

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 805 of 2024

**(Arising out of the Order dated 01 March, 2024 passed by the
'Adjudicating Authority' (National Company Law Tribunal,
Chandigarh Bench in CP(IB) No. 203/CHD/CHD/2021]**

IN THE MATTER OF:

Sh. Preet Mohinder Kohli

(PAN No. AZFPK0443D)

S/o Late Sh. Avtar Singh Kohli

R/o House No.254 Sector 6,

Panchkula – 134109.

Email: redtag41@gmail.com

...Appellant

Versus

Harbir Automobile Private Limited

(CIN No. U34300CH2015PTC035372)

Having its registered office at:

Plot No. 182/84, Industrial Area Phase-I

Chandigarh – 160001

Email: csinfochd@gmail.com

...Respondent

Present:

For Appellant : Mr. Kamal Satija, Advocate

For Respondent :

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

[Per: Arun Baroka, Member (Technical)]

That the present Appeal is being filed by the Appellant under Section 61(1) of the Insolvency and Bankruptcy Act 2016 ("Code") being aggrieved by the order dated 01.03.2024 ("Impugned Order") passed by Hon'ble National Company Law Tribunal, Chandigarh Bench ("Adjudicating Authority") in CP(IB) No. 203/CHD/CHD/2021) whereby the Hon'ble Adjudicating

Authority had dismissed the Company Petition on the ground of pre-existing disputes.

Factual Grounds:

2. The Applicant/Operational Creditor instituted Company Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 read with Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and Rule 11 of NCLT Rules, 2016 before this Hon'ble Tribunal seeking initiation of CIRP proceedings against the Corporate Debtor.

3. The Operational Creditor/Petitioner contends that it has been legally assigned an operational debt of Rs. 48,59,146 (rupees forty-eight lakhs, fifty-nine thousand, one-hundred and forty-six only) by Sh. Surinder Kohli (brother) and Rs. 48,59,146 (rupees forty-eight lakhs, fifty-nine thousand, one-hundred and forty-six only) by Smt. Neeru Kohli (wife) vide assignment deed dated 17.08.2021. Therefore, being an Operational Creditor as defined under Section 5(20) of Insolvency and Bankruptcy Code, 2016 as a part of debt is owed by him personally and he is also assignee of debt from other Operational Creditors, had instituted the subject petition seeking to initiate CIRP against the Corporate Debtor.

4. The Operational Creditor had leased out the premises situated at Industrial Shed No. 41, Industrial Area, Phase-II, Chandigarh to the Corporate Debtor vide lease agreements dated 20.01.2016 and 11.09.2016 at monthly rent of Rs. 8,00,000/- (rupees eight lakhs only). The leased premises included the entire building i.e. basement, ground floor and first

floor of the premises built on Industrial Shed No. 41 except for the space measuring approximately 300 sq. ft. on the first floor. The lease was subsisting since October 2016 and the Corporate Debtor made regular payments of rent till July 2018 and thereafter, started making defaults in the payment. The Corporate Debtor stopped making any payments from October 2020 onwards.

5. The total amount of debt against the Corporate Debtor is Rs. 1,45,77,438 (rupees one crore, forty-five lakhs, seventy-seven thousand, four-hundred and thirty-eight only) plus interest at the rate of 24% per annum (applicable post 90 days from the date of invoice) till June 2021 as per the rent agreement dated 11.09.2016 and against the invoices raised by Sh. Surinder Kohli, Sh. Preet Mohinder Kohli and Smt. Neeru Kohli. Since the said dues were not being repaid, the Operational Creditor issued a demand notice under Section 8 of IBC read with Clause (a) of Sub-rule 5 of The Insolvency & Bankruptcy (Application to Adjudication Authority), Rules, 2016 on 10.06.2021. The notice was duly served on the Corporate Debtor and Director on 14.06.2021. In response to the notice under Section 8, the reply dated 22.06.2021 was received, in which the Corporate Debtor did not raise any point relating to the existence of any dispute relating to the debt for the period prior to the issuance of notice. The Corporate Debtor also did not make any payment of the debt claimed in the notice.

6. The Respondent/Corporate Debtor filed its reply to the Company Petition before the Adjudicating Authority alleging that the Petition has been

filed on the basis of rent agreement dated 11.09.2016, which was entered into with the Harbir Singh S/o Late Harnam Singh, who has been referred to as director and partner in the firm. The lease deed is in no manner an agreement creating debt between Harbir Automobile Private Limited and the Operational Creditor. The rent does not fall under the ambit of the operational debt and also the application does not meet the threshold of Rs. 1,00,00,000/- (rupees one crore only). An attempt has been made to combine the alleged dues by various persons to meet the threshold for maintaining the petition under Section 9 of IBC, but the threshold cannot be met by addition of various assigned debts. The lease agreement relied upon by the applicant was terminated w.e.f. August, 2020. Vide notice dated 10.10.2020, the possession of property was offered by the Corporate Debtor to the Operational Creditor, so the Operational Creditor had no occasion to raise invoices beyond July, 2020. Invoices post-July, 2020 were received for the first time by the Corporate Debtor along with the demand notice. The Applicant/Appellant has fabricated invoices to meet the threshold stipulated for filing the petition under the IBC. The invoices after July, 2020 attached as part of Exhibit 'B', Exhibit 'C' and Exhibit 'D' are fake, self-serving and have never been served as the premises stood vacated on the instructions of the lessors w.e.f. 1st August 2020. If the amount claimed under these fabricated invoices from August 2020 to July 2021 is subtracted, the alleged debt does not meet the prescribed threshold of rupees one crore. A complaint to SSP has already been made against the Operational Creditor for fabrication of invoices. The petition is defective, as the bank statement for

