NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1218 of 2025

(Arising out of Order dated 12.06.2025 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court III in Company Petition IB-241(ND)/2024)

IN THE MATTER OF:

M/s. Durgapur Corporation Private Limited (DCPL)
Having its registered office at:
7, Ironside Road, Harikunj,
Ballygunge, Kolkata,
West Bengal – 700 019. **...Appellant**

Versus

M/s. Aryan Ispat & Power Private Limited
Having its registered office at:
198, SFS,
Vasant Enclave, Rao Tula Ram Marg,
New Delhi – 110 057. **...Respondent**

Present:

For Appellant: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Pranav Sachdeva, Mr. Arjun Bhatia, Ms. Shefali Munde, Ms. P. Rohit Ram and Mr. Sanyam Jain, Advocates.**

For Respondents: **Mr. Abhijeet Sinha, Sr. Advocate with Mr. Ankit Sharma, Mr. Rakesh Kumar and Ms. Preeti Kashyap, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed challenging the order dated 12.06.2025 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench, Court – III by which Section 9 application filed by the Appellant being C.P. IB-241(ND)/2024 for initiation of CIRP against the

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Respondent has been rejected. Aggrieved by the order, this appeal has been filed. Brief facts of the case necessary to be noticed for deciding this appeal are:

(i) The Corporate Debtor – M/s. Aryan Ispat & Power Private Limited is engaged in the business of manufacturing of sponge iron and generation of power. The Corporate Debtor has a land on leasehold basis from Odisha Infrastructure Development Corporation (OIIDC) and also private owned land on which it has constructed and maintained the plant for a capacity of 160,000 MTPA of sponge iron and 18MW power plant, coal washery 0.7 MTPA alongwith fixtures and appurtenances. The Corporate Debtor has obtained all necessary consent for operating the plant from Government Department.

(ii) On 01.02.2021, an agreement namely the Operation & Management Agreement was entered between the Corporate Debtor and M/s. Durgapur Corporation Private Limited (DCPL), the Appellant herein. The Corporate Debtor was mentioned as 'Owner' and Appellant as 'Operator'. Appellant claimed that it is qualified and has expertise to operate the plant owned by the Owner. The Owner agreed to permit the Appellant to operate in consideration of the service fees and the Operator agreed to pay usage fee to the Owner as per terms set out in the Agreement. Various terms and conditions were agreed between the parties. Payment of Usage Fees, Security Deposit and

Operators Fee were detailed in the Agreement. Agreement also contemplated that public freight terminal railway sliding will be separate business division of the Owner. The agreement provided its term as 10 years from the effective date unless terminated in accordance with the terms thereof.

(iii) In pursuance of the agreement, the Appellant proceeded to operate and manage the plant for manufacturing of sponge iron and power generation.

(iv) Termination Agreement dated 25.11.2022 was executed terminating the agreement. A Balance Settlement Sheet dated 18.10.2022 was enclosed along with the Termination Agreement.

(v) The Corporate Debtor issued a demand notice dated 16.12.2023 under Section 8 and preferred a petition under Section 9 before the NCLT, Kolkata Bench. It was after filing of Section 9 application before the NCLT by the Corporate Debtor against the Operational Creditor, a demand notice dated 12.03.2024 was issued by the Operational Creditor for an amount of Rs.34,12,10,212/- and Section 9 petition came to be filed on 16.04.2024.

