2021 INSC 394

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1137 OF 2019

KAY BOUVET ENGINEERING LTD. ...APPELLANT(S)

VERSUS

OVERSEAS INFRASTRUCTURE ALLIANCE (INDIA) PRIVATE LIMITED ...RESPONDENT(S)

J U D G M E N T

B.R. GAVAI, J.

1. This appeal challenges the judgment and order passed by the National Company Law Appellate Tribunal (hereinafter referred to as the "NCLAT") dated 21st December 2018, thereby allowing the appeal filed by respondent herein. The respondent herein had preferred an appeal being Company Appeal (AT) (Insolvency) No. 582 of 2018, challenging the order passed by the National Company Law Tribunal (hereinafter referred to as

the "NCLT") dated 26th July 2018, thereby rejecting the petition being C.P. (IB)-20(MB)/2018, filed by the respondent herein under Section 9 of the Insolvency and Bankruptcy Code (hereinafter referred to as the "IBC"). By the impugned order dated 21st December 2018, the NCLAT while allowing the appeal, has remitted back the matter to the NCLT with a direction to admit the petition filed by the respondent herein under Section 9 of the IBC after giving limited notice to the appellant herein so as to enable it to settle the claim.

2. The facts in brief giving rise to the present appeal are as under:-

The Government of India extended Dollar Line of Credit (hereinafter referred to as the "LoC") of USD 150 Million to the Republic of Sudan through Exim Bank of India (hereinafter referred to as the "Exim Bank") for carrying out Mashkour Sugar Project in Sudan. This was in two tranches of USD 25 Million and USD 125 Million. On 26th January 2009, the first tranche of USD 25 Million was executed between Republic of

Sudan and Exim Bank for financing the Mashkour Sugar Project. On 11th October 2009, Mashkour Sugar Company Limited, Sudan (hereinafter referred to as the "Mashkour") entered into an agreement with the respondent-Overseas Infrastructure Alliance (India) Private Limited (hereinafter referred to as the "Overseas") for USD 149,975,000 to be financed by Exim Bank. As per the said agreement, Mashkour was to nominate a sub-contractor. A subsequent agreement was entered into on 14th April 2010, between Mashkour and Overseas for payment of USD 25 Million to Overseas towards "design and engineering package and plant civil package including site mobilization". In response to the invitation by Mashkour, the appellant-Kay Bouvet Engineering Limited (hereinafter referred to as the "Kay Bouvet") submitted its bid as a sub-contractor for supply, erection and completion of the Sugar Plant at Sudan, which was accepted by Mashkour. On 18th December 2010, a Memorandum of Understanding (hereinafter referred to as the "MoU") was entered into between Mashkour, Overseas and Kay Bouvet at Khartoum, Sudan. The

said MoU provided that the contract has to be governed by the laws of Sudan. The same MoU also defined roles and responsibilities of each of the parties. On the same date, a Tripartite Agreement was also executed between all the three parties vide which, Kay Bouvet was appointed as a sub-contractor for executing the whole work of designing, engineering, supply, installation, erection, testing and completion of Factory Plant for Mashkour Sugar Company for an amount of USD 106.200 Million.

3. On 29th March 2011, Overseas vide an e-mail sent to Mashkour confirmed that under the Tripartite Agreement, Mashkour was to release payment of first tranche of LoC to Overseas and the Overseas in turn was to release payment of USD 10.62 Million to Kay Bouvet on submission of Advance Bank Guarantee and Performance Bank Guarantee by Kay Bouvet to Mashkour. Vide letter dated 21st April 2011, Exim Bank informed Overseas that an amount of Rs.46.58 Crore had been remitted to its bank account. Overseas vide letter of the

same date confirmed to Mashkour about receipt of funds and further informed that it will release USD 10.62 Million to Kay Bouvet on submission of requisite bank guarantees. On 28th July 2011, Kay Bouvet informed Overseas that it had submitted necessary Guarantees to Mashkour. On the advice of Mashkour, Overseas paid an amount of Rs.47,12,10,000/- to Kay Bouvet. There were certain disputes with regard to exchange rate, on account of which, Kay Bouvet informed Mashkour that it ought to have been paid more amount in Indian Rupees.

