

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,0

NEW DELHI

Company Appeal (AT) (Insolvency) No. 555 of 2020

(Arising out of order dated 13th February, 2020 passed in Company Petition No. C.P. No. 2431/I&BP/2019 by National Company Law Tribunal, Mumbai Bench)

In the matter of:

Anuj Khanna

**Ex-Director of Cosmic Export Solutions (India)
Private Limited, B-801 Neelkanth Heights,
Sector- 8, Plot No. 12/13, Ghansoli, Navi Mumbai,
Maharashtra- 400701**

...Appellant

Vs.

1. Wishwa Naveen Traders

**4/5, Joanna House, Sahar Air Cargo,
Near- Courier Shed, Andheri (East),
Mumbai- 400099**

2. Cosmic Export Solutions (India) Private Limited

**Through the Interim Resolution Professional,
C-802, Groma House, Opposite To- APMC Market
Sector-19, Turbhe Navi Mumbai- 400705**

...Respondents

Present

**For Appellant: Mr. Jayant Mehta, Mr. Anjuman Tripathi, Ms.
Smriti Churiwal and Mr. Aman Varma, Advocates.**

For Respondents: Mr. Kunal Kher (R-1) and Mr. Kunal Kohli (R-2).

J U D G M E N T

(25th November, 2020)

Mr. Balvinder Singh, Member (Technical)

1. The present appeal has been preferred by Anuj Khanna (hereinafter referred to as 'Appellant'). He was an Ex-Director of Cosmic Export Solutions (India) Private Limited (hereinafter referred to as 'Corporate Debtor'). The Appeal is preferred under section 61 of the Insolvency and Bankruptcy Code (hereinafter referred to as 'I&B Code') challenging the impugned order dated 13th February, 2020 passed by National Company Law Tribunal, Mumbai Bench (hereinafter referred as 'Adjudicating Authority') in Company Petition No. C.P. No. 2431/I&BP/2019. The Adjudicating Authority through impugned order, initiated the CIRP of the Corporate Debtor by admitting the Operational Debt. Hence the present Appeal is being preferred by the Appellant.
2. The brief facts of the case are that the Corporate Debtor had engaged the Respondent No. 1/Operational Creditor for its custom clearance services. The Corporate Debtor availed the services of the Operational Creditor from 2015 till 2019. The Operational Creditor filed a petition before the Adjudicating Authority dated 24th June, 2019, seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) alleging that the Corporate Debtor committed a default in making payment of Rs. 18,09,541/- including interest at the rate of 24% p.a., by invoking the provisions of section 8 and 9 of I&B Code.
3. The learned counsel for the Appellant stated that the Corporate Debtor had regularly paid the Operational Creditor all the amounts that were due to be paid to the Operational Creditor for its services during the aforesaid period. Pertinently, at the request of the Operational Creditor certain payment were also made to the employees of the Operational Creditor, namely Mr

Shailendra Yadav (8,81,000/-), Mr. Manoj Prajapati (Rs. 1,69,000/-), Mr. Raghav Malhotra (Rs. 3,27,000/-) and Mr. Nitin Dhawan (Rs. 40,000/-).

4. The learned counsel for the Appellant further stated that on discovering anomalies between the demands made by the Operational Creditor and the accounts maintained by the Corporate Debtor, the Corporate Debtor requested the Operational Creditor for the ledger books and bank statements with respect to the monetary transactions between the parties, particularly made to the employees of the Operational Creditor. The Operational Creditor failed to provide relevant ledger books and bank statements to the Corporate Debtor with respect to monetary transactions between the parties. However, in an attempt to reconcile the accounts and resolve the disputes, the Corporate Debtor held a meeting with the proprietor of the Operational Creditor (namely Nitin Dhawan) on 2nd March, 2019 whereby the Operational Creditor was made clear that the payments to the tune of Rs. 14,17,000/- were made to the employees of the Operational Creditor. In the said meeting, the said proprietor of the Operational Creditor had also agreed to provide the entire ledger books and bank statements with respect to the monetary transactions between the parties. Since, the Operational Creditor again failed to provide the ledger account and bank statements, the Corporate Debtor decided to suspend the services of the Operational Creditor with immediate effect.
5. It is also stated by the learned counsel for Appellant that the Corporate Debtor addressed an email dated 5th March, 2019 thereby informing the Operational Creditor regarding the suspension of its services by the Corporate Debtor with immediate effect for the following reasons:
 - i. Non-professional attitude.
 - ii. Mala fide intentions in pursuing the business.
 - iii. Failure to send ledger books and bank statements to the Corporate Debtor.

