IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD. COURT No.II.

CP(IB) No. 278/09/HDB/2020
U/s. 9 of IB Code, 2016

In the matter of:

M/s. Sandvik Mining & Construction Tools AB,
6428-Jarnverksleden 8,
SE-811 34, Sandviken,
Sweden.

.. Applicant / Operational Creditor

VERSUS

M/s TA Hydraulics Pvt. Ltd.,
#59c CIE (Expn), Gandhinagar,
Balanagar,
Hyderabad – 500 037.

.. Respondent/ Corporate Debtor

Date of order : 28th February 2023

CORAM:
Dr. Venkata Ramakrishna Badarinath Nandula, Member (Judicial)
Mr. Satya Ranjan Prasad, Member (Technical)

Counsels present:

For Operational Creditor : Shri Shabbeer Ahmed, Advocate and Aneesh. V., Advocate.

For Corporate Debtor : Shri Sudershan Reddy, Senior Counsel assisted by Shri Hirendranath and Ms. Prakruti Golecha, Advocates.

[PER: BENCH]
ORDER

1. This is an application filed by M/s Sandvik Mining & Construction Tools AB, Operational Creditor (hereinafter referred to as 'petitioner') against M/s. TA Hydraulics Pvt. Ltd, Corporate Debtor (hereinafter referred to as 'respondent') praying to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor alleging default in repayment of an operational debt, namely, excess payment mistakenly made by the petitioner to the respondent.

2. The facts as mentioned in the application, in brief, are as follows:

i. That the Operational Creditor required certain material to be procured from the Corporate Debtor. Accordingly, The Corporate Debtor has provided two Quotations to the Operational Creditor bearing Nos. TA/SAPL/QTN/DEV-2/2018-19 and TA/SAPL/QTN/DEV-1/2018-19 dated 04.06.2018 for supply of material at a cost of Rs.2,92,500/- and Rs.72,000/- **(Annexure-4).**

ii. That the Operational Creditor had issued two Purchase Orders dated 15.06.2018 on the Corporate Debtor for supply of material at a cost of Rs.2,92,500/- and Rs.72,000/- excluding taxes **(Annexure-5).** Accordingly, the Corporate Debtor has manufactured and delivered the requisite products and after delivery of the said products, the Corporate Debtor has issued two invoices vide Invoice No.151/18-19 and No.151/18-19 dated 11.01.2019 for an aggregate amount of

Rs.4,30,110/- (Rupees Four Lakhs Thirty Thousand One Hundred and Ten only) including taxes **(Annexure-6)**.

iii. That the Operational Creditor while making the payment on 13.02.2019 in terms of two invoices raised by the Corporate Debtor, had inadvertently made the payment of Invoice amount in USD instead of INR i.e. an amount of USD 430,110.00 was paid to the Corporate Debtor instead of INR 4,30,110/- at conversion rate of Rs.70.55/- which means, the Operational Creditor had paid an amount of Rs.3,03,44,260 instead of Rs.4,30,110/- to the Corporate Debtor i.e. an excess payment of Rs.2,99,14,150/- approximately was made by the Operational Creditor **(Annexure-7).**

iv. That the Operational Creditor had requested the Corporate Debtor vide e-mail dated 28.02.2019 to refund the excess amount paid **(Annexure-8)** and thereafter several e-mails were sent to the Corporate Debtor to that effect **(Annexure-9).**

v. That the Corporate Debtor had sent an email dated 03.07.2019 to the Operational Creditor, expressing its difficulty in refund of excess payment based on certain frivolous grounds **(Annexure-10)** and even after the visit of Representatives of the Operational Creditor's to India for making amicable settlement, the Corporate Debtor has been delaying in payment of the Outstanding amount, despite admitting its liability.

vi. That the Operational Creditor issued a Demand Notice dated 15.05.2020 u/s 8(1) of IBC, 2016 as per Form 3 under Rule 5,

demanding payment of Rs.2,99,14,150/- along with the interest @18% per annum in respect of unpaid operational debt **(Annexure-11 & 12).**

vii. After receipt of Demand Notice, the Corporate Debtor has sent a reply vide email dated 05.06.2020 denying the liability and stating that they will send a detailed response after lifting of lockdown **(Annexure-13).** Accordingly, issued a reply Notice dated 22.06.2020 refusing to pay the debt on certain frivolous grounds **(Annexure-14).** The contentions raised in the Demand Notice are more in the nature of a counter claim which are nothing but mere afterthoughts and the same is not a *bona fide* dispute but a mere moonshine. Even assuming but not conceding that there is some strength in Corporate Debtor's claim, the same is admittedly against two different group entities of Sandvik Mining and Construction Logistics Limited, Dublin, Ireland but not the Operational Creditor herein. It is needless to emphasise that every company is a separate and distinct legal entity / juristic person and liabilities of one entity cannot be linked to the other entity merely due to the fact that they are all part of one group. The purported services alleged to have been provided by the Corporate Debtor under the reply notice were admittedly provided to other group entities and not the Operational Creditor, as such the Operational Creditor does not own the purported liabilities of its sister concerns. Therefore, the purported counter claims raised by Corporate Debtor are baseless, frivolous and untenable and have nothing to do with the business of Operational Creditor. The non-refund of excess payment

constitutes a breach of contract under the Provisions of Section 72 of Indian Contract Act and amounts to unjust enrichment.