4. After execution of second tranche of USD 125 Million on 24th July 2013, between Republic of Sudan and Exim Bank, an agreement was executed between Mashkour and Overseas on 9th February 2014, for balance amount of USD 124,975,000 for financing the final part of the Sugar Factory Project. On 30th October 2014, Overseas informed Exim Bank to transfer partial amount of USD 95,580,000 in favour of Kay Bouvet from the funds to be received under the LoC in relation to Sugar Project.

5. It appears that in the meantime, there was certain exchange of communications between the Ministry of External Affairs, Government of India (hereinafter referred to as the "GoI") and the Sudan Government. In pursuance to such exchange of communications, on 17th April 2017, the Ambassador of Sudan to India addressed to the Minister of State of External Affairs, GoI and advised to terminate the contract of Mashkour with Overseas and in turn to appoint Kay Bouvet as a Contractor. In response thereto, the Ministry of External Affairs informed the Ambassador of Sudan that it will be necessary to execute an agreement with Kay Bouvet in order to enable Exim Bank to release funds to Kay Bouvet. Vide communication dated 25th April 2017, the Ambassador of Sudan informed Mashkour to enter an agreement with Kay Bouvet as a direct contract for unutilized portion of GoI's LoC for USD 150 Million. It was also informed that the advance amount of Rs.47,12,10,000/- received by Kay Bouvet from the first tranche of USD 25 Million was to be adjusted against supplies to be made to Mashkour for completing the project.

6. On 15th June 2017, Mashkour terminated the contract with Overseas for failure on its part to perform the duties. Overseas filed a Civil Suit being No. 785 of 2017 before the High Court of Bombay seeking specific performance of contract and an order of injunction from appointing Kay Bouvet as a Contractor in the Mashkour Project. Notice of Motion No. 1314 of 2017 was also moved for injunction. Vide order dated 27th June 2017, prayer for ad interim relief made by Overseas came to be rejected by the Bombay High Court.

7. Vide communication dated 5th July 2017, Mashkour informed Kay Bouvet about the developments and termination of contract and further informed that the advance payment of Rs.47,12,10,000/- received by Kay Bouvet from Overseas, was to be adjusted against supplies to be made to Mashkour for completion of the Project. It was further informed that Overseas will not claim back the said amount from Kay Bouvet. Accordingly, on the same day an agreement came to be executed between Mashkour and Kay Bouvet. The same was

informed by the Ambassador of Sudan to the Ministry of External Affairs on 11th July 2017.

8. A Demand Notice under Section 8 of the IBC was served upon Kay Bouvet by Overseas alleging default under the Tripartite Agreement and claiming an amount of USD 10.62 Million, paid by Overseas to Kay Bouvet. Kay Bouvet vide communication dated 6th December 2017, denied the claim of Overseas. It was specifically pointed out that the amount which was paid to Kay Bouvet by Overseas, was received on behalf of Mashkour and it was only routed through Overseas and the same stands adjusted under new agreement. On 27th December 2017, Overseas claiming itself to be an Operational Creditor, filed a petition under Section 9 of the IBC before NCLT, Mumbai being CP (IB) No.20(MB)/2018. Vide order dated 26th July 2018, the NCLT dismissed the petition. Overseas carried the same in an appeal being Company Appeal (AT) (Insolvency) No. 582 of 2018 before the NCLAT. By the impugned order dated 21st December 2018, NCLAT allowed the

appeal as aforesaid. Being aggrieved thereby, the appellant-Kay Bouvet has approached this Court.

9. Shri Jayant Bhushan, learned Senior Counsel appearing on behalf of the appellant-Kay Bouvet submitted that by no stretch of imagination, the claim made by Overseas could be considered to be an "Operational Debt" and as such, Overseas cannot be an "Operational Creditor", enabling it to invoke the jurisdiction of NCLT under Section 9 of the IBC. Shri Bhushan further submitted that Kay Bouvet could not have moved as a Financial Creditor and as such, by stretching the definition of "Operational Creditor", though it does not fit in the same, has filed the proceedings under Section 9 of the IBC. The learned Senior Counsel submitted that no amount is receivable by Overseas from Kay Bouvet in respect of the provisions of goods or services, including employment or a debt in respect of the payment of dues and as such, it will not fit in the definition of "Operational Debt" as provided under sub-section (21) of Section 5 of the IBC. The learned Senior Counsel submitted

that by the same analogy, Overseas would also not fall under the definition of “Operational Creditor”.

