on transporting freight by sea

using ships/vessels owned/chartered by it. The Operational Creditor terminated this Agreement on 5 September 2018.

e. After the Agreement's termination, the Operational Creditor issued a demand notice Dt. 12 June 2019 under section 8 of the I & B code 2016 to the Corporate Debtor. The Operational Creditor demanded repayment of debts, classified into three categories, namely, "unsecured loans" (part A), "payment towards Yacht" (part B) and payment towards freight collections (part C).

f. The Corporate Debtor, in response to the demand notice, admitted the Debt of USD 1766.09 claimed by the Operational Creditor under part 'C' of the demand notice and amount of the Debt, under part B, i.e. USD 61,119.45 out of the USD 1,41,072.57 as the actual payable dues, as per the books and the financials of the Company for the financial year ending 31 March 2018. But the reply was silent about the Debt claimed under part A.

g. The period of Limitation stood extended owing to acknowledgement in the balance-sheet of the Corporate Debtor. In addition to the acknowledgement in the yearly balance sheets, the Corporate Debt, whatever amount owed to the Operational Creditor, was reconciled on a yearly basis. The Debt was acknowledged every year through the communication addressed by the Corporate Debtor to the Operational Creditor. The communication contains the outstanding

Debt details and an acknowledgement that the same was due and payable.

h. For the first time in this Appeal, the Appellant has contended that Respondent No. 1 is not an Operational Creditor. The Debt arose in dealing between the Operational Creditor and the Corporate Debtor pursuant to the General Agency Agreement. Moreover, the Debt claimed by the Operational Creditor in its demand notice had no consideration for the time value of money. The consideration is the service that the Corporate Debtor had provided, or was expected to provide in the future, to the Operational Creditor.

i. The Appellant contention regarding malicious prosecution is neither borne out by the facts of the case nor does it have any basis since no proceedings have been initiated against him. Assuming that the Appellant is making this allegation on account of alleged fraudulent or malicious prosecution of the Corporate Debtor, even then, as of date, the Appellant had no authority to act on behalf of the Corporate Debtor.

5. **Discussion**

We have heard the argument of the learned counsel for the parties and perused the record. The following point arises for our consideration;

A. Whether alleged Debt is an Operational Debt?

1.1 The Appellant has raised the question of maintainability of the Petition under Section 9 of the I & B code 2016 because the alleged Debt

is not an Operational Debt. The Corporate Debtor contends that the Appellant had not raised this plea before the Adjudicating Authority. Since the legal plea can be raised at any stage of proceedings; therefore, the Corporate Debtor's objection in this regard is not sustainable.

1.2 Admittedly the Debt arose in the dealings between Respondent - 1 and Respondent -2 pursuant to the General Agency Agreement. The Operational Creditor's claim had no consideration for the time value of money. Still, it was for the consideration of the service that the Corporate Debtor had provided, or was expected to provide in the future, to the Operational Creditor. The Appellant has pleaded that the Operational Creditor's advance was not meant to fund the Corporate Debtor service. Hence, there was no time value of money involved.

1.3 The Learned Counsel for the Respondent No.1 placed reliance on the judgement of the Hon'ble Supreme Court in case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1 : 2019 SCC OnLine SC 1005 at page 490. In this case it is held:

> "**42.** *It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by the learned counsel on behalf of the petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at*

best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the Creditor and the person who has to pay for such goods and services is the Debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the Debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate Debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate Debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate Debtor. ***One other important distinction is that in an operational debt, there is no consideration for the time value of money—the consideration of the Debt is the goods or services that are either sold or availed of from the operational Creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance***

payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. *In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving "exchange" i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for homebuyers/allottees to approach NCLT under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc.* ***It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real***

estate developers as financial debtors. *This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws."*