3. The Corporate Debtor filed Counter contending that,

It is an admitted fact that the Operational Creditor is part of an International Conglomerate known as the "Sandvik Group" with its Headquarters in Stockholm, Sweden. The Sandvik Group's advertisements/profile claims that their organisation model is based on decentralised business model with the parent company being Sandvik AB, with its Head Office at Stockholm and subsidiaries in about 70 countries. These subsidiaries include, for the purpose of this application Sandvik Asia Private Limited ("Sandvik Asia" for brevity) having its registered office at Pune, Sandvik Mining and Constructions Logistics Limited Ireland ("Sandvik Ireland" for brevity) as well as the Operational Creditor herein. The Corporate Debtor has been supplying various products/services to the "Sandvik Group" companies including the Operational Creditor for the past 4 years. The Indian operations of the Sandvik Group is run by Sandvik Asia. For all purposes, the subsidiaries including the Operational Creditor are one entity controlled by the parent company, Sandvik AB, with common employees, common purchase and supply framework is put in place to provide a common agreement

pursuant to which Sandvik Group Companies purchases proprietary goods and services.

i. It is further contended that, that the Framework Purchase and Supply Agreement dated 07.03.2016 states as follows **(Annexure-2):**

A. Sandvik is a company within the Sandvik Group, a global engineering group in tooling materials technology, mining and construction.

B. Supplier is a company that engages in, among other things, Design, Manufacture and Support of Engineered and Automated Hydraulic Systems and Components.

C. Sandvik and Supplier wish to enter into an agreement to provide a framework pursuant to which Sandvik and Sandvik Affiliates will purchase fully assembled Buyer Proprietary Goods, and products and services from Supplier. For this purpose, the Buyer shall give specific instructions, Free Issue Material, if any and where necessary training to the Supplier, to enable the Supplier to supply assembled Buyer Proprietary Goods.

D. The Parties hereto undertake towards each other to ensure, to the extent legally and commercially possible, that Sandvik and/or its Affiliates shall have the right to utilize this Framework Agreement to purchase goods and/or services from Supplier and/or its Affiliates.

E. The Parties agree that additional Sandvik Affiliates and Supplier Affiliates can accede and benefit from the terms and conditions set forth in this Framework Agreement, as further outlined herein.

ii. That by virtue of the Framework Agreement, it is clear that Sandvik Asia, Sadvik Ireland and the Operational Creditor herein are interconnected and controlled by the parent company and thus dealing with the Respondent through Sandvik Asia. In view of the clear understanding between the Parties and the nature of control of the Sandvik Group over Sandvik Asia, Sandvik Ireland and the Operational Creditor, the Respondent was dealing with Sandvik Asia/its representatives who were also dealing with all issues relating to Sandvik Ireland and the Operational Creditor and the services being provided by the Respondent were related to the goods being dealt with by the Sandvik Group. Also submitted that based on the agreement, the Respondent has been contributing to the development manufacturing and supply of the Sandvik Group's machines in concert with all the other companies under the Sandvik Group since last 4 years and have almost done approximately 2 million dollars' worth of business till date.

iii. Further stated that on a number of occasions, various payments/dues of different companies of the Sandvik Group were being adjusted between them vide emails dated 05.03.2019 & 04.04.2019 (Page 60 & 61 of the application of the Operational Creditor) sent by Mr. Jaideep Gopale of Sandvik Asia to the Respondent. This proves beyond any doubt that the companies under the Sandvik Group, including the Operational Creditor had common accounts/officials and companies accounts were being handled jointly and for all purposes accounts were consolidated.

iv. The Respondent further submits that resort to bankruptcy proceedings without settlement of accounts of all other companies is clearly untenable, as the Respondent is not only not liable for any amount to the Sandvik Group or its affiliates but is entitled to claim a sum of Rs.6,97,34,267/- including interest which is due and payable towards payment of services rendered by them. In the circumstances, Sandvik Asia, Sandvik Ireland are necessary parties to this proceeding and unless the claims between the Respondent and the Sandvik Group are settled the question of the Respondent being liable to the Operational Creditor does not arise.

v. That the Operational Creditor and its affiliates/group company who are liable to pay a sum of Rs.6,97,34,267/- including interest and for the said dues a reference under Section 18 of the Micro and Medium Enterprise Act, 2006 before the Telangana State Micro and Small Enterprises Facilitation Council (TSMSEFC) has been filed and the same is pending vide Application No.TS09B0008717/S/00001 **(Annexure-3).**

vi. The Respondent submits that the allegations mentioned in Paras IV(1)(1 to 11 of Form 5 Petition) are false and hereby denied.

vii. The Respondent is categorically denied the Para IV(2) of Form 5 that the total amount due as on 13.02.2019 excluding interest is Rs.2,99,14,150/- and is liable to pay interest @18% p.a. from 14.02.2019 till date of realization.