6. It is also stated on behalf of the Appellant that by way of the said email dated 5th March, 2019, the Corporate Debtor had informed the Operational Creditor that Operational Creditor had received cheque payments amounting to Rs. 14,17,000/- from the Corporate Debtor for which receipts had not been received by the Corporate Debtor. On 6th March, 2019 the Corporate Debtor addressed a Legal Notice to the Operational Creditor thereby seeking the ledger books and bank statements with respect to the monetary transactions between the parties.
7. It is submitted by the learned counsel for the Appellant that during the course of the business, the Corporate Debtor had issued certain blank un-dated cheques to the Operational Creditor as security, a practice that is prevalent in business to secure debts. The Operational Creditor, acting with mala fide intention presented the cheques after filling in amounts not legally recoverable by it. The said cheques were dishonoured for 'insufficient funds' in the Corporate Debtor's bank account on 22nd February, 2019. The Corporate Debtor was not expecting the cheques to be deposited and therefore the arrangement to keep sufficient balance in the account was not made by it. Since, the alleged principal amount of Rs. 14,59,308/- had already been paid to the Operational Creditor, the deposit of cheques amounting to Rs. 4,01,049/- by the Operational Creditor was mala fide and erroneous.
8. It is further submitted on behalf of the Appellant that the Operational Creditor did not send any notice under section 138 of the Negotiable Instrument Act, 1881 after the cheques were dishonoured but waited to represent the said cheques for the second time again on 20th March, 2019. Consequently, the cheques were returned by the concerned bank with remark 'Payment Stopped by The Drawer'.
9. It is also submitted on behalf of the Appellant that the Corporate Debtor addressed a legal notice dated 28th March, 2019 to the Operational Creditor

again requesting for the ledger books and bank statement with respect to the monetary transactions between the parties. Pertinently, the Corporate Debtor, by way of the said notice had informed the Operational Creditor that an amount of 14,17,000/- was paid to the employees of the Operational Creditor for which receipts were not issued by the Operational Creditor. The content of legal notice dated 28th March, 2019 have neither been replied nor refuted by the Operational Creditor.

10. It is also submitted by the learned counsel for the Appellant that on 17th April, 2019, the Operational Creditor addressed a Legal Notice to the Corporate Debtor under section 138 & 141 of the Negotiable Instruments Act, 1881 thereby claiming an amount of Rs. 4,01,049/-. On 22nd April, 2019, the Operational Creditor issued a demand notice to the Corporate Debtor thereby raising a demand of Rs. 18,09,541.92/- which purportedly consisted of principal default amount of Rs. 14,59,308/- and interest of Rs. 3,50,233.02/-. On 2nd May, 2019 the Corporate Debtor replied to Legal Notice dated 17th April, 2019 thereby clearly stating that the Corporate Debtor had issued the cheques as security and hence the Operational Creditor ought not to have presented it to the bank. Further, by way of the said Reply the Corporate Debtor called upon the Operational Creditor to return the said cheque. On 16th May, 2019, the Corporate Debtor replied to the Demand notice dated 22nd April, 2019 sent by the Operational Creditor thereby again informing the Operational Creditor that an amount of Rs, 14,17,000/- was paid to the employees of the Operational Creditor and the receipt against such payments have not been issued by the Operational Creditor.

11. Learned Counsel for the Appellant further submitted that on 19th June, 2019 thereby acknowledging the receipt of the amount of Rs. 14,17,000/- from the Corporate Debtor and stating for the first time that the said amount was paid by the Corporate Debtor to the Operational Creditor's employees

towards the out of pocket expenses. The admission of the Operational Creditor with regard to payment of unpaid Operational debt is recorded in the impugned order as follows:

“7. The Corporate Debtor contended that they have made payment to the extent of Rs. 14,17,000/- to four persons who are employees of the Petitioner, and the Petitioner failed to account for the same whereas the Petitioner refutes the same, saying that those payments were towards the out of pocket expenses incurred during the process of customs clearing of Corporate Debtor’s goods.”

