

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA**

CP (IB)/39/KOB/2021

(Under Section 9 (6) of Insolvency and Bankruptcy Code 2016)

Order delivered on 17.01.2022

Coram:

Hon'ble Shri Ashok Kumar Borah, Member (Judicial)

Hon'ble Mr. Shyam Babu Gautam Member(Technical)

Jose Samuel

S/o Samuel

Proprietor of M/s Thankam Cashew Factory

having office at Anayadi P O

Sooranad North,

Kollam, Kerala-690 561

Residing at Jose Bhavanam, Anayadi PO

Kollam- 690 561

..... Applicant/Operational Creditor

Vs.

M/s Royals International Trade and Allied

Products Pvt. Ltd. Royal Junction,

Anchal PO, Kollam (District)-691306

Represented by its Managing Director

Kunjumon S/o Thankachan, Door No.

AP IX/1033, Royal Complex Building

Anchal.

..... Respondent/Corporate Debtor

Parties/Counsel present (through video conferencing)

For the Operational Creditor

: Shri Johnson Gomez, Advocate

For the Corporate Debtor

: Shri Nebil Nizar, Advocate

ORDER

Per: Ashok Kumar Borah, Member (J)

1. This application has been filed under Section 9 of Insolvency and Bankruptcy Code by **Mr. Jose Samuel** (hereinafter referred to as 'Operational Creditor/ applicant') proprietor of **M/s Thankam Cashew Factory** against **Royal International Trade and Allied Products Private Limited** (herein after referred to as 'Corporate Debtor/ CD') for initiation of Corporate Insolvency Resolution Process against them for the defaulted payment of Rs. 4,03,23,329/- as on 31.10.2017.

2. The brief facts are thus:

M/s. Thankam Cashew Factory is a proprietorship firm run by Mr. Jose Samuel. There was a contract entered between Operational Creditor - M/s. Thankam Cashew Factory and the Corporate Debtor M/s. Royal International Trade and Allied Products Pvt Ltd in 2017 for purchase of Raw Cashew Nuts Crops. The purchase money had to be paid in advance. When the supply was made, there was a short-supply of 268.139MT amounting to Rs. 4,10,22,661/-(Rupees Four Crores Ten lakhs Twenty Two Thousand Six Hundred and Sixty One Only). This short supply was acknowledged by, the Corporate Debtor and issued Cheque No. 10055498 dated 30.10.2017 for an amount of Rs. 2,93,26,058/- (Rupees Two Crores Ninety-Three Lakhs Twenty-Six Thousand and Fifty-Eight Only) to the Operational Creditor and another Cheque No. 10055499 dated 30.10.2017 for an amount of Rs. 1,15,00,000/- (Rupees One Crore Fifteen Lakhs Only) as full and final settlement to M/s. Kripa Cashew Exports (sister concern of M/s. Thankam Cashew Factory). These Cheques, on

presentation were returned due to “Insufficient Funds” in the account of the Corporate Debtor.

3. The Corporate Debtor vide letter dated 07.05.2018 cancelled the above mentioned 2 cheques and issued 3 new cheques bearing Nos: 10055508 dated 09.05.2018 for an amount of Rs. 1,00,000/-, 10055509 dated 14.05.2018 for an amount of Rs. 1,00,000/-, and 10055510 dated 21.05.2018 for an amount of Rs. 93,26,058/- in the name of M/s Thankam Cashew Factory and another cheque bearing No. 10055511 dated 18.05.2018 for an amount of Rs. 1,16,96,603/- in the name of M/s Kripa Cashew Exports.
4. The applicant/ Operational Creditor stated that M/s Kripa Cashew Exports, the sister concern of the Operational Creditor had filed application No. CP (IB)/ 38/KOB/2020 before this Tribunal on 19.11.2020 for recovering the Operational debts due to it. However, it was dismissed due to the absence of privity of contract between the Operational Creditor and Kripa Cashew Exports, vide order dated 18.03.2021. Thereafter, the Operational Debtor herein has initiated a proceeding against the Corporate Debtor on 06.02.2021 by filing Application No. CP(IB)/03/KOB/2021. The Operational Creditor proceeded the Application through his Power of Attorney holder, Mr. Jackson J. It is stated that the Power of Attorney Holder was unaware of the debt events, there was an error in contemplating the real cause of action. The cause of action which the Operational Creditor pointed out then has arisen on 30.10.2017. However, the said cause of action could not be maintained, as the same was later replaced by another three cheques which the Operational Creditor seeks to be resolved through this Application. The contention of the applicant is that for the sake of the Operational Creditor and in the interests of justice, CP (IB)/ 03/

KOB/2021 was withdrawn by the applicant – M/s. Thankam Cashew Factory on 29.07.2021.