4. The Rejoinder filed on behalf of the Operational Creditor, states that,

i. That the Counter raises only spurious and moonshine disputes meant to mislead this Hon'ble Tribunal and does not raise any *bona fide* / genuine disputes and therefore, the contentions taken in the Counter are liable to be rejected. The Counter filed by the Corporate Debtor is dubious, frivolous, vexatious and is neither maintainable in law nor on facts. The Corporate Debtor is guilty of suppression and misrepresentation of material facts before this Hon'ble Tribunal and as such, the instant Application filed against the Corporate Debtor deserves to be admitted under the provisions of IBC and the contents of the Counter are not specifically admitted hereunder shall be deemed to have been denied, except those that are matter of record.

ii. In reply to paragraph 1 & 2 of the Counter, it is in correct to state that the Petitioner has suppressed facts in the matter and in fact on the other hand, it is the Respondent who has suppressed the facts and misrepresented to the Hon'ble Tribunal by virtue of his counter which are discussed in detail hereinbelow.

iii. In reply to Para 3 of the Counter, the contents are denied and the Respondent is put to strict proof of the same. The Respondent's status under the MSME Act 2006 does not entitle it to any special concessions before this Hon'ble Tribunal. The Respondent is taking undue advantage of its status under MSME Act and resorting

to filing of frivolous cases which are extortive in nature against one of the sister concerns of Petitioner based out of India.

iv. In reply to Paras 4 & 5 of the Counter, the contractual obligations of one group entity cannot be enforced against another group entity. The Petitioner Company does not exercise any control over Sandvik Asia or vice-versa. It is further submitted that the scenarios envisaged for lifting of the corporate veil, as enunciated by the Hon'ble Supreme Court of India in ***Life Insurance Corporation of India Vs. Escrots Limited & Ors. (1986 59 Comp. Cas. 548 SC)*** are not satisfied in the instant case. It is also not out of place to submit that the Hon'ble Supreme Court of India in ***Vodafone International Holdings BV Vs. Union of India (Civil Appeal No.733 of 2012)*** held that the legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation. A company is a separate legal person and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence.

v. In reply to Paras 6,7 & 8 of the Counter, contents are denied for being incorrect and wholly frivolous.

As per recital `E' of the Framework Agreement, "The parties agree that additional Sandvik Affiliates and Supplier Affiliates **"can"** accede and benefit from the terms and conditions set forth in this Framework Agreement, as further outlined herein". Thus, it was the Petitioner's choice whether to accede to the terms of the

Framework Agreement or not and in absence of any conscious act on behalf of the Petitioner and also by not signing any acceding agreement conveying its intention to be bound by the FA, the Petitioner was evidently not bound by the FA.

The POs. issued by Petitioner Company are not covered under FA and would not fall under the definition of Purchase Contract under the Agreement and as such, the alleged counter claims of Respondent cannot be linked to the issued of overpayment made by Petitioner under the POs. The POs are independent contracts whose terms should be looked in isolation without any reference to FA.

The very purpose of having Appendix 2 and Appendix 4 to the FA is that any entity other than Sandvik Asia cannot automatically be bound by the terms of FA unless it is a signatory to Acceding Agreement. This is intention of the parties behind having such Appendix.

As per Clause 4.4. of the FA, was clear in its implication that *"each party to this Framework Agreement (including the Acceding Parties) is responsible for its own obligations and performance hereunder and in no event shall a Party hereto (whether such Party is signing this main document or is a Party acceding through signing an Appendix-4, or is entering into a Purchase Contract) be held liable under this Framework Agreement or any Purchase Contract for any responsibilities or obligations of any of its Affiliates."* Therefore, the Respondent's purported claim against

Sandvik Asia cannot be linked with the Petitioner's instant claim against the Respondent and as such, the contentions in Para 8 of the Counter merit outright rejection by this Hon'ble Tribunal.

vi. In reply to Paras 9,10 & 11 of the Counter, contents are denied for being incorrect. The Petitioner is a Company incorporated under the laws of Sweden and it is plausible if an employee / representative of an affiliate company situated in India followed up for payments in relation to another affiliate company and the same is completely a valid & common business arrangement followed across the world among group companies.

It is submitted that the Sandvik Asia, vide Legal Notice dated 15.06.2020 has separately conveyed to the Respondent that it has never placed any order for alleged services claimed by the Respondent. As a means to wrongfully withhold the amounts mistakenly paid by the Petitioner, the Respondent has conjured up the dubious claim of Rs.6,97,34,267/- in the form of a proforma invoice.

It is submitted that the Sandvik Asia never placed any orders through mere emails without a purchase order containing proper description of goods it required from the Respondent. Strangely, the same proforma invoice was raised by the Respondent also on the Petitioner's group entity in Ireland i.e., Sandvik Mining and Construction Logistics Limited **(Sandvik Ireland)** which also refuted the frivolous claim of the Respondent. The Respondent is

deliberately mixing the false and cooked up proforma invoice with the Petitioner whereas the proforma invoice was actually issued against Sandvik Asia and Sandvik Ireland. The copy of the email dated 24.11.2020 issued by the MSME Council along with the attachments thereto are annexed hereto as **Annexure-1** and a copy of the response submitted by Sandvik Asia to the complaint filed before MSME Council is annexed hereto as **Annexure-2.**

vii. It is true that the quotations were submitted to Sandvik Asia. The quotations were sent by Respondent by putting the addressee as Sandvik Asia which is not under the control of Petitioner and the Purchase Orders were ultimately issued by the Petitioner and not Sandvik Asia. The Respondent is acting on incorrect and false assumptions that the Petitioner, Sandvik Asia and Sandvik Ireland are acting in concert with regard to all transactions with the Respondent. Admittedly, payments for alleged services were previously received by the Respondent from Sandvik Asia and Sandvik Ireland separately. In the instant case, the payments were made from the Petitioner's office in Sweden. All these companies have separate bank accounts. As such, there was no commonality in payment of consideration to the Respondent and the Respondent cannot automatically assume that the Sandvik Group functioned as a single group entity and the Purchase Orders were not in relation to the items mentioned in Appendix-1 of the FA and thus, could not have assumed that the Petitioner or its entities were acting in concert.