(vi) The Adjudicating Authority issued notice to the Respondent, in response to which a reply was filed by the Respondent opposing Section 9 application. In reply to Section 9 application, it was pleaded that there is no debt due on the Respondent of the Applicant under the Operation and Management Agreement. The entire responsibility of procuring the materials and its payment was

that of the Operational Creditor. The Operational Creditor has sent bills of Vendors and liability was discharged by the Corporate Debtor. Corporate Debtor handed over plant along with machinery to the Operational Creditor under the Operation and Management Agreement. All liabilities created by the Operational Creditor were to be settled by the Operational Creditor. It is submitted that the Operation and Management Agreement was terminated on 25.11.2022 and along with the Termination Agreement, Balance Settlement Sheet was enclosed, which was signed by both the parties wherein Rs.11,32,24,945/- was to be paid by the Operational Creditor to the Corporate Debtor. The Operational Creditor has also sent email dated 31.10.2022 where the amount of Rs.11,32,24,945/- was payable by the Applicant to the Corporate Debtor. It was further submitted that Applicant has concealed fact that he was served demand notice under Section 8 by the Corporate Debtor who has also preferred Section 9 petition also. The petition under Section 9 by the Operational Creditor is nothing but counter blast to the application which is filed by the Corporate Debtor. The Corporate Debtor is running business of manufacturing sponge iron and more than 800 employees are working. Recoveries are due from the Operational Creditor by the Corporate Debtor. Corporate Debtor prayed the application to be dismissed.

(vii) The Adjudicating Authority heard the parties and by impugned order has rejected Section 9 application. The Adjudicating

Authority after hearing the parties and considering materials on record, came to the conclusion that clauses of the Operation and Management Agreement does not create any debt or financial liability payable by the Corporate Debtor to the Operational Creditor, but merely defines the entitlement of the operator (Operational Creditor) to a share of profits arising from the operations of the plant. In para 29 (xx), (xxv), (xxvi), (xxvii) following was held:

> *"xx. On a careful examination of this clause it is evident that this clause does not create any debt or financial liability payable by the Corporate Debtor to the Operational Creditor, but merely defines the entitlement of the operator (Operational Creditor) to a share of profits arising from the operations of the plant.*
>
> *……*
>
> *xxv. Payments under the Operation and Management Agreement dated 01.02.2021 are not for goods or services delivered by the operational creditor to the corporate debtor rather as stipulated under the contract are in the nature of an contractual agreement on profit sharing basis which is apparent from a bare reading of clause 5 of the said agreement.*
>
> *xxvi. From the nature of the Operation and Management Agreement dated 01.02.2021 it is very much clear that the said agreement did not provided for transaction between operational creditor and corporate debtor for supply of goods or rendering of services within the meaning of Section 5(21) of the*

Insolvency and Bankruptcy Code, 2016, thus in the present application the claim is not in the nature of operational debt.

xxvii. It is further observed that the existence of a profit sharing mechanism between the parties negates the existence of a relationship of Operational Creditor and Corporate Debtor. If there had been the relation of the Operational Creditor and the Corporate Debtor between the parties, there would have been no provision for the 'profit sharing' amongst them, as the same is not contemplated under the ambit and definition of the 'Operational Debt' as laid down under Section 5(21) of the Code. Therefore, the Applicant cannot be termed as the Operational Creditor within the definition of Operational Creditor as provided under section 5(20) of the Insolvency and Bankruptcy Code 2016."

(viii) The Adjudicating Authority has further found that there was pre-existing dispute since the Corporate Debtor has already issued demand notice dated 16.12.2023 under Section 8 of the I&B Code to the Operational Creditor and filed an application under Section 9 whereas the demand notice was issued by the Operational Creditor on 12.03.2024. It was held that there was a pre-existing dispute between the parties. The observation regarding pre-existing dispute have been made in Para 29 (xxxviii), which is as follows:

"xxxviii. On perusal of the material on record it is evident that Corporate Debtor had served a demand

notice dated 16.12.2023 under Section 8 of the Insolvency and Bankruptcy Code 2016 to the Operational Creditor and has also preferred a application under Section 9 of the Insolvency and Bankruptcy Code 2016 before the NCLT, Kolkata Bench, for debt and default for an amount of Rs.5,66,26,383/- (Rupees Five Crores Sixty Six Lakhs Twenty Six Thousand Three Hundred and Eighty Three). While with respect to the present application the Operational Creditor served the Corporate Debtor a demand notice dated 12.03.2024 for an amount of Rs.34,12,10,212/-. This goes on to suggest that prior to filing of the present application there was an existing dispute between the parties for which the Corporate Debtor served a demand notice under section 8 and filed an application under Section 9 of the Insolvency and Bankruptcy Code 2016 before the NCLT, Kolkata Bench, for debt and default for an amount of Rs.5,66,26,383/-."