10. Shri Bhushan further submitted that as a matter of fact, the payment which was made to Kay Bouvet by Overseas, was from the amount received by it from Mashkour. He submitted that the material placed on record would clearly fortify this position. The learned Senior Counsel submitted that, in any case, perusal of Clause 14.1 of the Tripartite Agreement would clearly show that the amount so paid, was paid by Mashkour to Overseas. It is submitted that in any case, the material placed on record and specifically the Demand Notice and reply thereto, clearly showed that there was an “existence of dispute” and as such, the NCLT had rightly dismissed the petition. It is submitted that, however, the NCLAT has misconstrued the provisions and allowed the appeal and directed admission of Section 9 petition. It is submitted that the jurisdiction of the adjudicating authorities under IBC is limited and it can

adjudicate only on the limited areas that are delineated in the Statute.

11. Shri C.A. Sundaram, learned Senior Counsel appearing for respondent–Overseas, on the contrary, asserts that the amount which was paid to Kay Bouvet, was the amount paid from the funds of Overseas and not from Mashkour. He submitted that perusal of material placed on record would reveal that Kay Bouvet has admitted of receiving the amount from Overseas and once the party admits of any claim, the same would come in the definition of "Operational Debt" as defined under sub-section (21) of Section 5 of the IBC and enable the party to whom admission is made to file the proceedings under Section 9 of the IBC being an "Operational Creditor". The learned Senior Counsel therefore submitted that NCLAT rightly considered the provisions and allowed the appeal of Overseas and directed admission of Section 9 petition. He therefore submitted that the present appeal deserves to be dismissed.

12. Though, elaborate submissions have been made on behalf of both the parties, we are of the considered view that the present appeal can be decided on a short ground without going into the other aspects of the matter. It will be relevant to refer to Sections 8 and 9 of the IBC:-

> "**8. Insolvency resolution by operational creditor**.—(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
>
> (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—
>
> (*a*) existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
>
> (*b*) the [payment] of unpaid operational debt —
>
> (*i*) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
>
> (*ii*) by sending an attested copy of record that the operational creditor has

encashed a cheque issued by the corporate debtor.

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

9. Application for initiation of corporate insolvency resolution process by operational creditor.—(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(*a*) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(*b*) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(*c*) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is

no payment of an unpaid operational debt [by the corporate debtor, if available;]

[(*d*) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and]

[(*e*) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

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

(*i*) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(*a*) the application made under sub-section (2) is complete;

(*b*) there is no [payment] of the unpaid operational debt;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(*e*) there is no disciplinary proceeding pending against any resolution

professional proposed under sub-section (4), if any.

(*ii*) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(*a*) the application made under sub-section (2) is incomplete;

(*b*) there has been [payment] of the unpaid operational debt;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(*d*) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(*e*) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (*a*) of clause (*ii*) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

13. Perusal of the aforesaid provisions would reveal that an "Operational Creditor", on the occurrence of default, is required to deliver a "Demand Notice" of unpaid "Operational Debt" or a copy of invoice, demanding payment of amount involved in the default to the "Corporate Debtor" in such form and manner as may be prescribed. Within 10 days of the receipt of such "Demand Notice" or copy of invoice, the "Corporate Debtor" is required to either bring to the notice of the "Operational Creditor" "existence of a dispute" or to make the payment of unpaid "Operational Debt" in the manner as may be prescribed. Thereafter, as per the provisions of Section 9 of the IBC, after the expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8 and if the "Operational Creditor" does not receive payment from the "Corporate Debtor" or notice of the dispute under sub-section (2) of Section 8 of the IBC, the "Operational Creditor" is entitled to file an application before the adjudicating authority for initiating the Corporate Insolvency Resolution Process.

14. The issue is no more *res integra*. It will be relevant to refer to paragraph 38 of the judgment of this Court in the case of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited***[1]**:-**

> **"38.** It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(*a*) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years,

1 **(2018) 1 SCC 353**

> such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties."

15. It could thus be seen that this Court has held that one of the objects of the IBC qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It has been held that it is for this reason that it is enough that a dispute exists between the parties.