It is not open to the Respondent to appropriate and adjust the excess amounts inadvertently paid to the Respondent under the garb of alleged additional amounts owed to the Respondent by the Petitioner's group company which at any rate is false and baseless. It is reiterated that no valid crystalized claim has been raised by the Respondent on the Petitioner or its group entities vide the email dated 05.07.2019 and nor was any contemporaneous invoice, much less a proforma invoice raised on the Petitioner or its group entities. A proforma invoice was subsequently issued by the Respondent on Sandvik Asia and not the Petitioner, only as an afterthought to cover up and withhold the amounts mistakenly paid by the Petitioner.

The Respondent never denied the receipt of excess payment and it is only argument to adjust the excess amount against alleged services rendered to one of the group companies of Petitioner several years ago, which is totally absurd.

5. In the light of the contest as afore mentioned, this Tribunal framed the following points for consideration;

1. Whether an *excess* sum paid *mistakenly* by the operational creditor to the corporate debtor is in the nature of an operational debt qua the purchase orders issued by the applicant and the commercial invoices raised by the respondent, especially when the applicant traced operational debt under a *quasi-contract?*

2. Whether a pre-existing dispute exists between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the *unpaid operational debt* in relation to such dispute?

6. We have heard Shri Aneesh V. learned counsel for the petitioner/financial creditor and Shri A. Sudershan Reddy, learned senior counsel assisted by Shri Hirendranath, and Ms. Prakruti Golecha, learned counsels for the respondent/ Corporate Debtor. Perused the record and the written submissions.

Point.1.

Whether an *excess* sum paid *mistakenly* by the operational creditor to the corporate debtor is in the nature of an operational debt qua the purchase orders issued by the applicant and the commercial invoices raised by the respondent, especially when the applicant traced operational debt under a *quasi-contract?*

7. A payment by the applicant herein, admittedly and mistakenly made in excess of the sum payable to the corporate debtor herein, under the two commercial invoices no.151/18-19 dated 11.01.2019 and no.152/18-19 dated 11.01.2019 and the *failure* on the part of the corporate debtor to *return/refund* the said *excess amount* to the applicant despite demands, appears to be the *genesis* of this application filed under Section

9 of the IB Code, for *initiation* of corporate insolvency resolution process, against the Corporate Debtor herein.

Therefore, a short but *interesting* question that arose for our consideration in this case is, whether the excess sum mistakenly *paid* by the applicant herein, to the corporate debtor *while* making the payment for goods supplied by the corporate debtor under the two purchase orders placed by the applicant herein, is in the *nature of an 'operational debt'* as defined under Section 5(21) of the IB Code, ***qua*** the purchase order issued by the applicant and the commercial invoices raised by the respondent, especially when the applicant based its claim of operational debt on a *quasi-contract*?

8. Shri Aneesh V., learned Counsel for the Operational Creditor, submits that the Applicant M/s. Sandvik Mining and Construction Tools AB, is a Company registered under the laws of Sweden and engaged in the business of manufacturing, mining equipment, rock cutting machines, crushing and screening, loading and hauling and breaking and demolition of rock etc., and for the purpose of its Business operations the operational creditor required certain material from the corporate debtor, hence the corporate debtor on 04.06.2018 has provided two quotations for supply of the said material at a cost of Rs. 2,92,500 and Rs. 72,000 respectively.

Thereafter the operational creditor had issued two purchase orders dated 15.06.2018 and pursuant thereto the corporate debtor had manufactured and delivered the said items vide two Invoices No. 151/18-19 both dated 11.01.2019 for an aggregated sum of Rs.4,30,110/- (Rupees Four Lakhs Thirty Thousand One Hundred and Ten only) It is further contended that, while making payment of the said sum of Rs. 4,30,110.00, the applicant *mistakenly*, credited 430110 US Dollars to the bank account of the corporate debtor vide bank transaction dated 13.02.2209. It is asserted the conversion rate per dollar in into India Rupee as on 13.02.2209 being Rs. 70.55, an excess payment of Rs.2,99,14,150/- (Rupees two crore ninety-nine lacs fourteen thousand one hundred and fifty only) has been made, since the actual amount payable as per the commercial invoices being only Rs. 4,30,110.00. Therefore, the corporate debtor has been requested to refund the excess amount vide email dated 28.02.2009 however, as the said email did not evoke any response, similar demand for refund of the excess amount has been made on 05.012.2019 12.03.2019, 18.03.2019, 04.03.2019, 27.04.2019, 15.05.2019, 21.06.2019 and 03.07.2019 in vain.