(ix) Aggrieved by the order, this appeal has been filed by the Appellant.

2. We have heard Shri Ramji Srinivasan, learned senior counsel appearing for the Appellant and Shri Abhijeet Sinha, learned senior counsel appearing for the Respondent.

3. Shri Ramji Srinivasan, learned counsel for the Appellant submits that the observation of the Adjudicating Authority that O&M Agreement does not contain any provision of service resulting in operational debt is an erroneous finding. O&M Agreement was expressly for services and in exchange of services, fees were payable to the Appellant, the service provider. Learned

counsel for the Appellant to support his submission has referred to various clauses of the O&M Agreement which we shall notice hereinafter. It is submitted that there is acknowledgement vide email dated 15.06.2023 from the Corporate Debtor to the Operational Creditor acknowledging the amount to the tune of Rs.14,74,72,100/-. Section 9 application filed by the Corporate Debtor was on the basis of illegible and unreliable with no binding Balance Settlement Sheet which was not a settlement between the parties. In any view of the matter the application under Section 9 was withdrawn on 23.04.2025, hence, it cannot be any basis for pre-existing dispute. Termination Agreement dated 25.11.2022 does not absolve the Corporate Debtor from making payment that were due to the Appellant. It is submitted that the mere fact that service fee was required to be paid from profits does not in any manner mitigate against holding that Appellant a Service Provider under the O&M Agreement. The balance confirmation letter dated 15.06.2023 was sent by Finance and Accounts of the Corporate Debtor to the Senior Manager of the Corporate Debtor, which was forwarded to the Operational Creditor. The said email cannot be said to be internal email and mere fact that it is not signed by anyone cannot be reason to dismiss acknowledgment. The Corporate Debtor having acknowledged the liability by the email, it cannot be said that no amount is due to the Operational Creditor. The refundable Security Deposit of Rs.5 Crore was required to be paid back. The Adjudicating Authority cannot create a third agreement between the parties. The agreement has to be read as per its

terms. The O&M Agreement was clearly a service agreement under which the Appellant was referred as 'Operator' i.e. 'Service Provider'.

4. Learned counsel for the Respondent refuting the submission of learned counsel for the Appellant contends that the O&M Agreement dated 01.02.2021 was an agreement under which the Appellant has taken over the operation and management of the manufacturing of Sponge Iron and generation of power of the Corporate Debtor. Under the contractual arrangement, the fee of the operator was on the basis of profit sharing basis. Under the agreement, the Operator was obliged to pay usage fee of Rs.2 Crore per month to the Owner with stipulation to increase the usage fee from time to time. All expense for operation of the plant were to be borne by the Operational Creditor. It is submitted that there was pre-existing dispute between the parties. The O&M Agreement was already terminated by the Owner on 25.11.2022 which clearly contemplated that all liabilities subsisting as on date or may arise in future shall be borne and settled by the Operator. The Agreement having been terminated on 25.11.2022 along with which Balance Settlement Sheet dated 18.10.2022 was also part of it where Rs.11,32,24,945/- was to be paid by the Operational Creditor to the Corporate Debtor. There was pre-existing dispute between the parties, which is clear from the Termination Agreement and the Balance Settlement Sheet dated 18.10.2022. In any view of the matter, the Corporate Debtor has already issued demand notice under Section 8 on 16.12.2023 and has filed Section 9 application against the Operational Creditor whereas demand

notice was issued by the Operational Creditor on 12.03.2024 much after filing of Section 9 application. Filing of Section 9 application by the Corporate Debtor was clearly pre-existing dispute and application filed by the Operational Creditor deserves to be rejected under Section 9(5)(ii)(d) of the I&B Code. Learned counsel for the Respondent further submitted that various clauses of the O&M Agreement clearly indicate that no services were being provided by the Operational Creditor to the Corporate Debtor rather the Operational Creditor has taken the plant and machinery for running it after paying usage fee to the Owner and service fees was payable on the basis of profit sharing. No debt was due on the Corporate Debtor and the application was wholly misconceived and rightly rejected.