12. It is contended on behalf of the Appellant that the Operational Creditor had not adduced in support of its contention that the payment of Rs, 14,17,000/- was made towards the out of pocket expenses. In fact, the out of pocket expenses actually incurred by the Operational Creditor are mentioned in the invoices under the heading of ‘Non-receipt Charges’ and hence there could not have been any other amount towards out of pocket expenses that is payable by the Appellant to the Operational Creditor apart from what is mentioned in the invoices. Notably, the repeated requests may by the Appellant to the Operational Creditor, for the ledger books, fell to deaf ears. Thus, the repayment of the principal amount can be clearly inferred from the Operational Creditor’s own admission and thus the claim of principal amount of Rs. 14,59,308/- is erroneous and no interest is liable to be paid there upon.
13. It is further contended by the learned counsel for the Appellant that the Adjudicating Authority has clearly ignored the fact of existence of a dispute between the parties prior to the demand notice dated 22nd April, 2019 issued by the Operational Creditor under section 8 of I&B Code. The communication exchanged between the parties prior to the demand notice are as follows:
 - i. E-mail dated 5th March, 2019 addressed by the Appellant to the Operational Creditor indicating suspension of work and payment of an amount of Rs. 14,17,000/-.

- ii. Legal Notice dated 6th March, 2019 addressed by lawyer of the Appellant to the Operational Creditor requesting reconciliation of accounts.
- iii. Legal Notice dated 28th March, 2019 addressed by the lawyer of the Appellant to the Respondent No. 1 indicating inter alia wrongful presentation of cheques by Respondent No. 1 since dues already paid and work suspended.
- iv. Legal Notice dated 28th March addressed by lawyer of the Appellant to the employees of the Operational Creditors requesting treatment of amount of Rs. 14,17,000/- deposited in their accounts.
- v. Legal Notice dated 17th April, 2019 addressed by the Operational Creditor u/s 138 of Negotiable Instrument Act, 1881 to the Appellant.

14. It is further contended by the learned counsel of the Appellant that the said communications would make it abundantly clear that the disputes pertaining to the alleged default in payment of Rs. 14,59,308/- existed prior to the issuance of demand notice. The aforementioned documents in-fact form a part of the application filled by the Operational Creditor before the Adjudicating Authority.

15. It is also contended by the learned counsel of the Appellant that the Adjudicating Authority have erred in initiating the CIRP of the Corporate Debtor without considering the fact that the unpaid Operational Debt has been admittedly paid. Also, claim of the Operational Creditor to the extent of Rs. 8,68,478/- raised in the Company Petition before the Adjudicating Authority is ex-facie barred by limitation since the Operational Creditor has admitted that the dates of default of the said amount are prior to three years preceding the date of institution of Company Petition i.e. on 24th June, 2019.

16. It is also contended that the Adjudicating Authority has failed to consider that the out of pocket expenses actually incurred by the Operational Creditor is mentioned in the invoice itself under the heading non-receipt charges,

hence there could not be any other amount towards out of pocket expenses that is payable by the Corporate Debtor. The Adjudicating Authority failed to appreciate that the onus of proving that the amount of Rs. 14,17,000/- paid by the Corporate Debtor to the employees of the Operational Creditor was towards out of pocket expenses was totally on the Operational Creditor.

17. Per contra, learned counsel for Operational Creditor submitted at the outset that the answering respondent had been providing custom clearing services to the Corporate Debtor since 2015. The Operational Creditor issued bills as well as tax invoices with respect to the services provided to the Corporate Debtor. The Operational Creditor has been maintaining the running ledger account in due course of its business transactions executed with the Corporate Debtor, whereby the Operational Creditor had mentioned and recorded all the financial transactions and the Books of Accounts of the Operational Creditor maintained in the course of business. As of 29th January, 2019, the total outstanding amount due and payable by the Corporate Debtor to the Operational Creditor for the services of the Operational Creditor was Rs. 18,09,541/-, Principal Amount Rs. 14,59,308/- and Rs. 3,50,233.92/- as interest.

18. It was further submitted by the learned counsel for Operational Creditor that in order to partly liquidate the due amount payable to the Operational Creditor, the Corporate Debt issued cheques in favour of Operational Creditor with the assurance that as and when cheques will be presented by the Operational Creditor, the same shall be honoured. However, when Operational Creditor presented the said cheques in order to be encashed, the same got dishonoured on 22nd February, 2019 with the remark "FUNDS INSUFFICIENT." Thereafter, the son of the proprietor of Operational Creditor had a meeting with the Corporate Debtor on 02nd March, 2019 who assured the Operational Creditor that the cheques should be deposited again on 20th March, 2019.