9. Ld. Counsel further contends that, vide its email dated 03.07.2018 had in fact *admitted its default* in returning the excess amount it received

as afore stated, however failed to return the same citing frivolous grounds. Under those circumstances, on 15.05.2020 the Operational Creditor got issued a demand notice in terms of Section 8 of IB Code, demanding payment of sum of Rs.2,99,14,150 along with interest at 18% per annum being the excess amount paid and the same was responded by the Corporate Debtor vide interim reply dated 05.06.2020 and another reply 22.06.2020, with baseless, untenable and unsustainable allegations and contentions, rising for the first time a dispute regarding the debt, which according to the Ld. Counsel is nothing but an afterthought. Ld. Counsel emphatically asserted that the claim of the Applicant is based on Section 72 of Indian Contract Act, and the 'Doctrine of unjust enrichment' as such the operational debt of a sum over Rupees one crore due and payable and its default by the corporate debtor stands firmly established hence the present application deserves to be allowed and corporate insolvency resolution process (CIRP) be triggered against the Corporate Debtor.

10. Ld. Counsel, in support of his contention that the debt in this case is in the nature of operation debt, placed reliance on the Ruling of Hon'ble Supreme Court in re, *Consolidated Construction Pvt, Ltd Vs Hitro Energy Solutions Pvt Ltd.2022 ibclaw.in 09 SC*, wherein, Hon'ble Supreme Court,

while addressing the issue, whether a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt or not? held that,

> " .. .. *Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.*"

11. Learned counsel vehemently contended that the subject dispute is squarely covered by the terms and conditions of the purchase orders placed by the petitioner on the respondent and as such the frame work agreement has no application to the subject transaction.

12. ***Per contra,*** Shri. Sudershan Reddy, learned sr. counsel for the corporate debtor at the outset submitted that an 'Operational Debt' as defined under Section 5 (21) of the IB Code, does not exist between the parties herein, as such the application is liable to be dismissed. Learned senior counsel further contends that when there is no operational debt, the question of corporate debtor committing default in payment of the same does not arise at all, hence the application is liable to be dismissed. According to the Ld. Sr. Counsel, even assuming without admitting that an operational debt as claimed exists, since there is a *pre-existing dispute*

as to the alleged debt, the application is not maintainable and is liable to be rejected. Ld. Sr. Counsel further contends that, the claim of operational debt since is based on Section 72 of Indian Contract Act, cannot be enforced under the present application, besides the same requires investigation more so when disputed, which is beyond the scope of enquiry in an application filed under section 9 of IB Code, as such on this ground also the application is not maintainable.

13. Lastly, Ld. Sr. Counsel contends that, the purpose of this application being recovery of excess money *mistakenly* paid to the corporate debtor and not insolvency resolution of the corporate debtor, the application is liable to be rejected. In this context Ld. Sr. Counsel placed reliance on the ruling in re,

14. Before we proceed to examine these submissions on the basis of the *factual matrix* of this case and the applicable *legal frame, we feel it necessary to refer to the following provisions contained in IB Code*.

Section 5(20) of the IBC defines “operational creditor” in the following terms:

> **"Operational creditor** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

Section 5(21) defines the meaning of "operational debt.

> **"Operational Debt** means a claim in respect of the provision of goods or services including employment or a debt in respect of the of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

Section 3(6) of IBC defines 'claim' in the following terms: means—

> "(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
>
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured."

Section 3(12) of the IBC defines 'default' as:

> "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not re-paid by the debtor or the corporate debtor, as the case may be."

15. Since the applicant rested its claim an 'operational debt' said to be *due and payable* by the corporate debtor, on a quasi-contract and the doctrine of unjust enrichment**,** at the outset we wish to refer herein to section 72 of Indian Contract Act, which is as below;

> Section 72 in The Indian Contract Act, 1872

> "Liability of person to whom money is paid, or thing delivered, by mistake or under coercion. —
> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.
> Illustrations
> (a) A and B jointly owe 100 rupees to C, A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B. (a) A and B jointly owe 100 rupees to C, A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B."
> (b) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegal and excessive. (b) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegal and excessive."

16. A bare reading of the above provision discloses that, a quasi-contract also known as an implied contract, in which an opposite party is required to pay/ restore the suitor the amount/benefit that has been paid/parted with under a mistake or coercion, comes into existence when no such contract between the parties exists**.** In other words, a quasi-contract is nothing but an obligation created by an implied contract in order to prevent unjust enrichment rather than under an agreement between the parties.

17. As per the ruling in, *Consolidated Construction Pvt, Ltd, supra*, relied on by the applicant, the *sine qua non*, for categorizing the 'debt' as an 'operational debt' the 'claim' defined under Section 3(6) of IB Code, must have *nexus* and must be *in respect of the provision of goods or services*. Therefore, it is *imperative* for the applicant to establish not only the *'nexus'* but also that the *excess payment* made to the corporate debtor was ***qua*** *the goods supplied* by the corporate debtor under two purchase orders dated 15.06.2018, and the commercial invoices dated 11.01.2019, lest no operational debt exists in this case.