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

6. One of the ground on which the Adjudicating Authority has rejected the Section 9 application is pre-existing dispute. The Adjudicating Authority in Para 29(xxxviii) has found that the Corporate Debtor has already issued demand notice dated 16.12.2023 to the Operational Creditor and has filed petition under Section 9 before the NCLT, Kolkata Bench and it was thereafter on 12.03.2024, the demand notice was issued by the Operational Creditor and Section 9 application was filed thereafter. The present is a case where it is not shown that demand notice issued by the Appellant was replied by the Corporate Debtor. The Corporate Debtor, however, has filed reply to Section 9 application, in which reply, it was categorically pleaded

that the Corporate Debtor has already issued a demand notice and filed a Section 9 application, which fact has been concealed by the Operational Creditor. In Para 23 of the reply following has been pleaded:

> *"23. That it is also imperative to state the Petitioner herein has concealed the fact that the Corporate Debtor had served a demand notice under Section 8 and has also preferred a petition under Section 9 of the Code before the Ld. NCLT, Kolkata Bench, for debt and default of an amount of Rs. 5,66,26,383/- (Rupees Five Crores Sixty-Six Lakhs Twenty Six Thousand Three Hundred and Eighty Three Only). The present petition is nothing but a counterblast to the same. The copy of the demand notice and the petition under Section 9 filed by the Corporate Debtor against the Operational Creditor is attached herewith and marked as ANNEXURE R-8."*

7. It is settled law that even if the Corporate Debtor has not replied the demand notice, in reply to Section 9 application it can bring into notice of the Court pre-existing dispute. Pre-existing dispute which can be referred and relied by the Corporate Debtor in reply to Section 9 application has to be dispute existing on the date prior to receipt of the demand notice. In the present case the Corporate Debtor has brought into notice existence of pre-existing dispute which is issuance of demand notice and filing of Section 9 application by the Corporate Debtor against the Operational Creditor, which is much prior to issuance of demand notice by the Appellant. The Corporate Debtor, thus, has brought into notice of the Adjudicating Authority

existence of dispute prior to receipt of demand notice by the Corporate Debtor. Disputed has been defied under Section 5(6) of the I&B Code in following words:

> *"5(6) "**dispute**" includes a suit or arbitration proceedings relating to—*
>
> *(a) the existence of the amount of debt;*
>
> *(b) the quality of goods or service; or*
>
> *(c) the breach of a representation or warranty;"*

8. The definition of dispute is an inclusive definition. When the Corporate Debtor has already issued a demand notice to the Operational Creditor claiming amount from the Operational Creditor and demand notice by the Operational Creditor has been issued thereafter claiming amount from the Corporate Debtor, existence of dispute is very much there on the date when demand notice is issued by the Operational Creditor. As noticed above, in the present case the Corporate Debtor has issued its demand notice under Section 8 on 16.12.2023 whereas the Operational Creditor issued demand notice on 12.03.2024 to the Corporate Debtor leading to filing of Section 9 application.