5. The learned counsel for the applicant argued that the cause of action for this Application arose on 05.05.2018, the date on which the Corporate Debtor and the Operational Creditor entered into a Settlement Agreement; **on 07.05.2018**, the date on which the Corporate Debtor issued a letter to the Operational Creditor, and on 24.07.2018, the date on which the cheques bearing nos. 10055508 and 10055509 were returned dishonored.
6. As no payments were received from the Corporate Debtor towards the dues, the applicant issued a Demand Notice dated 02.07.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 and sought payment of the amount within the statutory period of 10 days, to which Corporate Debtor replied on 12.07.2021 denying the debt due to the Operational Creditor. The applicant stated that the Corporate Debtor has failed to make the payment of the unpaid operational debt. Hence the present application has been instituted to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

Submissions of the Corporate Debtor

7. The Corporate Debtor filed a counter/ reply statement contending that they entered into a 'High Sea Sale Contract', with the applicant/ Operational Debtor on 31.05.2017 for import of Raw Cashew Nuts weighing 800 MT (+/- 10 %) from Bissau Port in Republic of Guinea Bissau to Tuticorin Port in India. However, the said contract could not be materialized fully because of the fraud played by the end supplier' Mr. Aneesh Babu who was the actual supplier of Raw Cashew Nuts to the Corporate Debtor. Despite the efforts, a supply

shortage of 268.139 MT occurred. A dispute regarding the quantity of goods arose between the applicant/ Operational Creditor and the Corporate Debtor.

8. The Corporate Debtor stated that he has filed a petition with Anchal Police Station [Kollarn Rural Police District, State of Kerala] on 17.12.2019. As the local police refused to register a First Information Report, the Corporate Debtor u/s 154 (3) of Code of Criminal Procedure 1973 approached the Superintendent of Police, Kollam Rural Police District [State of Kerala] on 15.01.2020 and a First Information Report dated 16.01.2020 bearing number 153/2019 was registered in Kottarakkara Police Station under Section 406, 420, 120-B, 468, 471 r/w 34 of Indian Penal Code. Thereafter, the superior police officers transferred the case from the local police to the Crime Branch CID of Kerala Police and a new crime was registered by the Economic Offences Wing (E.O.W.) of Crime Branch C.I.D. as Crime No. 29/2020 under Sections 406, 420, 120-B, 468, 471 r/w 34 of Indian Penal Code.
9. The learned counsel for the Corporate Debtor argued that the Demand Notice as mandated under Section 8 of IBC was issued on 02.07.2021 by the applicant and the same was received by the Respondent/ Corporate Debtor and a 'Notice of Dispute' to the same was issued by the Respondent on 12.07.2021. The learned counsel argued that a dispute including '**prior dispute**' was made with the Applicant in the reply.
10. During the arguments on 21.12.2021, the learned counsel for the Corporate Debtor submitted that this application deserves to be dismissed on three grounds mentioned below:
 - i. Resjudicata
 - ii. Identity of the Applicant

iii. Pre-existing Dispute

11. With regard to the issue resjudicata, the learned counsel for Respondents submitted that this Tribunal vide order dated 06.10.2021 dismissed the application-CP(IB)/03/KOB/2021 filed by Mr. Jackson J. in the capacity of Power of Attorney (POA) holder of the present petitioner Mr. Jose Samuel. The present Petition has been filed by Mr. Jose Samuel directly and hence parties in the prior petition, i.e., CP(IB)/03/KOB/2021, and the present petition are effectively one and the same. The cause of action of both the applications is also the same. Both the applications arose out of the same High Sea Sale Contract No. RIT/HSS/02/2017-18 dated 31.05.2017. The said application was subsequently dismissed as withdrawn and this Tribunal imposed a costs of Rs.25,000/- (Rupees Twenty-Five Thousand only) on the applicant. However, no liberty was sought by the petitioner or granted to the Petitioner to file a fresh application.
12. The learned counsel for the Respondent argued that the Corporate Debtor has been unnecessarily dragging the Corporate Debtor to this Tribunal by filing multiple Insolvency Applications, one after the other, on the same cause of action.
13. The learned counsel for the Respondent further argued that the Cause of Action of this Petition arose on 31.05.2017, the day on which the High Sea Sale Contract was entered into between the Operational Creditor and the Corporate Debtor. That the present application has been filed only on 15.09.2021. Therefore, the same is barred by the provisions of Limitation Act. To fortify his argument, the learned counsel has referred to a decision of the Hon'ble Supreme Court ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta***

and Associates [CA 23988 of 2017], wherein the Hon'ble Supreme Court of India held in Para 28 of the Judgement that Limitation Act is applicable to Section 7 and 9 applications filed under the I&B Code.

