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www.indolegalservices.com

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121, Tower 11, Supreme
Enclave, New Delhi- 110091



ashutosh@indolegalservices.com
gaurav@indolegalservices.com



+91- 9871433339; +91- 8588999046



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REPLY TO DEMAND NOTICE IS CONDITION PRECEDENT TO RAISE DISPUTE UNDER IBC: NCLAT ANSWER IN NEGATIVE.

The question *inter alia* was answered in negative by the NCLAT in the case of Flipkart India Private Limited (“Flipkart”) in matter titled as *Neeraj Jain Versus Cloundwalker Streaming Technologies Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 1354 of 2019 judgement dated 24.02.2020.*

NCLAT relied upon the law laid down by the Supreme Court in the cases of *Mobilox Innovations Pvt. Ltd v Kirusa software P. Ltd* and *Innovative Industries Ltd. Vs ICICI Bank and Anr.* (2018) 1 SCC 407, wherein a “pre-existing dispute” required to be raised by the Corporate Debtor was discussed in following terms:

“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) (ii) (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 credit 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 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 reject a spurious defence which is mere bluster. However, in doing so, the court does not need to be satisfied that 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 dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application”.



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Thus NCLAT held that what is required for the Corporate Debtor to prove is the pre-existence of dispute, which can be evident from mail or other correspondence or pending suit, arbitration or any other proceeding. Mere failure to make a reply to the demand notice does not vanish the dispute which might have been existing between the parties and therefore if some cogent evidences have been produced before the Adjudicating Authority as to such pre-existence of dispute then the Adjudicating Authority is not to be swayed by Application of the Operational Creditor or by the fact of Corporate Debtor's non-reply to the Demand Notice.

This proposition was again tested by NCLAT in *Umesh Saraf Vs. Tech India Eng. Pvt Ltd. Company Appeal (AT)(Ins.) No. 548 of 2020 vide judgement dated 19.10.2020* wherein NCLAT held that not replying to demand notice is purely a technical objection and Adjudicating Authority should have analysed the documents on record to access whether there was a pre-existing dispute or not in the given case. In simple word reply to a demand notice cannot be treated as condition precedent to raise dispute in IBC proceedings.

