

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 285 of 2022

[Arising out of the Impugned Order dated 11.02.2022 passed by the National Company Law Tribunal, New Delhi Bench Court-III in C.P.(IB) No. 1924/ND/2019]

In the matter of:

Rajendra Bisht,

Erstwhile promoter of

M/s Ambassador Logistics Pvt Ltd.

S/o Mr. HS Bisht

R/o C-142, Assotech Windsor Park,

Vaibhav Khand, Indrapuram,

Ghaziabad -UP 201010

... Appellant

Versus

1. M/s Satkar Logistics Pvt Ltd

F-1/2 Okhla Industrial Area,

Phase -1, New Delhi – 110020.

2. Ms. Gunjan Mittal

Insolvency Resolution Professional

of M/s Ambassador Logistics Pvt. Ltd.

A-25A, LGF, Lajpat Nagar -2,

Near Lajpat Nagar Metro Station,

New Delhi - 110024

... Respondents

Present:

For Appellant : Mr. Dhruv Gupta, Advocate.

For Respondents : Mr. Sukhbir Singh, Advocate.

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

This Appeal has been filed by the erstwhile promoter and director of M/s Ambassador Logistics Pvt. Ltd. (hereinafter referred to as the **‘Corporate Debtor’**) assailing the order dated 11.02.2022 of Ld. NCLT, New Delhi, Court-III in C.P.(IB) No. 1924/ND/2019 whereby the Corporate Debtor was admitted into Corporate Insolvency Resolution Professional (hereinafter referred to as the **‘CIRP’**) on an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **‘IBC, 2016’**) filed by the M/s Satkar Logistics Pvt. Ltd. (hereinafter referred to as the **‘Operational Creditor’**)/Respondent No. 1.

2. The brief facts of this case as noted in the impugned order are as under:

- i. The petition was filed by the Operational Creditor for an operational debt of Rs. 6,66,667/- along with interest @ 24% per annum w.e.f. 19.10.2016 till realisation.
- ii. The Operational Creditor had rendered management/logistics services such as ocean freight charges, B/L charges, IHC/THC charges etc to the Corporate Debtor for which various invoices were raised from time to time.
- iii. The parties had maintained a running account. The Corporate Debtor has made part payments which were adjusted by the Operational Creditor as per “FIFO method” (First in First Out method). There was an outstanding amount of Rs. 6,66,667/-.

- iv. The notice under Section 8 of IBC, 2016 was issued by the Operational Creditor on 27.02.2019 and the same was replied by the Corporate Debtor on 07.03.2019.
- v. Before the Ld. NCLT, the Corporate Debtor took the defence of pre-existing dispute, as also that the claim is barred by law of limitation.
- vi. The Operational Creditor on the other hand stated that dispute was raised only after receipt of Section 8 notice.
- vii. The Ld. NCLT held that the application was within limitation as the last payment was made by the Corporate Debtor on 19.10.2016, and the petition was filed within three years of the last payment. The relevant portion of the impugned order admitting the Corporate Debtor into CIRP is reproduced below for ready reference:

“7. We have heard-Ld. Counsels for both the parties at length, perused the application before us as well as the written submissions filed by the parties. The case laws relied upon by both sides have also been considered by us. It is seen that Operational Creditor has issued notice under section 8 of the Code on 27.2.2019 and the said notice has been duly replied by Corporate Debtor on 7.3.2019, and the present Application has been filed on 14.8.2019. In its reply dated 7.3.2019 the Corporate Debtor has only raised issues with regard to certain payments not being accounted for by Operational Creditor and nothing is shown/claimed as being prior existing dispute between the parties. It is seen from copy of ledger account annexed with Section 8 notice that parties are having running account in respect of various invoices raised by Operational Creditor for the logistics/freight services provided by it to the Corporate Debtor during the period from 1.4.2014 to 18.2.2019. The last invoice as recorded in the said ledger account is no. SLPL/15-16/3317 dated 4.1.2016 for Rs. 1,18,315/- and the last payment received from Corporate Debtor is on 19.10.2016 of Rs. 94,064.