14. Regarding the identity of the applicant, the learned counsel for respondent argued that the instant application filed on 15.09.2021 has not been signed by the Petitioner and it contains only the alleged Left Thumb Impression of the applicant. The cause of action of this application, i.e., the 'High Sea Sale Contract' dated 31.05.2017 contains the signature of the applicant herein. Moreover, the Left Thumb Impression taken has not been attested or authorized by any other person in whose presence the Left Thumb Impression has been taken.
15. The Corporate Debtor also stated that they are facing the third Insolvency Petition based on the same 'cause of action'. The first application was filed by M/s Kripa Cashew Exports as IBA/38/KOB/2020 against the Corporate Debtor and the same was dismissed on 18.03.2021. M/s. Kripa Cashews was then represented by its sole proprietor Mr. Jackson J. Mr. Jackson J., subsequent to the dismissal of aforementioned IBA/38/KOB/2020, filed another IBC Petition before this Tribunal as CP (IB)/ 03/KOB/2021 claiming to be the Power of Attorney (POA) Holder of the present petitioner Mr. Jose Samuel. When the Corporate Debtor, strongly objected to the lodging of Petition in the capacity of Power of Attorney holder, the CP (IBC)/ 03/KOB/2021 was withdrawn by the applicant without liberty. Moreover, the applicant/ Operational Creditor did not state any specific reason why the Left Thumb Impression has been made instead of affixing signature of the applicant. There is no endorsement to the effect that the Petitioner, Shri. Jose Samuel, who allegedly affixed his Left

Thumb Impression was suffering from any disability or is illiterate. The absence of such an explanation proves that the signatory to the application and the person who has purportedly filed this application are not one and the same. Hence, there is a manipulation of the Left Thumb Impression of Mr. Jose Samuel.

16. As regards the pre-existing dispute, the Corporate Debtor stated that the Corporate Debtor and the Operational Creditor were in dispute and the relationship between them became strained after the discovery of the hand of the applicant in the scam pulled on by Mr. Aneesh Babu on the Respondent. The Respondent has filed multiple Caveats before Civil Courts in Punalur, Kottarakara, and Karunagapally [Kollam District, State of Kerala] against the Applicant herein. It is further stated that the Respondent on 07.12.2020 filed a Suit for Declaration before Munsiff Court- Kottarakara as OS No. 563 of 2020 against the Operational Creditor/ applicant. The question involved in the aforesaid is of High Sea Sale Contract No. RIT/HSS/02/2017-18 dated 31.05.2017 which is subject matter in the present IBC application as well. It is stated that the said suit has been filed long before the receipt of Section 8 Notice under IBC, 2016.

17. The learned counsel for the Corporate Debtor had specifically stated about the pending dispute regarding the High Sea Sale Contract and also with regard to the pending disputes in the reply to Demand Notice. He further stated that the Respondent is commercially solvent and more than capable of discharging its lawful debts as and when they fall due in accordance with law. Hence, this application is nothing, but part of an elaborate stratagem engineered to illegally extract monies and deprive the Respondent of its dues, and that the Petitioner

is misusing the provisions of the Insolvency and Bankruptcy Code as a money recovery tool. In this regard, the learned counsel referred to the judgment of the Hon'ble Supreme Court of India in ***Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited [2018 SCC Online SC 2113]***, wherein it is stated that:

"In a recent judgment of this Court in [Mobilox Innovations Private Limited vs. Kirusa Software Private Limited \(2018\) 1 SCC 353](#), this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. We would like to reproduce the following discussion from the said judgment:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [[Section 8\(1\)](#)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [[Section 8\(2\)\(a\)](#)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise

received payment from the corporate debtor [[Section 8\(2\)\(b\)](#)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under [Sections 9\(1\)](#) and [9\(2\)](#). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under [Section 9\(3\)](#), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [[Section 9\(5\)\(i\)\(b\)](#)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [[Section 9\(5\)\(i\)\(c\)](#)], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [[Section 9\(5\)\(i\)\(d\)](#)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [[Section 9\(5\)\(i\)\(e\)](#)], it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process

gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso [[Section 9\(5\)\(ii\)\(a\)](#)]. It may also reject the application where there has been repayment of the operational debt [[Section 9\(5\)\(ii\)\(b\)](#)], or the creditor has not delivered the invoice or notice for payment to the corporate debtor [[Section 9\(5\)\(ii\)\(c\)](#)]. It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [[Section 9\(5\)\(ii\)\(d\)](#)]. [Section 9\(5\)\(ii\)\(d\)](#) refers to the notice of an existing dispute that has so been received, as it must be read with [Section 8\(2\)\(a\)](#). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected [[Section 9\(5\)\(ii\)\(e\)](#)].”

Rejoinder filed by the applicant

18. The applicant in the rejoinder, reiterated most of his contentions in the application and stated that the Corporate Debtor has already acknowledged the debt as per the Settlement Agreement and Annexure All (E) letter. The Financial Years 01.04.2017 to 31.03.2018 has recorded the liability due to the applicant as Current Liabilities under the head “Trade Payables”. The liability includes the liability towards the amount due to the applicant towards the short supply of quantity under High Sea Sale Contract for an amount of Rs. 4,10,22,661/-. The said amount is again reflected in the financial statement for the financial year 01.04.2018 to 31.03.2019 and 01.04.2019 to 31.03.2020. The ledger account of the Applicant would indicate that the liability recorded as Trade payables includes the amount of Rs. 4,10,22,661/- acknowledged and settled by the Corporate Debtor.

19. The learned counsel appearing for the applicant argued that the Original Suit (O.S. No. 563 of 2020) filed by the Corporate Debtor against the applicant, is stated to have been filed on 07.12.2020. The Corporate Debtor has produced it to show that there is a dispute regarding the debt between the parties pointing out that one of the conditions required under the dictum laid down by the SC in ***Mobilox Innovations Private Limited v Kirusa Software Private Limited***. reported in **2018(I) SCC 353**.
20. The applicant stated that Mr. Jackson Jose is the proprietor of M/s Kripa Cashew Exports and an amount of Rs. 1,16,96,603/- was paid to the Corporate Debtor out of the funds of M/s Kripa Cashew Exports. M/s Kripa Cashew Exports thereby initiated the CIRP proceedings before this Tribunal by issuing Demand Notice on 30.09.2020. The Corporate Debtor has filed a reply dated 10.10.2020 to the demand notice. In that reply notice the Corporate Debtor has not mentioned about the pendency of any suit or proceedings against the Applicant. The Application under Section 9 was filed by M/s Kripa Cashew Exports on 26.11.2020. In the Original Suit as mentioned above, the Corporate Debtor specifically stated that the cause of action of the said suit arose from 10.10.2020, on which date the plaintiff in the said suit received communication from the 1st defendant presumably under the IBC.
21. The learned counsel, therefore, argued that it is evident that the suit is initiated after the Demand Notice in Form 3 and after the filing of Section 9 application under the Code before this Tribunal and the same is an abuse of process of this Tribunal.

Findings:

22. We have heard the learned counsel for both the parties and also have gone through the pleadings on record. We may first consider the issue raised by the Corporate Debtor on res judicata.
23. The Doctrine of *Constructive Res Judicata* does not apply to the issues /points or any 'lis' between parties that has not been decided previously, and despite being pleaded, has not been considered by a court/tribunal and expressly dealt with in the order so passed. In Indian law, the principle has been recognized in Section 11 of the Code of Civil Procedure 1908.
24. In ***Satyadhyan Ghosal v. Deorajin Debi (1960) 3 SCR 590***, a three judge Bench of Hon'ble Supreme Court, speaking through Justice KC Das Gupta, explained the doctrine of res judicata in the following terms:

“7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.”

25. From the above extract, it is clear that while res judicata may have been codified in Section 11, that does not bar its application to other judicial proceedings, such as the one in the present case.