18. The *factual matrix*, in re, *Consolidated Construction Pvt, Ltd, supra*, discloses that the advance sum which was held to be an *operational debt under section 5(21) of IB Code*, has been paid by the operational creditor in *furtherance of an existing express contract for supply of goods* between the parties, in *juxtaposition,* in the case on hand the even though the act of making excess payment had taken place while paying the sale consideration in respect of *supply of goods* under the purchase orders/Commercial Invoices, *supra*, the same cannot be qua, the commercial invoices dated 11.01.2019 since the applicant under the said commercial invoices was required to make payment of the sum of mentioned in the said commercial invoices to the corporate debtor and no

other amount. Thus, the excess payment mistakenly paid by the applicant being not in pursuance of the terms and conditions of the purchase orders referred above, applying the definition of 'operational debt' as defined in section 5(21) of the IB Code, and the ruling supra, the same cannot be considered as payment for supply of goods by the corporate debtor herein. This view of ours is further fortified by the fact that the applicant, unequivocally based its claim of operation debt not under the purchaser order or commercial invoices referred to above but entirely under a quasi or implied contract, which contract can only emerge impliedly, and when no such express contract between the parties existed. Therefore, we are unable to buy the argument of the learned counsel for the 'operational creditor', in this case that the excess amount paid to the respondent is in the nature of an 'operational debt'. Needless to say that when no operational debt in terms of section 5(21) of the IB Code exists, default, even if there is such default cannot be in respect of an 'operational debt, as such triggering corporate insolvency resolution process against the respondent on the basis of such default is impermissible.

19. That apart, it is trite to say that, the *prime objective* of a *quasi-contract* is prevention of unjust enrichment by one party on account of a mistake/coercive act/thing done by the other party, by ordering the party

unjustly benefitted to pay/restore the befit it received to the party who suffered loss due to the said act, whereas the objective of IB Code, is to rescue a corporate debtor in distress in a time-bound insolvency resolution process.

20. Here we profitably quote, Hon'ble Supreme Court ruling in re, Swiss Ribbons, 2022 Live Law (SC) 129 PART D 35, wherein it was held that;

> "*The IBC was not akin to a recovery legislation for creditors, but is a legislation beneficial for the corporate debtor: It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.*"

Therefore, the present application having been based on a *quasi-contract*, can only serve the purpose of recovery and not resolution of insolvency of the respondent, we hold that the present application under section 9 of the IB Code is misconceived and not maintainable.

21. Therefore, for the reasons afore stated, we hold that there is no operational debt as defined under section 5(21) of IB Code, qua, the purchase order issued by the applicant or the commercial invoices raised

by the respondent on the applicant, as such this application is not maintainable under section 9 of the IB Code.

The Point is answered accordingly.

22. Point.2.

> Whether a pre-existing dispute exists between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

Since in our discussion on Point No.1, we have categorically held that no operational debt within the meaning of section 5(21) of the IBC exists qua, the purchase order issued by the applicant or the commercial invoices raised by the respondent on the applicant, it would be futile to embark upon the exercise of finding whether or not a *pre-existing dispute* of non-existing operational debt exists in this case. However, in the event of we arriving at a positive finding on this point, then even if it is *assumed* that an operational debt within the meaning of section 5(21) of the IBC exists in this case, yet the application will not be maintainable, in terms of *clause 2 of section 8 of IB Code*. Therefore, we proceed to discuss and answer this point as well.

According to the Ld. Counsel for the Operational Creditor, the Corporate Debtor vide its email dated 03.07.2018 had in admitted *its default* in returning the excess amount it received as afore stated, however failed to return the same citing frivolous grounds. Learned counsel further states that the corporate debtor for the first time under the interim reply dated 05.06.2020 and the another reply 22.06.2020, raised a dispute regarding the debt, which is nothing but an afterthought. In so far as the plea that the doctrine of group companies applies to the case on hand is concerned, Ld. Counsel submits that, that the excess payment admittedly made by the applicant being in respect of two invoices both dated 11.01.2019 raised by the Corporate Debtor for a sum of Rs. 4,30,110/- in *pursuance of the purchase orders since gave rise to the claim of the applicant*, the corporate debtor is not entitled to either refer or rely on the purported other business transactions with other members of the *Sandvik Group*, under the guise of 'group companies doctrine' in order to raise an unfounded and baseless plea of *pre-existing dispute.*

23. However, the Ld. Senior Counsel, would contend that the Framework Agreement dated 22.02.2016, clearly applies to all 'Group Companies of Sandwich Group' as such the applicant herein, besides M/s Sandvik Asia Pvt Ltd., being part of the said group companies are bound

by the said agreement. Learned senior counsel further submits that the said document though has been suppressed in the application, applicant had admitted the same in the Rejoinder, filed by the applicant. Learned senior counsel further submits that right from the stage of submission of quotations dated 04.06.2018, which was addressed to Jaideep Gopale of M/s Sandvik Asia Pvt Ltd., all important discussions relating to the subject dispute were held between the respondent and the representatives of M/s. Sandvik Asia Pvt Ltd, more particularly with Mr. Jaideep Gopale for a period of 15 months between 13.02.2019 and 15.05.2020 on various issues including on the excess payment and e-mails exchanged between the respondent and the representatives of the group companies of the applicant. In this regard Ld. Sr. Counsel placed reliance on the email dated 08.10.2019 (Annexure-10), e-mail dated 06.11.2019(Annexire-11), e-mail dated 09.11.2019(Annexure-12), e-mail dated 24.04.2020 (Annexure-15) and e-mail dated 10.06.2020 (Annexure-16) filed by the applicant. Therefore, according to the learned senior advocate, the doctrine of group companies squarely applies to the case on hand. In support of this submission learned senior counsel placed reliance on the ruling, in re.