8. *It is further seen from copies of invoices enclosed with Demand Notice dated 27.2.2019 u/s 8 of the Code sent to the Corporate Debtor that all Invoices (page 101 to 158 of the Application) are made out in Corporate Debtor's name and duly accounted for in Ledger account of Corporate Debtor. The Operational Creditor has been able to establish debt and default on part of Corporate Debtor with regard to these invoices. Corporate Debtor has not provided any cogent evidence in support of its contention with regard to any pre-existing dispute, prior to the issuance of Demand Notice. In defence to the said notice, it has only raised certain issues which are at best related to reconciliation of certain payments.*

9. *In view of the above discussion, we are convinced that Operational Creditor has made out case against Corporate Debtor for initiation of CIRP under the Code due to non-payment of Operational Debt of Rs. 6,66,667.40. The present application has been filed on 14.8.2019 with the last payment admittedly having been made by Corporate Debtor on 19.10.2016 on running account basis, the same is held to be within limitation u/s 137 of the Limitation Act. Therefore, this Authority admits the present Application under section 9 (5) of the I & B Code, 2016.”*

3. The Learned Counsel for the Appellant submitted that in its reply to Section 8 notice dated 07.03.2019, the Corporate Debtor had informed the Operational Creditor that as per their accounts, an amount of Rs. 6,94,102/- is due from the Operational Creditor against its claim of 6,66,667/-. The various accounting entries were also referred too. The relevant portion of the reply is reproduced below:

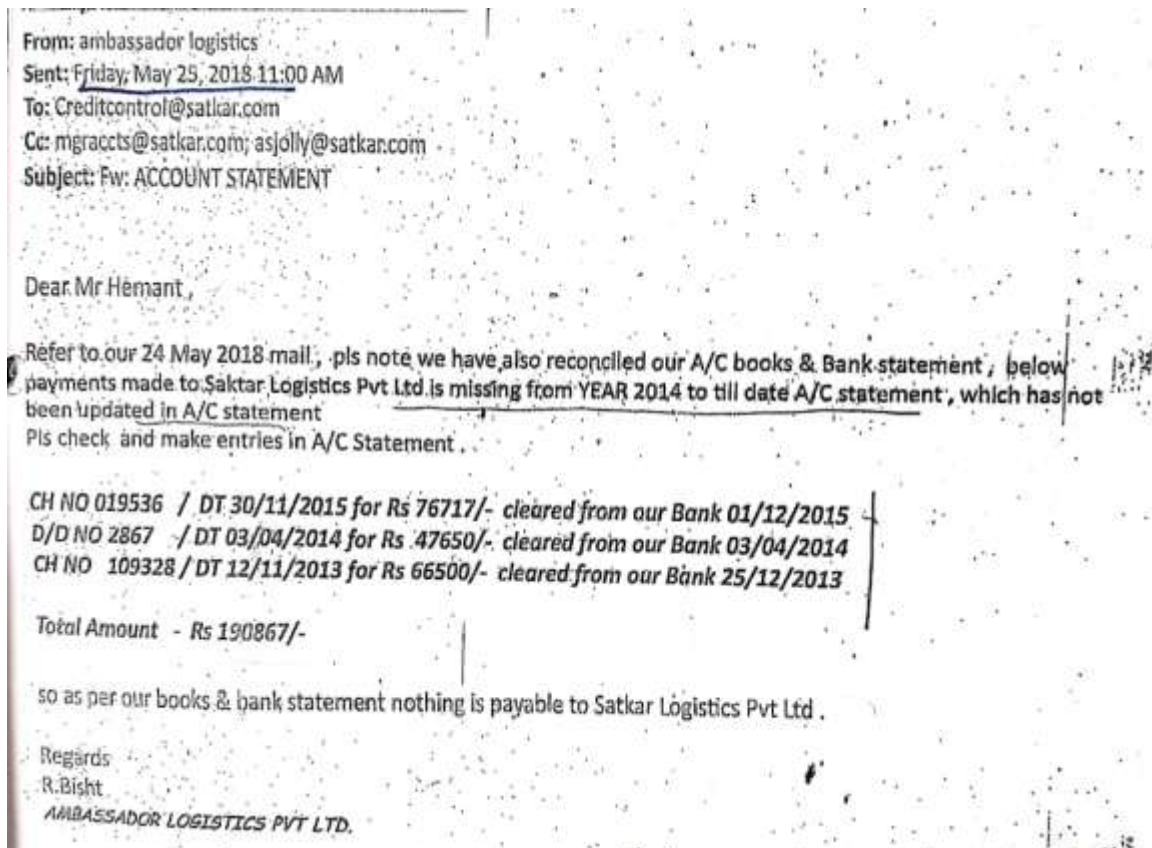
“No payment is due on account of Ambassador Logistics Pvt. Ltd as per below details.