9. There were other materials on the record which clearly lead to the conclusion that pre-existing dispute was there. The O&M Agreement although was for a term of 10 years but it was terminated on 25.11.2022, which was clear pleaded by Termination Agreement dated 25.11.2022,

which has been brought on the record in the appeal. Paras 1 and 2 of the Termination Agreement are as follows:

> *"1. Termination of the Contract. The Parties mutually agree that Contract shall be terminated effective from the 1st day of October, 2022 (the "Termination Date"). Upon the Termination Date, the Contract shall have no further force or effect.*
>
> *2. Consideration. Both the Parties have agreed to settle the account as on 30th September, 2022 and the account so settled shall be the· Consideration for the termination of this agreement. All liabilities subsisting as on date or may arise in future pertaining to the period starting from 01st February 2021 to 30th September 2022, shall be born and settled by the Operator. No additional consideration of any kind shall be due from the other Party with respect to the Contract."*

10. The Termination Agreement itself clearly contemplate that all liabilities subsisting as on date or may arise in future pertaining to the period starting from 01.02.2021 to 30.09.2022, shall be borne and settled by the Operator and no additional consideration of any kind shall be due from the other party with respect to the Contract. In view of the Termination Agreement which clearly contemplated that there shall not be any due from other parties with respect to the contract which Termination Agreement was entered on 25.11.2022 much prior to issuance of the demand notice by the Appellant, clearly points that there is dispute between

the parties. The claim filed by the Operational Creditor is not admitted claim. It is further relevant to notice that the Corporate Debtor in its reply to Section 9 application has also clearly pleaded that along with the Termination Agreement dated 25.11.2022, a Balance Settlement Sheet was enclosed where an amount of Rs.11,32,21,975/- was to be paid by the Operational Creditor to the Corporate Debtor, which pleading has been made in Para 20 of the reply to Section 9 application:

> *"20. That it is pertinent to mention that the said agreement dated 30.01.2021, was terminated between the parties as per the termination agreement dated 25.11.2022. Along with the said termination agreement, a balance settlement sheet was enclosed, which was signed by both the parties, wherein, an amount of Rs. 11,32,24,975/- (Rupees Eleven Crore Thirty Two Lakhs Twenty Four Thousand Nine Hundred and Seventy Five Only) was to be paid by the Petitioner to the Corporate Debtor. Since, the complete accounting effects was not given to the entries indicated in the termination agreement, therefore, standalone entry of the Petitioner for incurring the expenditure was standing in the books of the Corporate Debtor. It is due to the said reason; there was an outstanding amount indicated in the books of the Respondent. The correct status of the books of account, in terms of the termination agreement and financial sheet dated 18.10.2022 enclosed with the termination agreement, shows that there is an amount of Rs. 11,32,24,975/- (Rupees Eleven Crore Thirty Two Lakhs Twenty Four*

> *Thousand Nine Hundred and Seventy Five Only), recoverable by the Corporate Debtor from the Petitioner. The said settlement sheet is duly signed by the Petitioner as well as the Corporate Debtor. The copy of the balance settlement sheet dated 18.10.2022 is attached herewith and marked as ANNEXURE R-6."*

11. All the above pleadings clearly show that there is pre-existing dispute between the parties and Section 9 application has rightly been rejected by the Adjudicating Authority. Thus, due to the above, the order of the Adjudicating Authority rejecting application on the ground of pre-existing dispute cannot be faulted especially in view of the relevant pleadings as pleaded in reply to Section 9 application, noticed above.

12. Although we have upheld the decision of the Adjudicating Authority rejecting Section 9 application on the basis of the pre-existing dispute but since parties have made elaborate submissions on the Operation and Management Agreement, we also proceed to notice the nature of the contractual agreement between the parties, which is reflected by O&M Agreement dated 01.02.2021. The statement in Clause (E), (F) and (H) are as follows:

> *"E. The Operator has approached the Owner and has represented and warranted to the Owner that it is qualified and has the necessary skills and expertise to be designated as the Operator, to provide certain services as defined in the Agreement in relation to*

operation and management of the Plant owned by the Owner, subject to and in accordance with the terms and conditions as set out in this Agreement.