Cheran Properties Ltd. Vs. Kasturi and Sons Ltd., Civil Appeal Nos.10025-10026 of 2017, wherein it was held that,

> "*23. .. .. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non- signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.*"

Learned senior counsel further submitted that Mr. Bjorn G Olsson, who is the Product Manager M/s. Sandvik Mining and Rock Technology; a group company, vide email dated 18.11.2019, having referred to the discussions regarding the claims of the Respondents, sought information regarding the investment of excess funds received by the Corporate Debtor, and pursuant thereto the Corporate Debtor raised a *proforma invoice* for a sum of $1148149(Annexures 13 & 14) for the work done for M/s. Sandvik Asia Private Ltd and products supplied to M/s. Sandvik Mining and Construction Logistics Limited . Therefore, according to the learned senior counsel there is a pre-existing dispute between the parties regarding the refund of the excess amount paid, as such the present application is not maintainable.

24. In support of the plea of pre-existing dispute, ld. Sr. Counsel also placed reliance on the following rulings;

(i) Kaybouveat Engineering Ltd. Vs Overseas Infrastructure Alliance, wherein it was held that:

> "The dispute raised by the Corporate Debtor is not illusionary or feeble as such the application is liable to be dismissed."

(ii) Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd, wherein, Hon'ble Supreme Court of India, held that,

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

25. Having anxiously considered the submissions of the Ld. Counsels and on careful perusal of the above undisputed correspondence placed before us by both sides, we do not hesitate to say that we are fully convinced by the submission that a *pre-existing* dispute as to the unpaid (Purported) operational debt, exists in this case, which is not spurious, mere bluster, plainly frivolous or vexatious. The following are the reasons for the above conclusion that we have arrived at;

(i) The post 03.07.2018 correspondence between the representatives of M/s. Sandvik Asia Pvt Ltd, through Mr. Jaideep Gopale, in between 13.02.2019 and 15.05.2020, contain discussions on refund of excess payment and the Corporate Debtor's claim for the additional services it claimed to have rendered from time to time. The email dated 18.10.2019 (Annexure-10) from Mr. Bjorn G Olsson, who is the Product Manager M/s. Sandvik Mining and Rock Technology; a group company, which is extracted herein below, establishes the same.

"*Thanks for today's meetings. I hope this will be the start of us solving this issue. Sandvik looks at this as a very severe issue, I want to stress how important it is that we will solve this in order to have an ongoing cooperation.*

Attached are the notes, and below I have copied deliveries which are expected from TA.

- *Abhinav say that he asked Sandvik of their priority 1) Get money back or 2) invest the money into TA company that eventually would result in supplying Sandvik products.*

    * *Follow up: Abhinav will forward emails that shows this question.*

- *Follow up: TA needs to make a document that shows a figure of the extra work that they have done. Document will be ready in 2 weeks.*

    * *Manhours specified to specific task*
    * *Cost of man hours.*
    * *Investments and the cost of it.*

- *Follow : TA needs to make a document that shows how they have invested the overpayment money into their company and how it is related to Sandvik products.*"

(ii) Pursuant to the above e-mail dated 18.10.2019, the corporate debtor raised a 'Proforma Invoice' for a sum of $1148149 (Annexures 13 and 14) for the work (purportedly) done for M/s. Sandvik Asia Private Ltd and products allegedly supplied to M/s. Sandvik Mining and Construction Logistics Limited, one of the group Companies of Sandvik. The above correspondence, demolishes the plea of the applicant that the corporate debtor vide letter dated 03.07.2018 had admitted its default.

(iii) The submission of the Ld. Counsel for the applicant that since the excess payment made by the applicant being in respect of two invoices both dated 11.01.2019 raised by the Corporate Debtor for a sum of Rs. 4,30,110/- in pursuance of the purchase orders issued by the applicant, gave rise to the claim under this application, the corporate debtor is not

entitled to either refer or rely on the so called other business transactions with other members of the Sandvik Group or rely on the doctrine of group companies in order to raise an unfounded and baseless plea of pre-existing dispute, in our considered view is unacceptable, for the reasons namely,(i) the two quotations dated 4/6/2018, basing on which the purchase orders were issued to the respondent herein, were addressed and sent to the representative of M/s. Sandvik Asia Pvt Ltd, and not to the applicant.

(iv) Having overwhelmingly relied on the email dated 28.02.2019 sent by Mr. Jaideep Gopale, who is the representatives of M/s. Sandvik Asia Pvt Ltd, besides on the email dated 03.07.2019 sent by the respondent to Mr. Jaideep Gopale of M/s Sandvik Asia Pvt Limited in order to buttress its plea of purported admission of debt by the corporate debtor, the applicant is estopped under law from, disassociating itself either with M/s. Sandvik Asia Pvt Ltd or the correspondence made by/with Mr. Jaideep Gopale of M/s. Sandvik Asia Pvt Ltd, with the corporate debtor as the same is nothing but approbate and reprobate.

(v) A quasi-contract, even though mandates return/restoration of the benefit a party received due to a mistake/coercion, requires

investigation on whether or not the person is entitled to the equitable relief of restitution/return. In this regard, the email dated 18.10.2019 from Mr. Bjorn G Olsson, supra, discloses that, information regarding how the overpayment money sent to the respondent has been invested by the respondent and how it related to Sandvik products, has been sought from the respondent and pursuant thereto the respondent raised a 'proforma invoice' for a sum of $1148149 (Annexures 13 & 14) for the work it claimed to have done for M/s. Sandvik Asia Private Ltd and products allegedly supplied to M/s. Sandvik Mining and Construction Logistics Limited, one of the group Companies of Sandvik, which plea was not accepted by the applicant, thus, a dispute as to applicant's entitlement of refund of the excess amount, has arisen between the parties.