26. Before proceeding further, it is important to compare the reliefs sought by the applicant both the IBC Applications. They have been tabulated below, for an easy comparison:

Case Number	CP (IB)/ 03/ KOB/ 2020	CP (IB)/ 39/ KOB/ 2021
Case Name	Thankam Cashew Factory v Royals International Trade and Allied Products Private Limited	Jose Samuel v. Royals International Trade and Allied Products Private Limited
Filed on	16.02.2021	15.09.2021
Filed by	M/s Thankam Cashew Factory, represented by its proprietary Shri. Jose Samuel through Power of Attorney holder Shri. Jackson J.	Shri. Jose Samuel
Claim Amount	Rs. 2,93,26,058/-	Rs. 2,93,26,058/-
Debt Amount	Rs. 4,00,22,035/-	Rs. 4,03,23,329/-
Cause of Action	High Sea Sale Contract dated 31.05.2017	High Sea Sale Contract dated 31.05.2017
Result	In view of the order dated 29.07.2021, CP(IB)/03/KOB/2021 is allowed to be withdrawn.	Present application.

27. From the above table, it is clear that the prayers in the first application and second Application for initiation of CIRP were identical. However, the Interlocutory Application- IA(IBC)/110/KOB/2021 was filed by M/s. Thankam Cashew Factory for withdrawing the main application. The IA was heard on

29.07.2021 and on 06.10.2021, the order for withdrawal of CP(IB)/03/KOB/2021 was allowed imposing costs.

28. A two judge Bench of Hon'ble Supreme Court, in its judgment in ***Erach Boman Khavar v. Tukaram Shridhar Bhat (2013) 15 SCC 655***, has held that the doctrine of res judicata can only apply when there has been a conscious adjudication of the issue on merits. Justice Dipak Misra, speaking for the Court, held:

“39. From the aforesaid authorities, it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been a conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits. It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation.”

29. The learned counsel for the applicant quoted a latest judgment of Hon'ble

Supreme Court in ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr. Civil Appeal No. 3224 of 2020 dated 13.09.2021***, which reads as under:

“171 Res judicata cannot apply solely because the issue has previously come up before the court. The doctrine will apply where the issue has been “heard and finally decided” on merits through a conscious adjudication by the court.”

30. However, in the present case, the applicant has intentionally withdrawn the application after the application has been served on other side, and that, if considered and decided by the Tribunal, the fate will be against the applicant. Moreover, the application was allowed to be withdrawn with costs of Rs. 25,000/- which itself shows that the Tribunal was ready to hear and dispose of the matter so that a final order can be passed. Smelling the outcome, the applicant withdrew the application and filed the present application. Hence, the dictum above judgments cannot be applied in this case, and it is declared that there is res judicata in this matter. It is pertinent to state that the applicant did

not obey the directions to pay costs instead he filed the present application, which is definitely hit by res judicata. Thereafter, after an extended period, the costs were paid.

31. In the aforesaid circumstances, whether the case is finally decided by the Tribunal does not arise, as the intention behind the withdrawal of the application is well known to both parties.

32. Now, we may take up the second issue pointed out by the learned counsel for the Corporate Debtor, regarding the identity of the applicant. On a verification of the records, it is seen that nowhere the applicant has put his signature, even though, while the High Sea Sale Contract was executed on 31.05.2017, the same person who, stated to have been filed this application has put his signature. Nowhere in the application, it is stated why the applicant could not sign and on whose presence the Left Thumb impression has been taken and that anybody has counter signed or attested the Left Thumb Impression of the applicant in the application. We therefore relied on Rule 128 of NCLT Rules, 2016 for further clarification. It is stated that

“128. Affidavits of illiterate, visually challenged persons.-

*Where an affidavit is sworn or affirmed by any person who appears to be illiterate, visually challenged or unacquainted with the language in which the affidavit is written, the attester shall certify that the affidavit was read, explained or translated by him or in his presence to the deponent and that he seemed to understand it, and made his signature or mark in the presence of the attester in **Form No.NCLT 14.**”*

33. On analysis of the above, we have found that the applicant has not annexed Form No. NCLT 14 with the application. Hence, there is every reason to believe that this application has been filed without the actual knowledge or authority of the applicant, as rightly argued by the learned counsel for the Corporate Debtor.

34. Now, we may take up the issue of ‘pre-existing dispute’. We have examined Sub-Section 6 of Section 5 of the Code to determine what ‘dispute’ is. That Section defines as follows:

“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.

From the above definitions, it is clear that the Corporate Debtor could establish the above Sub-Section that there is a pre-existing dispute between the parties in this matter regarding the quality of goods or services.

35. In view of the aforesaid findings of this Tribunal, we do not find any reason to order initiation of Corporate Insolvency Resolution Process against the Corporate Debtor. Hence, this application which is bereft of merit is **dismissed, without costs.**

Dated this the 17th day of January, 2022

Sd/-
(Shyam Babu Gautam)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

Cimy