

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
(APPELLATE JURISDICTION)

Company Appeal (AT) (Insolvency) No. 1033 of 2023

[Arising out of the Impugned Order dated 30.05.2023 passed by the National Company Law Tribunal, Allahabad in C.P. (IB) No. 24/ALD/2022]

In the matter of:

LAW & KENNETH SAATCHI & SAATCHI PRIVATE LIMITED

Urmi Estate, Tower – A, 22nd Floor,

Ganpatrao Kadam Marg,

Lower Parel (W), Mumbai – 400013.

...Appellant

Versus

PATANJALI PARIDHAN PRIVATE LIMITED

Kripalu Bagh, Kankhal, Haridwar,

Uttarakhand – 24908.

...Respondent

Present :

For Appellant : Mr. Anirudh Krishan Gandhi, Ms. Anushree Poddar, Advocates.

For Respondents: Mr. Rohit Gandhi, Ms. Smita Jain, Advocates.

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

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

This appeal has been filed by the Appellant- Law & Kenneth Saatchi & Saatchi Private Limited (hereinafter called the ‘Operational Creditor’ or ‘OC’) against the order dated 30.05.2023 passed by the National Company Law Tribunal, Allahabad in C.P. (IB) No. 24/ALD/2022, wherein application of the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called the ‘IBC, 2016’) was dismissed.

2. The brief facts of the case are that the Appellant- Operational Creditor had undertaken to provide services for production of Television Commercial (hereinafter called the **‘TVC’**), print shoot and digital content for the Respondent -Patanjali Paridhan Private Limited (hereinafter called the **‘Corporate Debtor’ or ‘CD’**) under the terms of proforma invoice dated 17.10.2018.

3. It is the submission of the Operational Creditor that it had rendered services to the complete satisfaction of the Corporate Debtor and had raised final invoice on 29.01.2019 for sum of Rs. 2,06,50,000/-, out of which advance of Rs/ 87,50,000/- was already received by the Operational Creditor on 26.10.2018 and the balance amount of Rs. 1,19,00000/- was payable by the Corporate Debtor.

4. It is the submission of the Appellant that it had reminded the Corporate Debtor on multiple occasions including emails dated 13.04.2019, 16.04.2019, 25.04.2019, 26.04.2019, 02.05.2019, 03.05.2019, 08.05.2019, 09.05.2019 and as no payment was forthcoming, the Operational Creditor issued notice under Section 8 of the IBC on 12.03.2021 which was duly served on the Corporate Debtor on 15.03.2021. Since no payment was forthcoming from the Corporate Debtor, the Appellant had filed application under Section 9 of the IBC, 2016 before the Ld. NCLT which was dismissed by impugned order dated 30.05.2023.

5. Admittedly, there was no separate written agreement or contract for supply of the said TVC. To understand the controversy in this appeal, one requires to see the content of proforma invoice dated 17.10.2018 issued by the Operational Creditor which lists 32 terms and conditions, presumably agreed between the Operational Creditor and the Corporate Debtor. As per the proforma invoice, the payment terms included 50% advance and balance 50% on delivery

of the master TVC. The relevant terms and conditions stated in the proforma invoice are at Sl. No. 5, 6, 23 and 26 which are reproduced below for benevolent reference:

“5. 50% advance on total cost of master production payable 10 days prior to the shoot.

6. Balance against the delivery of the master TVC.

.....

23. The final TVC and the other material provided by LKSS will not violate or infringe any third-party proprietary rights or IPR of any nature whatsoever including any act, rule or regulation for the time being in force or as may be notified by the government from time to time and to that extent LKSS agree to indemnify and hold Client harmless against any claim, demand, action, investigation or other proceeding ('Claim') including but not limited to all damages, losses, liabilities, judgments, costs and expenses in relation thereto.

.....

26. Files will be handed over in digital format only. Client will be free to make the registration under any of the Intellectual Property Rights Acts. LKSS or Producer will provide the necessary NOC or any other paper which may require for the IP registration to the Client.”

.....

6. It is the admitted fact by both the sides that No Objection Certificate (hereinafter called the ‘**NOC**’) as per the terms and conditions No. 26 was not provided by the Operational Creditor. It is submitted by the Learned Counsel for the Corporate Debtor that through emails dated 07.05.2019 and 05.06.2019 the Corporate Debtor had specifically asked for NOC of the Operational Creditor. These emails are annexed at pages 163 and 165 of the Appeal Paper Book. It is the submission of the Learned Counsel for the Corporate Debtor that through

letter dated 08.09.2020, the legal department of the Corporate Debtor had asked the Operational Creditor for the NOC. The reference was specifically made to para 2 of the said letter, reproduced below:

“That in order to protect our Intellectual Property Rights in relation to "TVC", you have assured us of the NO OBJECTION CERTIFICATE (NOC) from the writer /lyricist, Music Composer, Whole TVC but it has been more than 22 months and we are yet to receive the NOC from your side. It is pertinent to mention that as per the agreed terms & condition as laid down in the proforma invoice dated 17-10-2018, it was your obligation to provide the NOC signed by the writer /lyricist, Music Composer.”

