NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.162 of 2019

IN THE MATTER OF:

Unistill Alcoblends Pvt. Ltd. **...Appellant**

Versus

India Brewery & Distillery Pvt. Ltd. **...Respondent**

For Appellant: **Shri Rajshekhar Rao, Shri Ranjeet Singh Sidhu, Shri Raghav Kacker and Ms. Rajshree Jaiswal, Advocates**

For Respondent: **Ms. Pallavi Sengupta, Advocate**

O R D E R

16.01.2020 This Appeal has been filed by Appellant claiming to be Operational Creditor against Impugned Order dated 11th January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) in C.P. (IB) No.147/BB/2018. The Application had been filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) against the Respondent – Corporate Debtor. The Appellant claims that the Appellant and the Respondent had business arrangement whereunder the Respondent had to manufacture India Made Foreign Liquor (IMFL) for various brands of the Appellant and also to separately supply Extra Neutral Alcohol (ENA) to the Appellant. For the purpose, Appellant provided advance payments, working capital to purchase raw material and manufacture IMFL for the brands of the Appellant. According to the Appellant, for the purpose, Appellant had also supplied High

peed Bottling Unit Equipment to the Respondent. It is stated that there was an Agreement dated 21st February, 2011 with regard to the manufacture of IMFL. There was also a Memorandum of Understanding dated August, 2011 with regard to the supply of High Speed Bottling Unit Equipment. It is the case of the Appellant that in view of such business relations, the Appellant had on 30th June, 2012 paid an advance amount of Rs.47,57,800/- for purchase of ENA; Appellant provided working finance as per the Agreement, and Rs.16,77,827/- was payable by the Respondent towards raw material. The High Speed Bottling Unit had also been supplied. The Appellant claims that the Respondent stopped production of IMFL and the arrangement came to be terminated in the month of November, 2012. According to the Appellant, the Respondent is liable to pay Rs.47,57,800/- plus Rs.16,77,827/- and is also liable to return the equipment supplied by the Appellant or in default, pay Rs.30,00,000/- which is the written down value of High Speed Bottling Unit. The Appellant claims that the Section 9 Application was filed claiming total outstanding dues of Rs.2,38,16,374/-.

2. The learned Counsel for the Appellant states that this amount includes amount of interest which has been disputed by the Respondent as not part of Agreement but even if the portion of interest was to be excluded, outstanding dues were more than Rs.1 Lakh. According to the Appellant, in view of the dues, Notice under Section 8 of IBC was sent on 5th April, 2018 (Page – 147) and the Respondent replied on 14th April, 2018 (Page – 159). Subsequent to such Reply, Respondent filed suit so that arbitration proceedings could be initiated. The learned Counsel referred to document at Page – 161 as the

Section 9 Petition under the Arbitration Act. It is further the case of the Appellant that even subsequent to Section 8 Reply, the Respondent admitted liability to pay by sending another letter dated 5th May, 2018 (Page – 128) and the liability has been admitted even in the balance sheet of the Corporate Debtor (Page – 134 at 136) which balance sheet was with regard to the Financial Year ending 31st March, 2017.

3. Learned Counsel for the Respondent submitted that under the Agreement concerned, there was no provision for interest and the Respondent was not liable to pay interest. It is also claimed that the advances made were not debt payable to the Appellant. In fact, it is claimed that the Respondent had counter claimed against the Appellant as the Respondent had enrolled employees with a view to meet the requirements of the Appellant but the Appellant did not meet the guaranteed offtake as a result of which, the Respondent was unable to meet its financial obligations. It is also claimed that the amounts claimed were old amounts of 2012 and thus, the Section 9 Application was rightly rejected by the Adjudicating Authority.

4. Against this, the learned Counsel for the Appellant has referred to letter sent by the Respondent on 15th April, 2014 (Annexure A9 – Page 121), and then another letter dated 19th November, 2015 (Page – 125), and then yet another letter was sent by the Respondent (Page – 126) on 6th July, 2017 and letter dated 14th February, 2018 (Page – 127) in which letters, the Respondent continuously acknowledged the amounts due even specifying the amount outstanding. The learned Counsel pointed out that within the period of limitation, the Respondent continuously issued such written

acknowledgements and in fact, even after vague Reply dated 14th April, 2018 (to Section 8 Notice dated 5th April, 2018), the Respondent sent yet another letter dated 5th May, 2018 (Page – 128) which read as under:-

> "We profusely thank you for the courtesies extended to us on 27th April, 2018.
>
> In continuation of our discussion on the above subject matter during the course of our meeting, we would like to inform you that the balance outstanding as per our books of accounts will be cleared within 6 to 8 months.
>
> In case if you initiate any further legal action on us in this period, we reserve our right to pursue the matter legally.
>
> Further this letter is being issued on the basis of our mutual understanding arrived at the meeting held on 27.04.2018."

5. The Counsel pointed out that clearly Respondent admitted that it had dues to pay which were also appearing in books of accounts. Counsel referred back to the balance sheet of the Respondent which is at Page – 134 at 136. The balance sheet is for the Financial Year ending 31st March, 2017 and the Counsel referred to Note 4 (Page – 136) to submit that the Respondent showed in its books of accounts that it had to pay Rs.1,30,05,426/- to the Appellant – Unistill.

6. The learned Counsel states that although the amount is shown under the heading of long term borrowings, the nature of dealings between the parties are apparent from the Agreement which they entered into and the business dealings which they had and which are reflected even in the various acknowledgements issued by the Respondent.

7. Considering the documents pointed out by the leaned Counsel for the Appellant, and the fact that the learned Counsel for the Respondent is unable to show us any document before the Notice under Section 8 was issued which would indicate that there was any dispute communicated by the Respondent to the Appellant, we find that the Adjudicating Authority erred in dismissing the Section 9 Application observing that "it is deemed that there is dispute prior filing the instant petition". What was relevant was to see whether there was pre-existing dispute when Section 8 Notice was issued.

8. There is nothing to show that there was any other reason why Section 9 Application was required to be rejected

9. For the above reasons, we allow the Appeal. We set aside the Impugned Order. We remit back the matter to the Adjudicating Authority. The Respondent may, before Section 9 Application is admitted by the Adjudicating Authority, settle the dispute with the Appellant, if the Respondent so wants. The Appellant and Respondent will appear before the Adjudicating Authority on 10th February, 2020. If the Respondent does not settle the dispute before that date, the Adjudicating Authority will admit the Section 9 Application and pass further necessary Orders required to be passed under the IBC.

The Appeal is disposed accordingly. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

/rs/md