1.4 In the instant case, the monies advanced by the R-1 to the Corporate Debtor were advance payment for work to be done in the future. Admittedly, the work was to be done in terms of the General Agency Agreement between the parties. The Corporate Debtor referred to these amount as advance payment in its audited accounts and the objection filed by it before the NCLT. It even claimed that the said amount was "adjusted towards various cost and expenses incurred by the Respondent Company in the course of business, without raising any doubt about the nature of the Debt. Hence the amounts referred to as above cannot be treated as anything but Operational Debt under the Code. Further, in case of Pioneer (supra) Hon'ble Supreme Court has clearly held that in Operational Debt there is no consideration for the time value of money. The consideration of the Debt is the goods or services that are either sold or availed of from the Operational Creditor. Payments made in advance for goods and services are not made to fund the manufacture of such goods or the provision of such services. The advance payment being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made. The liability or obligation in respect of a claim which is due from any person is defined as Debt under Section 3 (11) of the Code. It provides that the Debt includes Financial Debt and Operational Debt. Further, the term' Financial

Creditor' and 'Financial Debt' is defined under Section 5 (7) & 5(8) of the Code. Section 5 (20) defines the term 'Operational Creditor' as a person to whom an Operational Debt is owed and includes any person who has been legally assigned or transferred. Section 5 (21) defines 'Operational Debt' as a claim in respect of the provision of goods or services including employment or a debt in respect of payment of dues arising under any law for the time being in force and payable to the central government, any state government or any local authority.

1.5 As per the General Agency Agreement between the Operational Creditor and the Corporate Debtor, the Corporate Debtor acted as an agent of the former in India and collected various payments due to the Operational Creditor's customers remitted the same to the Operational Creditor. The Operational Creditor has annexed various invoices and debit notes with the Petition as evidence of the claim amount. Since the Corporate Debtor was an agent and service provider of the Operational Creditor, the amounts due under the transactions would fall within the ambit of Operational Debt as defined under Section 5 (21) of the Insolvency and Bankruptcy Code 2016.

B. Whether alleged Debt is barred by Limitation?

1.1 The Appellant contends that Respondent No. 1's claims are barred by time, and by no stretch of the imagination, Respondent No. 1 can make good its dead claim. It is contended that by the issuance of notice dated 12 June 2019, at this late stage, Respondent No. 1 cannot claim the Debt on time.

1.2 Respondent No. 1 claims a sum of USD 12,23,937 towards the freight from 2004 to 2016, which is the time-barred claim of Respondent No.1. It is stated that it is not possible to raise freight invoices both by Respondent No. 1&2 Company for the same freight transaction.

1.3 The Appellant, in response to the above, contended that the repayment of the Debt as demanded could be classified into three categories, namely, "unsecured loans" (part A), "payment towards Yacht (part B) and payment towards freight collections (part C).

1.4 The Corporate Debtor vide reply dated 1 July 2019 admitted the debt amount of Rupees USD 1766.09 claim by the Operational Creditor under part C of the demand notice and part of the Debt under part B of USD 61,119.45 as the actual payable dues, as per the books and financials of the Company for the financial year ending 31 March 2018.

1.5 The details of the outstanding Debt as per the demand notice about the advance payment made by Respondent No. 1 to Corporate Debtor relate to the latter's services. It was admittedly disbursed between December 2015 and January 2018. The Debt under part B and part C are not barred by Limitation was admittedly payable as per the Corporate Debtor Company's books and financials as of 31 March 2018. It is admitted fact that in the audited balance sheet of the Corporate Debtor, the amounts were reconciled on a yearly basis between Respondent No. 1 and Corporate Debtor. The Debt was acknowledged in the communication addressed by the Corporate Debtor to

Respondent No. 1. This communication contains the details of outstanding Debt and an acknowledgement that the same were due and payable.

1.6 The latest such acknowledgement of Debt is an email communication dated 23 October 2018 from Ms Rosy Rego to financial@navalmar.co.uk, which states that the following Debt is due and payable to the Operational Creditor.

- Towards advances received-US the 2,53,591.50;
- Towards freight (due from 2005 onwards) USD 13,38,807.80;
- Towards motorboats-USD 1,15,022.56.

1.7 Thus it is clear that the record substantiates the period of Limitation to the extent of its acknowledgement in the balance sheet of the Corporate Debtor. This communication was addressed by Ms Rosy Rego, the Director and shareholder (50%) of the Corporate Debtor. It is significant that despite being a shareholder of the Corporate Debtor Company, she has not come forward to challenge the Order admitting the insolvency petition.