16. It will further be apposite to refer to the following observations of this Court in ***Mobilox Innovations Private***

Limited (supra), wherein this Court has considered the terms "existence", "genuine dispute" and "genuine claim" and various authorities construing the said terms:-

> **"45.** The expression "existence" has been understood as follows:
>
> "*Shorter Oxford English Dictionary* gives the following meaning of the word "**existence**":
>
> (*a*) Reality, as opp. to appearance.
>
> (*b*) The fact or state of existing; actual possession of being. Continued being as a living creature, life, esp. under adverse conditions.
>
> Something that exists; an entity, a being. All that exists. (P. 894, *Oxford English Dictionary*)"

> **46.** Two extremely instructive judgments, one of the Australian High Court, and the other of the Chancery Division in the UK, throw a great deal of light on the expression "existence of a dispute" contained in Section 8(2)(*a*) of the Code. The Australian judgment is reported as *Spencer Constructions Pty Ltd.* v. *G & M Aldridge Pty Ltd.* [*Spencer Constructions Pty Ltd.* v. *G & M*

Aldridge Pty Ltd., 1997 FCA 681 (Aust)] The Australian High Court had to construe Section 459-H of the Corporations Law, which read as under:

"(1)***

(*a*) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;

(*b*)***"

47. The expression "genuine dispute" was then held to mean the following:

"Finn, J. was content to adopt the explanation of "genuine dispute" given by McLelland, C.J. in Eq in *Eyota Pty Ltd.* v. *Hanave Pty Ltd.* [*Eyota Pty Ltd.* v. *Hanave Pty Ltd.*, (1994) 12 ACSR 785 (Aust)] ACSR at p. 787 where his Honour said:

'In my opinion [the] expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This

> does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently and probable in itself, it may be not having 'sufficient prima facie plausibility to merit further investigation as to [its] truth' (cf *Eng Mee Yong* v. *Letchumanan* [*Eng Mee Yong* v. *Letchumanan*, 1980 AC 331 : (1979) 3 WLR 373 (PC)] AC at p. 341G), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence': cf *South Australia* v. *Wall* [*South Australia* v. *Wall*, (1980) 24 SASR 189 (Aust)] SASR at p. 194.'

His Honour also referred to the judgment of Lindgren, J. in *Rohalo Pharmaceutical Pty Ltd.* [*Rohalo Pharmaceutical Pty Ltd.* v. *RP Scherer*, (1994) 15 ACSR 347 (Aust)] where, at p. 353, his Honour said:

> 'The provisions [of Sections 459-H(1) and (5)] assume that the dispute and offsetting claim have an "objective" existence the genuineness of which is capable of being assessed. The word "genuine" is included [in "genuine dispute"] to sound a note of warning that the propounding of serious disputes and

> claims is to be expected but must be excluded from consideration.'

There have been numerous decisions of Single Judges in this Court and in State Supreme Courts which have analysed, in different ways, the approach a court should take in determining whether there is "a genuine dispute" for the purposes of Section 459-H of the Corporations Law. What is clear is that in considering applications to set aside a statutory demand, a court will not determine contested issues of fact or law which have a significant or substantial basis. One finds formulations such as:

> '... at least in most cases, it is not expected that the court will embark upon any extended enquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.'

See *Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia* [*Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia*, (1993) 11 ACSR 362 (Aust)] ACSR at pp. 366-67, followed by Ryan, J. in *Moyall Investments Services Pty Ltd.* v. *White* [*Moyall Investments Services Pty Ltd.* v. *White*, (1993) 12 ACSR 320 (Aust)] ACSR at p. 324.

Another formulation has been expressed as follows:

> 'It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt.…'

See *John Holland Construction and Engg. Pty Ltd.* v. *Kilpatrick Green Pty Ltd.* [*John Holland Construction and Engg. Pty Ltd.* v. *Kilpatrick Green Pty Ltd.*, (1994) 12 ACLC 716 (Aust)] ACLC at p. 718, followed by Northrop, J. in *Aquatown Pty Ltd.* v. *Holder Stroud Pty Ltd.* [*Aquatown Pty Ltd.* v. *Holder Stroud Pty Ltd.*, Federal Court of Australia, 25-6-1996, Unreported]

In *Morris Catering (Australia) Pty Ltd.* [*Morris Catering (Australia) Pty Ltd., In re*, (1993) 11 ACSR 601 (Aust)] ACSR at p. 605, Thomas, J. said:

> 'There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of

> the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".
>
> It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.
>
> The essential task is relatively simple — to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).'

In *Scanhill Pty Ltd.* v. *Century 21 Australasia Pty Ltd.* [*Scanhill Pty Ltd.* v. *Century 21 Australasia Pty Ltd.*, (1993) 12 ACSR 341 (Aust)] ACSR at p. 357 Beazley, J. said:

> '… the test to be applied for the purposes of Section 459-H is whether the court is satisfied that there is a serious question to be tried that the applicant has an offsetting claim.'