1- Bank payments (Cheques & NEFT) Year 2014 to till date	- Rs.261439.00
2- Payment refund of Ambassador Logistics Year 2014-2015	- Rs.242978.00
3- TDS amount F.Y. 2013-2014, F.Y. 2014-2015	- Rs. 24589.00
4- Closing & Opening Balance F.Y.2013-2014, F.Y.2014-2015-	Rs. 7501.00
5- Wrong Invoice Year 2014-15	- Rs. 90337.00

6- Invoice amount not as per agreed rate Year 2015-2016 - Rs. 67258.00

Total amount to be settled in A/C of Satkar Logistics Pvt. Ltd - Rs.694102.00”

4. The Learned Counsel for the Appellant referred to page 216 to 222 of the Appeal Paper Book containing emails exchange between the Corporate Debtor and the Operational Creditor. The last three emails are dated 18.05.2018 (at page 222 of Appeal) from Operational Creditor to Corporate Debtor, 24.05.2018 (at page 220 of Appeal) from Corporate Debtor to Operational Creditor and finally email sent on 25.05.2018 (at page 220 of Appeal) from Corporate Debtor to Operational Creditor wherein the Corporate Debtor had clearly stated that as per their books of account and bank statement nothing is payable to M/s Satkar Logistics Pvt. Ltd. This final email dated 25.05.2018 is reproduced below:



5. It is submitted the said email dated 25.05.2018 was not replied to by the Operational Creditor and straightway after a gap of 7 months the demand notice dated 27.02.2019 was sent.

6. It is submitted the Ld. NCLT erred in ignoring email correspondence, which was prior to the issue of notice under Section 8 of IBC, 2016 and has erred in holding that there is no pre-existing dispute. The Learned Counsel for the Appellant has relied upon the following judgments in his support:

- i. *M/s S.S. Engineers & Ors. v. Hindustan Petroleum Corporation Ltd. in Civil Appeal No. 4583 of 2022 dated 15th July, 2022 reported in 2022 LiveLaw (SC) 617;*
- ii. *M/s. Laina Power Engineering v. Sokeo Power Private Limited in Company Appeal (AT) (Insolvency) No. 452 of 2018.*

7. The Learned Counsel for Respondent No. 1/Operational Creditor has submitted that the Appellant had made the last payment amounting to Rs. 94,064/- on 19.10.2016 and the limitation would start from this date. The demand notice was served on the Corporate Debtor and Corporate Debtor replied to the said notice vide reply dated 07.03.2019 and admitted the default and liability of Corporate Debtor towards Respondent No. 1.

8. It is submitted that in view of the appeal of the Corporate Debtor, the application is not barred by limitation, and is an admitted debt, and thus the order of Ld. NCLT be upheld.

9. We have heard both the parties and perused the record.

10. Since the last payment was made on 19.10.2016, and the application was filed within three years, we hold that application under Section 9 of the IBC, 2016 is within limitation. On the issue of “pre-existing dispute”, we find that in

email dated 25.05.2018, the Corporate Debtor had clearly stated that as per their books of account and bank statement nothing is payable to M/s Satkar Logistics Pvt. Ltd., the Operational Creditor.