7. In response to the said letter, the representative of the Operational Creditor, namely, L&L Partners replied through letter dated 13.09.2020 stating that no objection certificate was not required as the writer/lyricist of the song, in the TVC, was an employee of the Operational Creditor. They stated that the terms and conditions attached in the proforma invoice stipulate that in the event PPPL (the Corporate Debtor) intends to go for registration of the services then the Operational Creditor will provide the NOC and the understanding was if any third-party material was being used only then a NOC may be needed for registration of the services under IPR laws and not otherwise. It was alleged that the issue of NOC raised is an afterthought to deny the claim of the Operational Creditor.

8. The letter from legal department of the Corporate Debtor dated 08.09.2020 and reply of the legal representative of the Operational Creditor dated 13.09.2020 are both much prior to the issue of demand notice under Section 8 of the IBC dated 12.03.2021.

9. The Learned Counsel for the Appellant took us through provisions of the Copyright Act, 1957, and reference was made to Section 17 of the Copyright Act and more specifically to clauses (b) and (c) of the said Section, to buttress their claim that no NOC was required as the TVC was made by the employees of the Operational Creditor at the instance of Corporate Debtor. The said provisions are reproduced below for ready reference:

**“CHAPTER IV
OWNERSHIP OF COPYRIGHT AND THE RIGHTS OF THE
OWNER**

17. First owner of copyright.—*Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:*

Provided that—

(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;

(b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;”

10. The Learned Counsel for Corporate Debtor, on the other hand, drew our attention to Rule 70 of the Copyright Rules, 2013. Specific mention was made to sub-Rule (3) of Rule 70 which specified the requirement of the original copy of 'no objection certificate' issued by the author in case the application is submitted by the owner of right. It was the submission of the Learned Counsel for the Corporate Debtor that the original no objection certificate is essential requirement for submitting application for registration of copyright. The relevant part of Rule 70 of the Copyright Rules, 2013 is reproduced below:

“(3) Every application should be signed only by the applicant, who may be an author or owner of right. If the application is submitted by the owner of copyright, it shall be enclosed with an original copy of no objection certificate issued by the author in his favour.”

11. The Learned Counsel for the Appellant, on the other hand, submitted that there was no need for NOC and that the debt has been admitted and acknowledged by the Corporate Debtor and application under Section 9 of IBC, 2016 ought to have been admitted by Ld. NCLT. He relied upon the following judgments of this Tribunal regarding acknowledgement of debt and its impact on admission under Section 9 of IBC, 2016:

- **Devesh Saraf v. Rama Tent House & Anr., Company Appeal (AT) (Insolvency) No. 51 of 2023.**
- **Naresh Choudhary v. Sterling Enamelled Wires Pvt. Ltd. & Anr., 2023 SCC Online NCLAT 487.**

12. The Learned Counsel for the Respondent relied upon the following judicial pronouncements on the issue of pre-existing dispute vis. a vis. admission of application under Section 9 of the IBC:

- **Mobilox Innovation P Ltd. v. Kirusa Software Pvt. Ltd. [(2018) 1 SCC 353 at pr. 33, 34, 51]**
- **K. Kishan V. Vijay Nirman Eompany Pvt. Ltd. [2018) SCC Online SC 1013 at Pr. 7, 9, 17]**
- **Sabarmati Gas Ltd. v. Shah Alloys Ltd. [(2023) 3 SCC 229 at Pr. 56, 57]**

13. The Respondent has also relied upon on the following judgments on its submission that NOC is essential for making the application for copyright:

- **Dabur India Ltd. v. Baidyanath Ayurved Bhawan Pvt. Ltd. [2012 (193) DLT 558], para 33, 35.**
- **Marico Ltd. v. Jagit Kaur, [2018 (248) DLT 623], para 11, 12.**

14. The Learned Counsel for the Respondent has also relied upon the judgment of NCLAT in **Subhash Chandra Goyal v. M/s KB Ispat Private Limited [Company Appeal (AT) (Insolvency) No. 166 of 2022]** which has been sustained in **Civil Appeal No. 4824 of 2022** by the Hon'ble Supreme Court vide order dated 12.08.2022. In the said case, application under Section 9 was not admitted on the grounds of pre-existing dispute as the material supplied by the Operational Creditor was from a tainted source, which has been found to be fictitious by the GST and alert circular has been issued, though the debt was acknowledged and materials were received. It was found that the claim of the Corporate Debtor that its tax cases are assessed undisputedly is a legitimate concern for which the Corporate Debtor had requested the Operational Creditor to provide the bank guarantee till the Corporate Debtor's GST assessment was completed, which the Operational Creditor was not willing to give. This dispute

was held to be real and genuine and admission of application under Section 9 of IBC, 2016 was denied.