In *Chadwick Industries (South Coast) Pty Ltd.* v. *Condensing Vaporisers Pty Ltd.* [*Chadwick*

Industries (South Coast) Pty Ltd. v. *Condensing Vaporisers Pty Ltd.*, (1994) 13 ACSR 37 (Aust)] ACSR at p. 39, Lockhart, J. said:

> '… what appears clearly enough from all the judgments is that a standard of satisfaction which a court requires is not a particularly high one. I am for present purposes content to adopt any of the standards that are referred to in the cases.… The highest of the thresholds is probably the test enunciated by Beazley, J., though for myself I discern no inconsistency between that test and the statements in the other cases to which I have referred. However, the application of Beazley, J.'s test will vary according to the circumstances of the case.
>
> Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a "genuine dispute" in this context suggests to me that the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance.'

In *Greenwood Manor Pty Ltd.* v. *Woodlock* [*Greenwood Manor Pty Ltd.* v. *Woodlock*, (1994) 48 FCR 229 (Aust)] Northrop, J. referred to the formulations of Thomas, J. in *Morris Catering (Australia) Pty Ltd., In re* [*Morris Catering (Australia) Pty Ltd., In re*, (1993) 11 ACSR 601 (Aust)] ACLC at p. 922 and

Hayne, J. in *Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia* [*Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia*, (1993) 11 ACSR 362 (Aust)] , where he noted the dictionary definition of "genuine" as being in this context "not spurious … real or true" and concluded (at p. 234):

> 'Although it is true that the Court, on an application under Sections 459-G and 459-H is not entitled to decide a question as to whether a claim will succeed or not, it must be satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt. If it can be shown that the argument in support of the existence of a genuine dispute can have no possible basis whatsoever, in my view, it cannot be said that there is a genuine dispute. This does not involve, in itself, a determination of whether the claim will succeed or not, but it does go to the reality of the dispute, to show that it is real or true and not merely spurious'.

In our view a "genuine" dispute requires that:

> (*i*) the dispute be bona fide and truly exist in fact;
>
> (*ii*) the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

> We consider that the various formulations referred to above can be helpful in determining whether there is a genuine dispute in a particular case, so long as the formulation used does not become a substitute for the words of the statute.""

17. It is thus clear that once the "Operational Creditor" has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required 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 a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.

18. In the light of the law laid down by this Court stated hereinabove, we will have to examine the facts of the present case. We clarify that though arguments have been advanced at the Bar with regard to the questions as to whether the so-called claim made by Overseas would be considered to be an "Operational Debt" and as to whether Overseas could be considered to be an "Operational Creditor", we do not find it necessary to go into said questions, inasmuch as the present appeal can be decided only on a short question as to whether

Kay Bouvet has been in a position to make out the case of "existence of dispute" or not.

19. For considering the rival submissions, it will be appropriate to refer to the Demand Notice/Invoice dated 23rd November 2017, addressed to Kay Bouvet by Overseas:-

> "7. Due to termination of the EPC contract by Mashkour, the tripartite sub-contract also came to an automatic end by virtue of the clause 15.2 of the Particular Conditions of the said sub-contract.
>
> 8. On or about 14th July 2017, the Corporate Debtor filed its affidavit dated 14th July 2017 in the Notice of Motion (L) No. 1314 of 2017 in Suit (1) No. 382 of 2017 in reply to the said Notice of Motion (hereinafter referred to as the "said Reply"). In the said reply, the Corporate Debtor has categorically stated and admitted that Mashkour has now, in replacement of the Operational Creditor, appointed the Corporate Debtor itself as its EPC Contractor for the said Project under and the EPC Contract dated 5th July 2017. Consequently the tri-partite contract dated 18th April 2010 between Mashkour, the Corporate Debtor and the Operational Creditor stands vitiated and superseded by the fresh Contract executed between Mashkour and

Corporate Debtor. In view thereof the Corporate Debtor can no longer perform under the said tri-partite contract dated 18th April 2010 between Mashkour, the Corporate Debtor and the Operational Creditor as the same stands superseded by the fresh contract dated 5th July 2017 executed between Mashkour and the Corporate Debtor.