11. On specific query by the Bench, the Learned Counsel for the Respondent No. 1 admitted this e-mail was not replied to by the Operational Creditor. We find there is continuous exchange of e-mails between the Operational Creditor and the Corporate Debtor regarding the differences in the accounting entries and the final email exchanged is dated 25.05.2018, which is reproduced above at para 4, wherein the Corporate Debtor had clearly stated no amount is payable to M/s Satkar Logistics Pvt. Ltd.

12. On perusal of the reply to Section 8 notice, we find that Corporate Debtor had clearly stated no amount is due to the Operational Creditor. This Tribunal in order dated 16.08.2018 *Company Appeal (AT) (Insolvency) No. 452 of 2018 (supra)* had relied upon the emails exchanged between the parties prior to issue of demand notice under Section 8 of the IBC, 2016 as evidence of pre-existing dispute.

13. The Hon'ble Supreme Court in *M/s S.S. Engineers & Ors. v. Hindustan Petroleum Corporation Ltd. in Civil Appeal No. 4583 of 2022 (supra)* has held that the application under Section 9 was rightly rejected on the grounds of pre-existing dispute. The relevant portion of the order is reproduced below for reference:

“30. This Court finds that there was a pre-existing dispute with regard to the alleged claim of the appellant against HPCL or its subsidiary HBL. The NCLAT rightly allowed the appeal filed on behalf of HBL. It is not for this Court to adjudicate the disputes between the parties and determine whether, in fact, any amount

was due from the appellant to the HPCL/HBL or vice-versa. The question is, whether the application of the Operational Creditor under Section 9 of the IBC, should have been admitted by the Adjudicating Authority. The answer to the aforesaid question has to be in the negative. The Adjudicating Authority (NCLT) clearly fell in error in admitting the application.

31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.

32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.

33. We find no grounds to interfere with the judgment and order of the NCLAT impugned in this appeal.”

14. The Hon’ble Supreme Court in the case of *Sabarmati Gas Limited v. Shah Alloys Limited*, (2023) 3 SCC 229 has held that failure of reconciliation of accounts qualifies as a pre-existing dispute. The rejection of Section 9

application on the grounds of such “pre-existing dispute” was upheld. The relevant portion of the judgment is reproduced below:

55. *In this context the meaning of the word “reconciliation” is to be looked into. Going by Black’s Law Dictionary, 10th Edition, the apt meaning suitable to the situation in relation to accounting, reads thus: “an adjustment of amounts so that they agree, especially by allowing for outstanding items”. It is submitted by the learned counsel for the respondent that such a reconciliation had not taken place and also that indisputably, DRS was not formulated and approved. The aforesaid facts revealed from Annexure 40 together with the stand taken by the respondent in the letter dated 04.01.2013 (Annexure 36) would reveal the existence of a pre-existing dispute between the parties.*

56. *In the contextual situation it is only apposite to be remindful of the observation in Mobilox Innovations that in doing the act of separating the grain from chaff the Court need not to be satisfied that the defence is likely to succeed. It is enough that a dispute exists between the parties and in other words, what is to be seen is whether there was a plausible contention requiring investigation for the purpose of adjudication. Taking note of the nature of the dispute of the respondent as referred hereinbefore in respect of the claim made by the appellant, we do not find any reason to disagree with the concurrent findings of the Tribunals that there existed a ‘pre-existing dispute’ between the parties before the receipt of demand notice under Section 8 IBC. In other words, the dismissal of the application under Section 9 IBC on the ground of ‘pre-existing dispute’ cannot be held to be patently illegal or perverse. We also do not find any reason, in the facts and circumstances, to hold that the case set up by the respondent was a patently feeble legal argument. At any rate, we are not inclined to brush aside the case of the respondent as spurious.*

57. *We may hasten to add here that we shall not be understood to have held that the dispute set by the respondent regarding the dues is ultimately to be upheld. Certainly, when the expression ‘pre-existing dispute’ is used it will only indicate the existence of a dispute prior to the receipt of a demand notice under Section 8 IBC, and the correctness or its truthfulness is a matter of evidence. In short, the respondent has succeeded in raising a dispute describable as ‘pre-existing dispute’. In that*

view of the matter once we find that the Tribunals have rightfully held that there existed a 'pre-existing dispute' between the parties there cannot be an order of remand of the matter to the Tribunal for reconsideration of Section 9 application under IBC."