19. It is also submitted that thereafter, the cheques were again deposited on 20th March, 2019, however, much to their shock, the same were dishonoured with remarks “PAYMENT STOPPED BY DRAWER”. As the undisputed dues of the Operational Creditor were not cleared by the Corporate Debtor, the Operational Creditor issued a demand notice dated 22nd April, 2019 to the Corporate Debtor, calling upon to clear the dues of the Operational Creditor with interest.
20. It is also submitted by the learned counsel for the Operational Creditor that thereafter, the Operational Creditor filed a petition for insolvency before the Adjudicating Authority wherein the Corporate Debtor did not dispute the invoices and the due amount, but alleged that it had made a payment of Rs. 14,17,000/- to the employees of the Operational Creditor and therefore, the Operational Creditor ought to have given credit to the Corporate Debtor for the same towards the outstanding invoices. It was also alleged that the Operational Creditor ought to have given credit to the Corporate Debtor for the same towards outstanding invoices. It was further alleged that in their reply that the invoice dated 22nd August, 2015 as well as 19th September, 2016 were not raised on the Corporate Debtor but on a third party under the name of one New Decent Footwear Industries which were not payable by the Corporate Debtor. It was contended by the learned counsel that all such pleas taken by the Corporate Debtor were false, devoid of any merit and an afterthought.
21. It was contended by the Learned Counsel that the answering respondent in their Rejoinder to the reply of the Corporate Debtor submitted that the invoices raised by the Operational Creditor inter alia had the following terms at the foot of the invoices: viz: “all cheques/demand draft in payment of the bill should be drawn in favour of “M/S Wishwa Naveen Traders” on Mumbai Branch only.” Therefore, it is submitted that there was no question of the Corporate Debtor making payments to the employees of Operational

Creditor and claiming credits for the same. In addition, in the alleged email dated 05th March, 2019, it has not been mentioned anywhere by the Corporate Debtor that the said amount of Rs. 14,17,000/- has been paid to the employees of Operational Creditor.

22.It was further contended on behalf of the Operational Creditor that in the reply sent by the Corporate Debtor dated 02nd May, 2019 to the notice dated 17th April, 2019, the Corporate Debtor had stated that the sum of Rs. 14,17,000/- was paid to the employees of the Operational Creditor in their personal capacity and on the request of the Operational Creditor. However, it is submitted by the learned counsel that neither the Corporate Debtor could show any such request from the Operational Creditor to this effect nor could they show any proof of payment.

23.It was further submitted that it is important to note that the Corporate Debtor had acknowledged that the said alleged payments to the employees were given in their personal capacity and not on account of Operational Creditor. Thus, the alleged defence and the so-called dispute was a spurious defence which is mere bluster.

24.It was further submitted that each of the invoices raised by the Operational Creditor on the Corporate Debtor inter alia had the following terms at the foot of the invoice viz: "Interest at 24% will be charged for delayed payments'. Therefore, it was submitted that the Corporate Debtor is liable to pay the interest of 24% to the Operational Creditor on the amount of default.

25.It was further contended by the learned counsel for Operational Creditor that there were no instructions from Operational Creditor to make payments towards invoices to a third party or even to the employees of Operational Creditor. The Corporate Debtor failed to produce any written instructions from Operational Creditor to make payments towards the outstanding invoices to the employees. In the email dated 5th March, 2019, the Corporate Debtor acknowledged that they do not have receipts for the said alleged

payments which they previously claimed to have been made to the said employees. The Corporate Debtor has not produced any instructions in writing, wherein the Operational Creditor is said to have mentioned that the payments need to be made to the employees.

26. It was further contended by the learned counsel for Operational Creditor that the answering respondent has delivered the Ledger Account from time to time and the Ledger Account is duly acknowledged by one Mr. Arun Khanna, one of the directors of the Corporate Debtor in August, 2018, which again amounts to an admission on the part of the Corporate Debtor towards the liability in respect of the outstanding payable by them to Operational Creditor. The contents of the confirmation of accounts have not been disputed by the Corporate Debtor. In any event, the Corporate Debtor had not disputed the invoices, thus, based on the invoices itself, it is evident that the Corporate Debtor is in default to make payment to the Operational Creditor. It was thus denied that the Operational Creditor has not provided the ledger to reconcile the accounts as the ledger confirmation provided by the Operational Creditor has the acknowledgement and signatures of the Corporate Debtor.