9. The Operational Creditor therefore states that in the light of the Corporate Debtors admission in the said reply, the Corporate Debtor is liable to refund the said Advance Amount forthwith to the Operatinal Creditor. The Operational Creditor further states that the said Advance Amount became due and payable as and by way of refund to the Operational Creditor by the Corporate Debtor on or about 5th July 2017 i.e. the date on which the Corporate Debtor was appointed as an EPC Contractor by Mashkour.

10. The Corporate Debtor has, therefore, defaulted in refunding the said Advance Amount"

20. It can thus be seen that the claim of Overseas is that in the reply filed to its Notice of Motion by Kay Bouvet, it has admitted that Mashkour has, as a replacement of Overseas,

appointed Kay Bouvet as the Contractor. As such, the Tripartite Agreement dated 18th December 2010, stands vitiated and superseded. As such, Kay Bouvet cannot perform under the said Tripartite Agreement. According to Overseas, therefore, in view of the admission in the reply, Kay Bouvet is liable to refund the advance amount forthwith.

21. It will be relevant to refer to the Reply dated 6th December 2017, addressed by Kay Bouvet to Overseas as per the provisions of Clause (a) of sub-section (2) of Section 8 of the IBC:-

> "3. We state that Key Bouvet expressly denied the claim of 10.62 million of equivalent to Rs.47,12,10,000/- (Rupees 47 Crores Twelve Lakhs Ten Thousand Only). We state that Key Bouvet had received advance monies on behalf of Mashkour Sugar Company Limited (hereinafter Mashkour) as per the Agreement executed between the parties. We state that thereafter Mashkour has terminated an agreement with you vide their letter dated 17.05.2017 and therefore Key Bouvet has monetary liability towards OIA.

4. We state that on 05.07.2017 Mashkour has entered into a fresh contract with Key Bouvet. In the said Agreement Mashkour has considered the earlier Advance Payment of USD 10.62 Million equivalent to Rs.47,12,10,000/- (Rupees 47 Crores Twelve Lakhs Ten Thousand Only) made to Key Bouvet from Mashkour. The execution of the fresh contract in favour of Kay Bouvet in no manner creates an automatic liability on Kay Bouvet to refund any amount. ***There is no such legal and contractual monetary liability between the OIA and Kay Bouvet. The very perusal of the definition of "debt" and "operational Creditors" would establish that termination of contract by Mashkour with you does not create any debt due from Key Bouvet towards OIA. It expressly denied that Kay Bouvet is an Operational Creditor towards OIA.***

5. We state that, as per the pleadings in the Suit (L) No. 382 of 2017, you have sought a relief of release of the amount of USD 10,745,000/- under the letter of agreement of 2th March 2014. ***Thereafter there is an existence of dispute of the existence of such amount of debt claimed by you.*** In such event your demand notice is erroneous, illegal and bad in law considering provisions of Insolvency and Bankruptcy Code, 2016 and more particularly Section 5(6), Section 9(5)(i)(d) and Section 9(5)(ii)(d)."

[emphasis supplied]

22. It can thus be seen that Kay Bouvet has clearly stated that the said amount of Rs.47,12,10,000/- was received as advance money on behalf of Mashkour. It has been specifically stated that in the agreement entered into between Mashkour and Kay Bouvet on 5th July 2017, the said advance payment of Rs.47,12,10,000/- has been duly considered. It is stated that the execution of the fresh contract in favour of Kay Bouvet in no manner creates an automatic liability on Kay Bouvet. As such, Kay Bouvet has pressed into service the "existence of dispute" for opposing the demand made by Overseas.

23. We will have to examine as to whether the claim of Kay Bouvet with regard to the "existence of dispute", can be considered to be the one which is spurious, illusory or not supported by any evidence. It will be relevant to refer to Clause 14.1 of the Tripartite Agreement dated 18th December 2010, between Mashkour, Overseas and Kay Bouvet:-

"1. 10% of the sub contract Price as interest free advance payment by way of telegraphic transfer directly to the bank account of the Sub-Contractor against submission of invoice and Advance Payment Bank Guarantee for 10% of the sub contract Price, from any Indian public sector bank acceptable to Mashkour upon receipt of amounts from EXIM Bank. The Advance Payment Bank Guarantee shall be as per format attached herewith (Uniform Rules for Demand guarantees, Publication No.758, International Chamber of Commerce) and its value may be reduced in proportion to the value of amounts invoiced as evidenced by shipping documents and receipt of payment from EXIM Bank."