15. Following the said judgment of the Hon'ble Supreme Court, this Tribunal in *East India Udyog Ltd. v. SPML Infra Limited in Company Appeal (AT) (Insolvency) No. 256 of 2023* held that failure of reconciliation of accounts qualifies as a pre-existing dispute and had upheld the order of Ld. NCLT in rejecting the application under Section 9 on the ground of pre-existing dispute. The relevant portion of the said judgment is reproduced below:

7. *The Learned Counsel for the Corporate Debtor making rival contentions submitted that the business transactions between the Operational Creditor and the Corporate Debtor were based on payments to be made through the LC. Moreover, payments that were released by the Corporate Debtor did not correspond to any particular PO but was released corresponding to consolidated amounts that was due. However, the Operational Creditor has cherry-picked particular invoices which was contrary to the business model and commercial understanding between the parties. Further there has been no reconciliation of accounts and prior to reconciliation of accounts, no default could have arisen. In support of their contention, it has been submitted by the Learned Counsel for the Respondent that the Hon'ble Supreme Court in the matter of Sabarmati Gas Ltd. v. Shah Alloys Ltd. (2023) 3 SCC 229 has held that the failure of reconciliation of accounts also qualifies as a pre-existing dispute between the parties in terms of Section 8 of the IBC Code.*

.....

9. *The short point for consideration is whether there was any discernible pre-existing dispute surrounding the debt claimed to be due and payable by the Operational Creditor.*

10. *We find that the Corporate Debtor in its reply dated 08.08.2020 to the Section 8 demand notice had disputed both the quantum of operational debt and also deficiencies in respect of discharge of contractual obligations by the Operational Creditor.*

.....

12. We also notice that even prior to receipt of demand notice dated 29.07.2020, the Corporate Debtor on 18.07.2020 had refused to accept the outstanding operational debt, inter-alia, on the ground of reconciliation of accounts. We also notice that at page 855 of Appeal Paper Book (**'APB'** in short), the Operational Creditor in their counter affidavit dated 15.12.2021 to the additional affidavit dated 27.09.2021 filed by the Corporate Debtor has on their own admitted that they had given numerous reminders to the Corporate Debtor prior to 18.07.2020 to reconcile the account. The Adjudicating Authority has also taken note of the fact that since the Appellant had themselves sent email to the Corporate Debtor on 31.08.2018 and 04.09.2019 for reconciliation of accounts, that by itself shows that there existed a dispute between the parties regarding the amount of debt due and the requirement for reconciliation of accounts as both the parties were having counter claims against the other. It is the case of the Appellant that the emails for reconciliation of accounts were sent since the Corporate Debtor was not sharing their books of accounts. Be that as it may, this does not detract from the fact that there was a dispute around the debt due and payable since both parties had raised the issue of reconciliation of accounts. We also do not find any material to have been placed on record by the Operational Creditor wherein the Corporate Debtor can be said to have unambiguously admitted the operational debt claimed by the Appellant. We, therefore hold that the Adjudicating Authority has rightly observed in the impugned order that the Corporate Debtor had raised an issue with regard to the existence of amount claimed by the Operational Creditor and asked for reconciliation of accounts.

.....

20. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are of the view that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant on the ground of pre-existing dispute.”

16. In the facts of this case, we find that there existed a dispute between the Operational Creditor and the Corporate Debtor prior to the issuance of notice

under Section 8 of the IBC, 2016, which is evidenced by the emails exchanged between the parties. The Ld. NCLT has erred in ignoring the pre-existing dispute and admitting the Corporate Debtor into CIRP. The impugned order of the Ld. NCLT is set aside and the appeal is allowed. All pending application(s) are closed. No order as to costs.

[Justice Yogesh Khanna]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 11.03.2025
Ram N.