15. The following submissions were made by the Respondent in its reply dated 25.10.2023:

“That by the non-issuance of the NOC under the agreement, the Appellant has breached the terms and conditions of the agreement as due to the non-issuance the TVC could not be registered preventing it to use the TVC by releasing it on Television and therefore, further causing substantial loss of revenue to the Corporate Debtor. That consequently it has failed to perform its part of the obligation under the proforma invoice by breaching its Clause 26 in view of not issuing NOC as demanded by the Appellant and therefore, the services rendered by the Appellant cannot be said to have been fulfilled, thereby disentitling the Appellant to raise any claim under the proforma invoice”

16. The Learned Counsel for the Respondent submitted that they have not used the TVC in absence of the copyright and they have, thus, also lost the advance given to the Operational Creditor.

17. We have heard both the sides and have perused the records.

i. It is an admitted fact that service relating to TVC was provided by the Operational Creditor, for which 50% amount was paid upfront as advance by the Corporate Debtor.

ii. It is also an admitted fact that NOC, as stated in condition No. 26 of proforma invoice was not supplied by the Operational Creditor, despite specific requests through emails and also through letters issued by the legal department of the Corporate Debtor. The submission of the Learned Counsel for the Respondent that TVC was never used, in absence of copyright, was not controverted by the counsel for the Appellant.

iii. The various emails exchanged as well as the letters from legal department of the Corporate Debtor and its response by the legal representative of the Operational Creditor is evidence that there was a genuine and real dispute regarding issue of NOC by the Operational Creditor regarding TVC. These emails and letters are prior to the issue of notice under Section 8 of the IBC, 2016.

iv. In deciding the fate of this appeal on the denial of admission of application under Section 9 of IBC, 2016, we are guided by the following judicial pronouncements of the Apex Court:

(a) The Hon'ble Supreme Court in **Mobilox Innovation P Ltd. v. Kirusa Software Pvt. Ltd. [(2018) 1 SCC 353]**, in para 33 and 34 of the said judgment, has given guidelines as to what constitutes a pre-existing dispute. The relevant portion of the judgment is reproduced below:

“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)].

34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute 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?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

[Emphasis supplied]

Thus, the Adjudicating Authority is required to examine whether there is a valid and genuine dispute prior to the issuance of demand notice. The Hon'ble Supreme Court further, in para 51 of the said judgment has given the guideline for deciding this issue. The said paragraph is reproduced below for reference:

“51. 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.”

[Emphasis supplied]

(b) The said judgment has been followed in a more recent judgment dated 04.01.2023 passed by the Hon'ble Supreme Court in **Sabarmati Gas Ltd. v. Shah Alloys Ltd. [(2023) 3 SCC 229]** wherein, in paragraph 56 and 57 it is held as under:

“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.”*

[Emphasis supplied]

v. In the facts and circumstances of the case it is undisputed that the Corporate Debtor was demanding NOC from the Operational Creditor, through various emails and legal notice to enable him to register the copyright of TVC, which the Operational Creditor has failed to provide. Clause 26 of the Terms and Conditions stipulated in the proforma invoice, without any exception, state that “LKSS or Producer will provide the necessary NOC or any other paper which may require for the IP registration to the Client.”. The Appellant Operational Creditor

has failed to provide the NOC and the Corporate Debtor was unable to register the copyright. We note that the dispute was real and genuine, and not moonshine or feeble, and is supported by evidence, and also that the Corporate Debtor, despite having made substantial payment as advance, had not used the TVC in absence of copyright. The correspondence and dispute regarding issuance of NOC is prior to the issuance of notice under Section 8 of the IBC, and thus, qualifies to be treated as “pre-existing dispute”, which is a valid ground for rejection of application under Section 9 of the IBC.

vi. The Ld. NCLT had rightly rejected the application under Section 9 of the IBC and we do not find any merit in this appeal. The appeal is accordingly dismissed. No order as to costs. All connected I.As., if pending, are disposed of.

[Justice Yogesh Khanna]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 13.11.2024
Ram N.