24. It will further be relevant to refer to the e-mail dated 29th March 2011, from Overseas to Mashkour:-

"1. Mashkour Sugar Company will release payment of two invoices to OIA against factory DDE for USD 10.5 Million (USD 9.00 M + USD 1.50M).

2. OIA will release payment of USD 10.62 Million to Kay Bouvet on submission of Advance Bank Guarantee and Performance Bank Guarantee to Mashkour and its confirmation and acceptance

by Mashkour and discharge of OIA Bank Guarantee of USD 7.5 Millions.

3. Mashkour will release Second payment of two Invoices of USD 4.375 Million (USD 3.50M + USD 0.875M) … civil work to OIA.

4. OIA will release advance payment of USD 1.113 Million to Civil Contractor after signing of contract between OIA and civil contractor and on confirmation from Mashkour regarding acceptance or ABG/PBG of the Civil Contractor as per Contract.

You are requested to please accept this proposal and send authorization letters to EXIM."

25. A perusal thereof would clearly reveal that Mashkour was to release payment of two invoices of Overseas for USD 10.5 Million (USD 9.00 Million + USD 1.50 Million). It will further reveal that Overseas was to release payment of USD 10.62 Million to Kay Bouvet on submission of Advance Bank

Guarantee and Performance Bank Guarantee to Mashkour and its confirmation and acceptance by Mashkour.

26. It will further be relevant to refer to the communication addressed by Exim Bank to Overseas dated 21st April 2011:-

> "GOI supported Exim Bank's Line of Credit for USD 25 Million to Government of Sudan Approval No. Exim/GOILOC-82/1.Disbursement advice:3.
>
> We advise that an amount of Rs.46,58,75,853/- has been remitted to India Overseas Bank, Nehru Place, New Delhi through RTGS Code – IOBA0000543 ***to the credit of account of Overseas Infrastructure Alliance (India) Private Limited. The disbursement is made against the contract between Mashkour Sugar Company, Sudan and Overseas Infrastructure Alliance (India) Private Limited.*** Details of the disbursement are as under:-
>
> Amt. in USD

Disbursement No.	Invoice Value (CIF) 100%	Eligible Value 100%	Net Remitted	Value Date
2	15,000,000.00	10,500,000.00	10,476,781.85	April 18, 2011

2. The breakup of the disbursement made as follows:-

		USD
Eligible Value	10,500,000.00	465,911,250.00
Less Negotiation Charges (Service Tax)	23,218.15	10,30,247.00
Currency Conversion Chg. And Service Tax		110.00
Net Remittance	10,476,781.85	46,48,80,893.00

3. Please confirm receipt of the credit."

[emphasis supplied]

27. It will further be relevant to refer to the communication addressed by Overseas of the same date to Mashkour:-

> *"**We have been paid the advance amount to 10.05 million USD in INR by Exim Bank because of Stringent Sanction entrancement by the United State Office of Foreign asset Control (OFAC) as per the letter enclosed herewith.*** The amount has been delivered to us @ Rs.44.37 per disbursement advice of the Exim bank attached herewith.
>
> ***Further OIA will release payment of USD 10.62 Million to Kay Bouvet on Submission of Advance Bank Guarantee and Performance Bank Guarantee to Mashkour Sugar Company and its confirmation and acceptance by Mashkour Sugar Company and discharge of OIA Bank Guarantee of USD 7.5 Million (As per mail dated 29.03.2011) of Mr. Ghodgankar**."*
>
> [emphasis supplied]

28. The communication dated 28th July 2011, addressed by Mashkour to Overseas would further clarify the position which reads thus:-

> "We are please to inform you that ***nominated sub-contractor messres Kay Bouvet Engineering Private Limited has submitted Advance Payment Bank Guarantee as well as Performance Bank Guarantee to us as per the sub-contract agreement and we are satisfied with the same.***
>
> ***In the light of the above we request your good self to release the 10% of the Sub-contract value as per letter dated 21.04.2011 addressed to Mashkour.***
>
> The payment to be released as under:-
>
> Name of the Beneficiary : M/s Kay Bouvet Engineering Private Ltd.

Name of Bank	:	M/s Bank of Maharashtra, Satara, City Branch
IFSC Code	:	MAH80000134
Account No.	:	60018168457
Mode of Payment	:	RTGS

+ amount of Rs.47,12,10,000/- (Rupees Forty Seven Crores Twelve Lakhs Ten Thousand only)

As soon as we get confirmation from your side regarding release of payment we shall release your Bank Guarantee USD 7.5 Million.