F. The Owner has allowed Operator with access to the Plant, and with access to the information in the Owner's files relating to the Plant. Operator has conducted such inspections, investigations and analyses as Operator deems fit and appropriate, and has fully satisfied itself as to the existing conditions with respect to the Plant and also various permissions as are necessary for the operation of the plant. Operator is familiar with the facilities and equipment comprising the Plant and has experience in operating and maintaining these types of facilities and equipment. Operator has also observed and gone through the nature, scope and extent of the operation and maintenance services for the Plant.

H. The Owner, relying upon the representation and warranties of the Operator, is desirous of appointing the Operator for operating the Services, in consideration of the Service Fees (defined below) and upon the Operator agreeing to pay a Usage Fees (defined below) to the Owner, as per the terms set out in this Agreement."

13. The Clause (H) clearly indicates that the Operator agreed to pay usage fee to the Owner and Operator has agreed to operate the services in consideration of the service fee. Service fees is defined in Clause 1.1.17 and Usage fees is defiled in clause 1.1.18 which are as follows:

"1.1.17 "Service Fees" shall have the meaning assigned to it under clause 5.1 hereto and detailed in Schedule III hereto."

"1.1.18 "Usage Fees" shall have the meaning assigned to it in clause 4.1 hereto."

14. We also look into Clause 5 which deals with 'payment to the Operator/manner of calculation of profit'. Clause 5.1, 5.5 and 5.7 are as follows:

"5.1. As consideration for providing the Services, the Operator shall be entitled to all the profits earned by the Owner from the Plant except the profit related to the Railway Siding and handling business, assets as per Annexure - B (As per Schedule III), during a particular Financial Year after deduction of the Usage Fees, duly paid for a period of 12 (months) in accordance with this Agreement ("Service Fees"). The Operator agrees that the Profit earned from the Plant except the profit related to the Railway Siding and handling business and assets as per Annexure-B shall be the amount computed after deducting the Usage fees from the total income from the Plant.

5.5. The Operator agrees that the Service Fee payable to it pursuant to this Agreement shall be the full and complete consideration for the Services stipulated under this Agreement.

5.7. The Owner and the Operator hereby agree that the PFT Railway Siding operations will be a separate business division for all the accounting and

operational purposes. Further, the Owner will control the operations and accounting for the PFT business division. The Owner and the Operator further agrees that, all the profit and losses of the PFT Railway Siding business-division will be shared in the ratio of 75:25 respectively from the Effective date."

15. Schedule III provides for manner of calculation of service fees i.e. after deduction of all expenses and usage fees which is payable to the Owner. Thus, any fees which was payable as service fee was out of the profit of the operations. The agreement when read as whole clearly indicate that there is no financial liability undertaken by the Corporate Debtor towards the Operational Creditor rather it was Operational Creditor which was liable to pay usage fees which was defined in Clause 4.1. Clause 4.1 is as follows:

"4.1. The Operator hereby agrees and undertakes that, it shall pay to the Owner, a fixed monthly fee of INR 2,00,00,000 (Indian Rupees Two Crore Only) ("Usage Rees") from 01st March 2021 for using the equipment's, fixtures, facilities, machinery etc. at the Plant, stated in Part B of Schedule I ("Permitted Use"), in order to provide the Services, under this Agreement. The Usage Fees will be increased by INR 15,00,000 per month (Indian Rupees Fifteen Lacs Only) from the first day of the power export to a dedicated plant of the Operator. The Usage Fees per month will be increased by 7% after completion of every three years w.e.f. 21st February 2024. The Usage Fees for the month of February 2021 will be of INR 66,66,667

(Indian Rupees Sixty Six Lacs, Sixty Six Thousand Six Hundred and Sixty Seven Only)"

16. Thus, payment of usage fees was obligation of the Operator to the Corporate Debtor whereas service fee was payable to the Operator was out of the profit after deduction of usage fee and expenses. Thus, the Usage Agreement does not create any liability on the Corporate Debtor to pay any service fee to the Appellant. The Adjudicating Authority in the impugned order has noted relevant clauses. The Adjudicating Authority, thus, has rightly come to the conclusion that there was no obligation on the Corporate Debtor to pay any amount to the Operational Creditor and there was no debt due on the Corporate Debtor for which any Section 9 proceeding can be initiated by the Operational Creditor.