26. Be that as it may, even assuming that the *defence* put forth by the corporate debtor is *moonshine,* yet the settled law being that a person who claims an equitable relief from the Court, has to satisfy the Court that in equity he is entitled to such relief. A mere bald claim would not do; he must make it apparel to the Court that equity demands the grant of relief to him. This legal position cane be well traced from the authoritative pronouncement of the division bench of Hon'ble High Court of Andhra

Pradesh, in re, N.V. Ramaiah vs State Of Andhra Pradesh And Ors. 1988 (35) ALT 38 AP, wherein it was held that,

> **"***Section 72 incorporates a rule of equity. It is said to be legislative expression of the principle of equitable restitution. This Section and S. 70 can be said to be cognate Sections, both incorporating the same rule of equity in its varying facets. Section 70 says that, where a person lawfully does anything for another, or delivers anything to him, without intending to do so gratuitously, the other person who enjoys the benefit thereof is bound to compensate the former in respect of, or to restore the thing so done or delivered. A person who claims an equitable relief from the Court, has to satisfy the Court that in equity he is entitled to such relief; a mere bald claim would not do; he must make it apparel to the Court that equity demands the grant of relief to him*."
>
> *What does this precisely mean? It can better be set out in the words of the Supreme Court itself in a case arising under S. 70, viz., Mulamchand v. State of M. P. The Court said:*
>
> "*The important point to notice is that in a case falling under S. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under S. 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution*."
>
> "*The above extract yields the following principles : (i) Section 70 - which would also mean S. 72, incorporate as they both do the equitable rule of restitution - is designed to prevent unjust enrichment; (ii) it is not appropriate to draw a distinction between*

law and equity, and the relief of restitution would be ordered by the Court only if the justice of the case so requires; and (iii) the plaintiff who seeks this equitable remedy, has to adduce evidence in support of his claim. He has a duty to account to the defendant for what he has received in the transaction from which the right to restitution arises. In short, accounting by the plaintiff is a condition precedent from granting restitution. The burden is upon the plaintiff, who seeks such equitable remedy, to plead and prove all the facts which lead the Court to the conclusion that the equity and justice demand the grant of relief to him."

"*In our opinion, the above principles will apply with equal force to a case arising under S. 72 of the Contract Act. A held by the Supreme Court, a person who seeks restitution has a duty to account to the defendant what he received in the transaction in which his right to restitution arises. In other words, accounting by the plaintiff is a condition of restitution. It is, therefore, that we have taken the view that in order to successfully claim restitution under S. 72, it is necessary for the person claiming restitution to prove loss or injury to him. If a person who has paid money or delivered thing by mistake to another has received some benefit on account of or in consequence of such payment or delivery, he is liable to account for it before claiming restitution from the person to whom money has been paid or thing has been delivered*".

"We are, therefore, of the opinion that, the plaintiff having failed to plead and prove that he has suffered any loss or injury and that, to offset that loss or injury he must be granted the equitable relief of restitution, he would not be entitled to the equitable relief under S. 72 of the Contract Act. Added to the failure to plead and prove on the part of the plaintiff, is the presumption which the Court is entitled to draw, having regard to the ordinary course of business, that every manufacturer passes on the *burden* of what he has paid for the raw material, to the consumer of his product. Similarly, every dealer who resells such product to another, equally recovers the same from his purchaser." (*Emphasis is ours*)

27. Legal position as to the enforcement of a quasi-contract being as above, having regard to the scope and the nature of enquiry that IB Code has called upon us to undertake in an application filed under section 9 of the IB Code, we are certain that we cannot in this case embark on the investigation **as to the sufficiency or otherwise of the pleadings and proof in the present claim which is based on section 72 of the Indian Contract Act.** However, suffice if it is said that, a mere plea that the opposite party failed to return the excess money it received from the applicant unjustly, by itself is not sufficient to grant the equitable relief under S. 72 of the Contract Act. In that view of the natter when the applicant's pleadings are examined, what we found was a mere mention that *the respondent failed in returning the excess amount it received from the applicant even though it is bound to return the same under a quasi-contract*, hence the applicant filed the present application. Therefore, basing on such a bare mention alone it would be improper under law for us to hold that a debt due and payable by the respondent under a quasi-contract has been established by the applicant. Hence, we hold that existence of an *operational debt* as claimed by the applicant remains unestablished by the applicant.

28. Therefore, in light of our findings on points above, we hereby hold that the present application is liable to be rejected as not maintainable. However, before we part with, we make it clear that we have rejected this company petition for initiation of Corporate Insolvency Resolution Process against the respondent, only on the ground of *maintainability* and we have not entered into merits of the applicant's entitlement of the sum claimed as an *operational debt.*

29. In fine, this Company Petition (IB) No.278/9/ HDB/2020 is hereby *rejected* as not maintainable, however, without costs.

SD/- SD/-

SATYA RANJAN PRASAD
MEMBER (TECHNICAL)

DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

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