As I discussed today with Mr. Suresh I will be in India with original discharge bank Guarantee in the beginning of last week."

[emphasis supplied]

29. As already discussed hereinabove that Kay Bouvet had certain grievances with regard to payment of less money on account of exchange rate, the communication dated 21st September 2011, addressed by Kay Bouvet to Mashkour would clarify the said position which reads thus:-

"We have been paid Rs.47,12,10,000/- by M/s. Overseas Infrastructure Alliance (India) Ltd. On 30th August 2011 equivalent to USD 10.62 Million converted 1 USD @ Rs.44.37/-, whereas

on that day the conversion rate as per the attached list was 1 USD – Rs.46.26/-, so the amount would have been Rs.49,12,08,012/-, so they have underpaid a sum of Rs.1,99,98,012/-.

So you are requested to advise OIA to release amount of Rs.1,99,98,012/- to us without any delay."

30. The last nail in the case of the Overseas would be in the nature of communication addressed by the Ambassador of Sudan to Mashkour dated 25th April 2017, which reads thus:-

"With reference to the earlier correspondence, we have received the DO No. 1425/Secy(ER)/2017 dated 18th April, 2017 from Mr. Amar Sinha, Secretary (Economic Relations) Ministry of External Affairs, Government of India, New Delhi, India expediting the termination of the agreement with Overseas Infrastructure Alliance (India) Private Limited (OIA) and that an agreement be signed with Kay Bouvet Engineering Ltd. (KBEL) as a direct contractor for the unutilized portion of the GOI's Line of Credit for US Dollars 150,000,000 for the Mashkour Sugar Project.

It is on the record that a sum of Rs.47,12,10,000/- (US $ 10.62 Million) was paid by OIA to Kay Bouvet Engineering Ltd. "KBEL" on behalf of Mashkour Sugar Company from the funds released to OIA by Exim Bank from the 1st disbursed tranche of US $ 25 Million.

Kindly make a note, while signing the revised contract with KBEL that the above mentioned amount of US Dollars 10.62 shall be adjusted by Kay Bouvet Engineering Ltd. against the supplies to be made to Mashkour Sugar Company Ltd. for the purpose of completing the project.

Naturally, it should be borne in mind that the termination of OIA contract with Mashkour should not absolve them of any liability for the balance of the LoC 1st tranche of 25 Million disbursed to them, other than the US Dollars 10.62 already paid to KBEL and which will be adjusted when a contract is signed with KBEL as a main contractor."

[emphasis supplied]

31. It is thus abundantly clear that the case of Kay Bouvet that the amount of Rs.47,12,10,000/- which was paid to it by Overseas, was paid on behalf of Mashkour from the funds released to Overseas by Exim Bank on behalf of Mashkour, cannot be said to be a dispute which is spurious, illusory or not supported by the evidence placed on record. The material placed on record amply clarifies that the initial payment which was made to Kay Bouvet as a sub-Contractor by Overseas who

was a Contractor, was made on behalf of Mashkour and from the funds received by Overseas from Mashkour. It will also be clear that when a new contract was entered into between Mashkour and Kay Bouvet directly, Mashkour had directed the said amount of Rs.47,12,10,000/- to be adjusted against the supplies to be made to Mashkour Sugar Company Ltd. for the purpose of completing the Project. On the contrary, the documents clarify that the termination of the contract with Overseas would not absolve Overseas of any liability for the balance of the LoC 1st tranche of 25 Million disbursed to them other than USD 10.62 paid to Kay Bouvet.

32. In these circumstances, we find that NCLT had rightly rejected the application of Overseas after finding that there existed a dispute between Kay Bouvet and Overseas and as such, an order under Section 9 of the IBC would not have been passed. We find that NCLAT has patently misinterpreted the factual as well as legal position and erred in reversing the order of NCLT and directing admission of Section 9 petition.

33. Resultantly, this appeal is allowed and the impugned order dated 21st December 2018, passed by NCLAT is quashed and set aside. The order passed by NCLT dated 26th July 2018, is maintained.

34. In view of the above, all the pending IAs shall stand disposed of.

.....J.
[R.F. NARIMAN]

.....J.
[B.R. GAVAI]

NEW DELHI;
AUGUST 10, 2021.