17. The Adjudicating Authority has also rightly taken note of the Clause 1 and 2 of the Termination Agreement and has made following observations in Para 29 (xxxvii):

"xxxvii. In the light of clause 2 of the termination agreement, it cannot be said that the liabilities incurred by the Operator/Operational Creditor during the course of its tenure in operating and managing the plant was the responsibility of the Corporate Debtor. The two balance confirmations letters dated 15.06.2023 which do not bear any stamp or signature of the Corporate Debtor cannot be treated as acknowledgement of debt. Moreover, the Operator/Operational Creditor has not produced any

> *invoice to show that any service was rendered and any amount was claimed for rendering such services. Therefore, we agree with the stand of the Corporate Debtor that there is no debt and due payable by the Corporate Debtor to the Operational Creditor and has not yet been paid."*

18. We fully concur with the view taken by the Adjudicating Authority in Para 29 (xxxvii) as above.

19. Learned counsel for the Appellant has placed reliance on various judgment of the Hon'ble Supreme Court and this Tribunal. Appellant has placed reliance on judgment of Hon'ble Supreme Court in ***"Annaya Kocga Shetty vs. Laxmibai Narayan, 2025 SCC Online SC 758"*** where the Hon'ble Supreme Court has held that Court must look into the words used in the contract and if words are clear there is very little the Court can do about it. In Para 16 to 18 following was held:

> *"**16.** The circumstances dealing with the dispute between the parties are stated in required detail in the preceding paragraphs. At the outset, let us refer to the ratio of this Court in Provash Chandra Dalui (supra) on the construction of the basic agreement between the plaintiff and the defendant. This Court held that the court must look at the words used in the contract unless they are such that one may suspect that they do not covey the intention correctly. If the words are clear, there is very little the court can do about it. In constructing a deed, looking at the*

surrounding circumstances and subject matter is legitimate only if the words used are doubtful.

18. *The construction of a deed is "generally speaking, a matter of law." However, when there is an ambiguity in the deed, determining its meaning is a mixed question of fact and law. This concept is encapsulated by sections 91 and 92 of the Evidence Act, 1872.*

18.1 *Section 91 of the Evidence Act, 1872 denotes that a deed constitutes the primary evidence of the terms to which the parties are to adhere. Whereas section 92 of the Evidence Act, 1872 forbids any contradictions or variations in a written document by extrinsic evidence. However, there are exceptions outlined in the proviso to section 92, that allow variations from this general rule:*

> *"**92. Exclusion of evidence of oral agreement**. – "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms;*
>
> *Proviso (1): Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto: such as fraud, Intimidation, illegality, want of due execution, want of capacity in any contracting party want or failure of consideration, or mistake in fact or law:*

Proviso (2): The existence of any separate oral agreement as to any matter on which a document is silent, and which is not Inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3): The existence of any separate oral agreement. constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4): The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5): Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract:

Proviso (6): Any fact may be proved which shows in what manner the language of a document is related to existing facts."

(Emphasis supplied)

18.2 *The subtle distinction in the point of law, as carved out by the provisos, is that the evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is no agreement in the first place is admissible. Thus, unless the grounds fall within the provisos read with*

the Illustrations to section 92, there is a bar on adducing oral evidence."

20. There can be no dispute to the proposition laid down by the Hon'ble Supreme Court in the above case. The clauses of the agreement have been read as it is. Present is not a case that the Adjudicating Authority or this Tribunal has put any other interpretation on the clear and unequivocal clauses of the Operation and Management Agreement.