27. Having heard to the parties and after perusal of the records the Adjudicating Authority has given the findings that there is a debt and default on the part of the Corporate Debtor. The Adjudicating Authority have put its reliance on the Judgment of the Hon'ble Supreme Court in the case of "Mobilox Innovation Ltd. v/s. Kirusa Software (P) Limited-2017 (SCC Online SC 1154)" held as below: -

"40 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.

28. The Adjudicating Authority having relied on this paragraph of the aforementioned Judgement and had made the following observation in para 12 of the impugned order which is reproduced as below: -

“12. On hearing the arguments of either side and on the going through the pleading that the dispute raised by the Corporate Debtor are not the real disputes and in fact spurious and they doesn't fall under the ambit of section 5(6) of the code, which provides as below:

“Disputes 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.

29. We have gone through the records and observed that there were communications made by the Corporate Debtor to the Operational Creditor requesting for the account ledgers and also asserts that the Operational Creditor have received an amount of Rs. 14,17,000/- through cheque payments, for agency charges for which no receipt has been received by the Corporate Debtor. The Corporate Debtor through its email dated 5th March, 2019 also raised a dispute that in spite of hundreds of reminders were sent to the Operational Creditor, the Corporate Debtor have not received any details in last three years in relation to sending account ledger. The Corporate Debtor not just raised such dispute but also suspended the services of the Operational Creditor stating the grounds of non-professional attitude and malafide intentions in pursuing the business.

30. Apart from the aforementioned email the Appellant have also sent two legal notices to the Operational Creditor dated 6th march, 2019 and 28th march, 2019. The paragraphs reproduced below has been taken from the legal notice dated 6th March, 2019 which stated as follows:

This Notice is being issued for the reasons as under:

Our Clients have informed us that the relationship between you and our client is of more than 7 years and during all the years our client have been availing services from you and payment was made to you at all the times on regular intervals including payment being made in the personal accounts of your key employees i.e. Mr. Shailendra Yadav (Rs. 8,81,000/-), Mr. Manoj Prajapati (Rs. 1,69,000/-), Mr. Raghav (Rs. 3,27,000/-) and yourself (Rs. 40,000/-) aggregating to Rs. 14,17,000/- (Rupees Fourteen Lakhs Seventeen Thousand Only). Please note the laws of India.

Our Client have informed us to state that the reason payments of Rs. 14,17,000/- (Rupees Fourteen Lakhs Seventeen Thousand Only) was made to your key employees i.e. Mr. Shailendra Yadav, Mr. Manoj Prajapati and yourself was on your request and there is no other need to make the payment to your key employees i.e. Mr. Shailendra Yadav, Mr. Manoj Prajapati and yourself and hence, we hope that you might have treated that payment as payment against your invoices and business entity and accordingly have been treated in your Ledger as per Accounting principles applicable all over.

Under the circumstances, we as instructed by our Clients, hereby call upon you to share the Ledger and also the treatment made to the payment of Rs. 14,17,000/- (Rupees Fourteen Lakhs Seventeen Thousand Only) in your books which was made to your key employees i.e. Mr. Shailendra Yadav, Mr. Manoj Prajapati and yourself within 3 days so that there are no accounting errors at the time of filling Annual Return.

31. Once again, on 28th March, 2019 another legal notice was sent to the Operational Debtor, indicating inter alia wrongful presentation of cheques by Operational Creditor since dues were already paid and work was suspended. The said legal notice also asserts to the employees of the Operational Creditors requesting treatment of amount of Rs. 14,17,000/- deposited in their accounts. The below paragraphs reproduced below has been taken from the legal notice dated 28th March, 2019 which states as follows:

“Your attention is invited to the fact that on you no. 4 who is the owner of M/s Wihswanaveen Traders, business firm, request, our clients made the payment to you in your respective personal accounts, detail as under:-

- 1) Mr. Shailendra Yadav (Rs. 8,81,000/-)
- 2) Mr. Manoj Prajapati (Rs. 1,69,000/-)
- 3) Mr. Raghav Malhotra (Rs. 3,27,000/-)
- 4) Mr. Nitin Dhawan (Rs. 40,000/-)

Aggregating to Rs. 14,17,000/- (Rupees Fourteen Lakhs Seventeen Thousand Only).

“You are further being informed that your act of not showing in your books of the above money towards M/s Wishwanaveen traders also amount to criminal act such as misrepresentation, fraud, misconduct, criminal breach of trust under the provisions of Indian penal Code and our Clients are very much determined to take this matter to Megistrate Court for your such acts, which our Clients will assumed of doing so, if there is no reply from your end within 7 days from the date of this notice, and the punishment under the above provisions does call for more than 2 years imprisonment.”