1.8 It is essential to mention that after the matter was reserved for Orders, the Hon'ble Supreme Court settled down the law relating to the Limitation Act's applicability to the Insolvency proceedings, which is very much relevant for this case. In Civil Appeal No. 2734 of 2020, Laxmi Pat Surana V Union Bank of India Hon'ble Supreme Court has held:

"**35.** *The purport of such observation has been dealt with in the case of Babulal Vardhraji Gurjar (II) (supra).* ***Suffice it to observe that this court had not ruled out the application of section 18 of the Limitation Act to the proceedings under the Code, if the fact situation of the case warrants. Considering that the purport of section 238 A of the Code, as enacted, it is clearificatory in nature and being a procedural law had been given retrospective effect; which included application of provisions of the Limitation Act on case to case basis. Indeed, the purport of amendment in the Code was not to reopen or revive the time-barred debts under the Limitation Act. At the same time, accrual of fresh period of Limitation in terms of section 18 of the Limitation Act is on its own under that Act.*** *It will not be a case of giving new lease to time-barred Debt under the existing law (Limitation Act) as such.*

36. Notably, the provisions of the Limitation Act have been made applicable to the proceedings under the Code, as for as may be applicable. For, section 238 A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or Appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be*. After enactment of section 238 A of the Code on 6 June 2018, validity whereof has been upheld by this court,* ***it is not open to contend that the Limitation for filing application under section 7 of the Code would be limited to article 137 of the Limitation Act and extension of prescribed period in certain cases***

would be only under section 5 of the limitation act. There is no reason to exclude the effect of section 18 of the Limitation Act to the proceedings initiated under the Code. ----

37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial Creditor to initiate action under section 7 of the Code. ***However, section 7 comes into play when the Corporate Debtor commits default. Section 7, consciously uses the expression default-not the date of notifying the loan account of the corporate Debtor as NPA. Further, the expression "default" has been defined in section 3 (12) to mean non-payment of "debt" when whole or any part or instalment of the amount of Debt has become due and payable and is not paid by the Debtor or the corporate Debtor, as the case may be****. In cases where the corporate person had offered a guarantee in respect of loan transaction, the right of the financial Creditor to initiate action against such entity being a corporate debtor (corporate guarantor), gets triggered the moment the principal borrower commits default due to non-payment of the Debt. Thus when the principal borrower and/or the (corporate) guarentor admit and acknowledge the liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of Limitation due to (successive) acknowledgements, it is not possible to extricate them from the renewed Limitation accruing due to the effect of section 18 of the limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgement in writing signed by the party against*

whom such a right to initiate resolution process under section 7 of the Code enures. Section 18 of the limitation act would come into play every time when the principal borrower and/or the corporate guarantor (corporate Debtor), as the case may be, acknowledge the liability to pay the Debt. Such acknowledgement, however, must be before the expiration of the prescribed period limitation including the fresh period of Limitation due to acknowledgement of the Debt, from time to time, for institution of the proceedings under section 7 of the Code. Further, the acknowledgement must be of a liability in respect of which the financial Creditor can initiate action under section 7 of the Code."

(emphasis supplied)

1.9 Based on the above observation of the Hon'ble Supreme Court, it is clear that Section 7 of the I&B Code comes into play on non-payment of "debt" when whole or any part or instalment of the amount of Debt has become due and payable and is not paid by the Corporate Debtor. When the Corporate Debtor acknowledges the liability before the expiration of three years, from that point fresh period of Limitation u/s 18 of the Limitation Act starts. But such acknowledgement must be before the expiration of the prescribed period of Limitation, including the fresh period of Limitation due to acknowledgement of the Debt, from time to time for the institution of proceeding under Section 7 of the Code. In the instant case the Appellant has contended that during the years 2002 to 2019, Mr Andrea Columbo and Fernando Poletti were handling the Respondent No. 2 Company's operations. Mr Andrea Columbo was removed from the company directorship with effect from