21. Next judgment relied by the Appellant is in the matter of ***"Shree Ambica Medical Stores vs. Surat People's Coop. Bank Ltd., (2020) 13 SCC 564"***, where the Hon'ble Supreme Court has held that the Court by interpretative process cannot rewrite or create a new contract between the parties and have to simply apply the terms and conditions of the agreement as agreed between the parties. There can be no dispute to the above proposition. To the same effect is judgment of Hon'ble Supreme Court in ***"General Assurance Society Ltd. vs. Chandumull Jain, 1966 SCC OnLine SC 208".***

22. We also need to notice the submission of the Appellant on the basis of email dated 15.06.2023, which is clamed as acknowledgment by the Corporate Debtor of balance confirmation. The said emails have been brought on record by the Appellant. As submitted by the Appellant, the said emails were sent by the Finance and Account Department of the Corporate Debtor to its Senior Manager who had forwarded the email to the office of the Operational Creditor. The email has been extracted by the Adjudicating

Authority in the impugned order. The email does not indicate as to which official of the Corporate Debtor has send the email.

23. Learned counsel for the Appellant has place reliance on judgment of High Court of Karnataka in ***"Sudarshan Cargo v. Techvac Engineering, 2013 SCC Online Kar 5063"*** where the Karnataka High Court had occasion to examine the expression 'sign' or 'signed' under Section 18 of the Limitation Act, 1963. In Para 23 of the judgment following has been observed:

> *"23. The word "sign" or "signed" employed in Explanation (b) to section 18(2) has not been defined under the Limitation Act, 1963. Explanation merely says "signed" means either personally or by a agent duly authorised in this behalf. It requires to be noticed that even under section 3(56) of the General Clauses Act, 1897, the word "sign" has not been defined but has its extended meaning with reference to a person who is unable to write his name to include mark with its grammatical variation and cognate expressions. Undisputedly, an e-mail is a communication addressed to a definite person and it means a person who is intended by "originator" to receive such electronic record as per section 2(b) of the IT Act, 2000 and the "originator" would mean a person who sends or transmits any electronic message to any other person as defined under section 2(za) of the IT Act, 2000. Thus, if an acknowledgment is sent by a "originator" to the "addressee" by e-mail, without any intermediary, it amounts to electronic communication*

by e-mail which is an alternative to the paper based method of communication. This mode of transaction is legally recognised under section 4 of the IT Act, 2000."

24. There can be no dispute to the proposition that transaction by email is legally recognized. The question arises as to whether there is any acknowledgment was sought with regard to balance confirmation but email is required to be sent by any authorised person. When email does not disclose as to who has sent email, the Adjudicating Authority has not committed any error in not relying on the email. Furthermore, as noted above, in the Termination Agreement dated 25.11.2022, there was a balance settlement sheet which is pleaded by the Corporate Debtor where an amount of Rs.11,32,24,945/- is claimed from the Operational Creditor to the Corporate Debtor. In wake of other materials on the record including the proceeding initiated by the Corporate Debtor under Section 9 for recovery of its debt against the Operational Creditor no reliance could be placed on the email as claimed by the Appellant.

25. We need to notice judgment of Hon'ble Supreme Court in ***"Mobilox Innovations (P) Ltd. vs. Kirusa Software (P) Ltd., (2018) 1 SCC 353"*** where the Hon'ble Supreme Court has clearly laid down that the Adjudicating Authority at the stage of admitting Section 9 application has to only see whether there is 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. In Para 51 of the judgment following was laid down:

> *""51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

26. When we apply the ratio of above judgment in the present case, pleading which was relied in reply to Section 9 application is based on

relevant materials, as noted above. Hence the said dispute can neither be said to be a spurious defence. At this stage, the Adjudicating Authority was not to decide as to whether the defence ultimately liable to be succeeded. The only thing that is to be looked into is that whether there is plausible contention. In the facts of the present case, we find that plausible contention was raised by the Corporate Debtor in the reply to Section 9 application and there being pre-existing dispute between the parties, application filed under Section 9 deserved rejection.

27. In view of the foregoing discussion, we do not find any error in the order of the Adjudicating Authority requiring any interference. Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

10th April, 2026

Archana