32. The Operational Creditor also sent a legal notice dated 17th April, 2019 under section 138 & 141 of the Negotiable Instrument Act, 1881, after the Cheques issued by the Corporate Debtor being returned dishonoured. We Observed that the cheques were first returned dishonoured on 22nd February, 2019 due to “Insufficient Funds” and thereafter when the Operational Creditor presented the cheques again for clearance on 20th March, 2019, cheques again returned dishonoured with remark ‘Payment Stopped by The Drawer’. This considered course of action taken by the Corporate Debtor is indicative of existence of disputes over payments between the parties. All these email Communications and the legal notices sent by the parties to each other had occurred prior to the issuance of demand notice under section 8 by the Operational Creditor. These sequence of events showed that there was a

dispute in existence prior to the issuance of demand notice by the Operational Creditor.

33. The Adjudicating Authority have put its reliance of the aforementioned Judgment of Hon'ble Supreme Court and concluded that the disputes raised by the Corporate Debtor are not the real dispute and also does not falls within the ambit of Section 5(6) of I&B Code. However, the Adjudicating Authority have not reasonably explained the rationality for not considering this as a real dispute. Also, Section 5(6) of the I&B Code is an inclusive provision and does not confine the Adjudicating Authority from considering the existence of a dispute from a broader angle.
34. The intent of Legislature is very vital for interpreting any law, which can be well deduced from the words of Section 8(2)(a) of I&B Code 'existence of a dispute if any'. It can be easily inferred that dispute shall not be limited to instances specified in the definition as provided under Section 5(6), as it has far arms, apart from pending Suit or Arbitration as provided Under Section 5(6) of IBC. The IBC is not a substitute for a recovery forum.
35. Section 9 of the IBC makes it very clear for the Adjudicating Authority to admit the application "if no notice of dispute is received by the Operational Creditor and there is no record of the dispute in the information utility." Whereas, on the other hand, Section 9 also states that the Adjudicating Authority to reject the application so filed "if the Operational Creditor has received a notice of a dispute from the Corporate Debtor".
36. We also want to clarify that the Operational Creditor cannot take recourse that the payment if any made to the employees were in their personal capacity and not on account of Operational Creditor. As it is a well settled principle under Law of Agency that "where an employee does some wrongful act, within the course of his employment, then for that act the employer's liability shall arise. The employee would be liable for the wrongful act he has done, whereas the employer would be liable vicariously

for the act due to the principal-agent relationship between the two. In that situation, the aggrieved person is at the choice whether to sue principal or agent or both. Therefore, fraud committed by any of the employees of the Operational Creditor cannot be said to be done in their personal capacity.

37. From the bare perusal of the impugned order, in Para 7 it is clear that the Operational Creditor has admitted before the Adjudicating Authority that the Corporate Debtor have made the payment of Rs. 14,17,000/- (Rupees Fourteen Lakhs Seventeen Thousand Only), saying that those payments were towards the out of pocket expenses incurred during the process of custom clearing of Corporate Debtor's goods. The onus to prove whether the payment was for out of pocket expenses or for the main services lies on the Operational Creditor. However, the Operational Creditor have considerably failed to prove whether such payment was received for the out of pocket expenses or not as there were no written agreement stating such expenses to be paid by the Corporate Debtor.

38. From the above we can conclude that since there was a dispute existing prior to the issuance of Section 8 notice, the insolvency provisions cannot be invoked. However, whether the amount of Rs. 14,17,000/- was received by the Operational Creditor or not and whether the cheques which were returned dishonoured were issued by the Corporate Debtor as a security or not and whether the authority was given to the Corporate Debtor to make the payments to the personal accounts of the employees of the Operational Debtor are disputed questions of law and facts and shall be decided by the appropriate forum as the Adjudicating Authority cannot substitute the recovery forum.

39. For the reasons aforesaid, we disagree with the observation made by the Adjudicating Authority and set aside the impugned order dated 13th February, 2020 passed in C.P. No. 2431/(I&BP)/2019 and the Appeal is

allowed. Hence the Corporate Insolvency initiated against the Corporate Debtor is set aside.

40. We also direct the Adjudicating Authority to pass the necessary order for compensating the Insolvency Resolution Professional for his remuneration or expenses incurred by him while he was working in such capacity. No Order as to cost.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

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