1 April 2019 for the act of non-compliance. As a counterblast to his removal, he issued the alleged demand notice dated 12 June 2019. In addition to the acknowledgement in the Corporate Debtor's yearly balance sheets, the debts owed by the Corporate Debtor to the Operational Creditor were reconciled on a yearly basis between them. The Debt was acknowledged every year through the communications addressed by the Corporate Debtor to the Operational Creditor. This communication contains the outstanding Debt and an acknowledgement that the same were due and payable. It is the case of running account were Operational Creditor used to give advance payment for obtaining services of the Corporate Debtor. After the removal of Mr Andrea Columbo from the directorship of Respondent No. 2 Company, the demand notice was raised by Mr Andrea Columbo. Before the removal of Mr Andrea Columbo, every year account was reconciled, and the amount due and payable to Mr Andrea Columbo as a creditor was shown in the balance sheet of the Corporate Debtor. The limitation period started after the General Agency Agreement's termination, when demand was raised, and the default was committed by the Corporate Debtor. Therefore, the limitation period is regularly getting extended by implication of Section 18 of the Limitation Act. Thus it is clear that the Debt is not barred by Limitation.

C. Whether the Petition filed under Section 9 of the Code is not maintainable on the pre-existing dispute's ground?

1.1 The Appellant contends that the Petition under Section 9 of the Code is not maintainable on the ground of pre-existing dispute. In response to it, the Operational Creditor contended that the Corporate Debtor had not issued any notice of dispute until the demand notice dated 12 June 2019. Further, there is no document to substantiate any dispute in relation to the Operational Debt prior to the demand notice. The Corporate Debtor has never raised any dispute about falsification fabrication of invoices prior to the receipt of demand notice. It is pertinent to mention that the Corporate Debtor has not taken the falsification or fabrication of invoices in its reply dated 1 July 2019. As contemplated under the I& B code 2016, the dispute has to be a pre-existing dispute that is genuine and not a patently feeble argument, as held in the case of Mobilox Innovations (supra). It is also important to mention that any investigation into the issues of fabrication/falsification of documents, invalid debit notes, directors having a conflict of interest after leaving the Corporate Debtor Company etc., as now raised by the Respondent/Corporate Debtor, are the issues clearly outside the scope of the summary proceedings. The Petition filed under Section 9 of the Code is filed by Mr Andrea Colombo, being duly authorised by Board Resolution dated 15 July 2019 by the Operational Creditor Company, which is a separate legal entity, and not in his personal capacity.

1.2 It is pertinent to mention that there is an admission of liability to repay the due amount by the Corporate Debtor, in its reply dated 1 July 2019 to the demand notice. It is stated that;

> *"under these circumstances, on being mindful of the long standing relationship with you, in order to resolve the issue amicably in good faith, we are ready and willing to reimburse the amount of rupees INR 5,97, 45,758 as the freight payable, and USD 61,119.452 towards the settlement of Yacht Import Bills, within the period of 2 years, by selling the immovable assets standing in the name of the company (i.e. residential flat number 203 & 301 in Galina apartment, Indira Nagar Bangalore and commercial flats number 5 A, 5B, 5C and 5D the in Sea View Towers, Chennai), after evicting the current occupants*".

6. Further, at various places in its objection, the Corporate Debtor has admitted receiving USD 2,54,000, the remaining import bills of USD 61,119.45 and outstanding freight payable of USD 13,38,807.80. The Corporate Debtor, in its reply to the demand notice, agreed to repay a sum of ₹ 5,97,45,758/-. On perusal of the latest audited financial statement of the Corporate Debtor for the year ending 31 March 2018 produced by the Operational Creditor, it is seen that the Corporate Debtor admits a sum of ₹5,93,67,527 trade payable to the Operational Creditor.

7. It is a settled position of law that once the Debt and default in question are proved, and the Corporate Debtor raised no prior dispute, it is mandatory for the Adjudicating Authority in an Application filed under Section 9 of the Code, admit the Petition for Initiation of CIRP. We believe that the Appellant's

objection regarding the pre-existing dispute is not sustainable in the above circumstances.

8. Given the above discussion, we find that the Corporate Debtor owes a debt of more than Rupees One Lac, i.e. above the threshold limit, and it committed default in discharging the same. It also appears that there was no pre-existing dispute. The Corporate Debtor's main contention is that the amounts paid by the Operational Creditor and its financial statements do not match. It is not for the Adjudicating Authority to ascertain, investigate, or fix the exact amount of liability at the admission stage. After the admission of the petition, it is the duty of the Resolution Professional to collate the claims and ascertain the liability.

9. According, we find no reason to interfere with the Adjudicating Authority's finding.

10. The Appeal is dismissed with no order as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
7 April 2021

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