the relevant period has been intentionally concealed, i.e., statement before July, 2018. By doing so, the Applicant has concealed amounts of more than Rs. 40 lakhs which have been deposited on account of security and advance rent by the Corporate Debtor. The chart reflecting the various bank entries and the ledger from January, 2016 till July, 2020 were annexed as Annexure R-1 of the reply, which reflects that the Respondent/Corporate Debtor is to receive an amount of Rs. 21,67,966/- (rupees twenty-one lakhs, sixty-seven thousand, nine-hundred and sixty-six only) from the Operational Creditor. The amount of Rs. 24 lakhs was credited to the account of the Operational Creditor as advance rent vide cheque no. 43593 dated 26.09.2016 and another amount of Rs. 27,90,000/- (rupees twenty-seven lakhs and ninety-thousand only) was paid as advance rent in the month of August, 2017 vide various cheques, which has been concealed. Not only the advance payments are ignored, but the security amount and the payments made towards TDS have also been deliberately concealed. The total amount of Rs. 34,56,900/- (rupees thirty-four lakhs, fifty-six thousand and nine-hundred only) stands paid as TDS, which are duly reflected in Form 26AS.

7. The Corporate Debtor also mentioned in its reply that they had also entered into an addendum to the agreement dated 11.09.2016 vide which the amount of rent was reduced to Rs. 6 lakhs + GST @18% w.e.f. 01.12.2018 and continued till the vacation of said premises by the lessee. At this stage, an amount of Rs. 21,67,966/- (rupees twenty-one lakhs, sixty-seven thousand, nine-hundred and sixty-six only) is liable to be refunded to the

Corporate Debtor and when Mr. Harbir Singh requested for refund, the Operational Creditor took an unjustified stand that possession had not been handed over. Thereafter, the Corporate Debtor issued a letter dated 10.10.2020 asking to take over the possession, as the premises had been vacated. In reply to the same, the Operational Creditor illegally demanded rent and GST. Neeru Kohli and Surinder Kohli (co-owners of the property of Operational Creditor) signed a letter acknowledging that as on 24.08.2020 invoices till July 2020 has been raised in respect of Neeru Kohli and the Chart shows that all invoices were raised on the first of each month, but no invoice was raised on 01.08.2020, which clearly shows that the parties had severed the relationship, the premises had been offered to be vacated and invoices mentioned in the said letter are duly cleared.

8. There is a pre-existing dispute between the parties and the Corporate Debtor received the demand notice on 14.06.2021, which was responded on 22.06.2021 and in the said reply, Corporate Debtor highlighted the objections and established that there existed a pre-existing dispute in respect of the agreement to lease. In this regard, various proceedings were undertaken even before the police authorities. The Operational Creditor had also filed complaints with the police authorities vide letter dated 04.12.2020, alleging fraud on the part of Corporate Debtor and thereafter vide letter dated 21.01.2021 alleging trespass.

9. Both the parties appeared before the inquiry officer where the Corporate Debtor offered keys and joint inspection of the premises, to which the Operational Creditor refused.

10. Without a valid GST No., the GST invoices could not have been raised and the Corporate Debtor suffered a loss of Rs. 27,79,935/- (rupees twenty-seven lakhs, seventy-nine thousand, nine-hundred and thirty-five only) on account of non-deposit of GST by the Operational Creditor for the period till July, 2020.

11. It was agreed between both parties to waive the rent for the month of April 2020 due to lockdown and covid. A perusal of the statement would show that the Applicant had already received a total amount of Rs. 4,24,44,134/- (rupees four crores, twenty-four lakhs, forty-four thousand, one-hundred and thirty-four only), inclusive of TDS till July, 2020 against total invoices raised of Rs. 4,07,00,416/- (rupees four crores, seven lakhs, four-hundred and sixteen only) inclusive of GST.

12. The Applicant/Operational Creditor filed its rejoinder to the reply filed by the Corporate Debtor before the Adjudicating Authority, denying the contentions raised by the Corporate Debtor. In addition, it was also submitted that the rent agreement was with Harbir Automobile Pvt. Ltd. through Mr. Harbir Singh, who had signed the agreement in the capacity of director of Harbir Automobile Pvt. Ltd. Further, all invoices were raised in favour of Harbir Automobile Pvt. Ltd. and all payments since the beginning

from 11.09.2016 were made by the Corporate Debtor Company. The actual physical possession of the property was given by the Corporate Debtor to the Operational Creditor in the Office of Assistant Commissioner of Police, Sector 34, Chandigarh, vide compromise letter dated 24.08.2021 between the parties. Therefore, the amount of rent is due till the date of handing over of actual physical possession. The advance rent paid by the Corporate Debtor vide cheque dated 28.09.2016 has been adjusted against principal lease rentals and vide various cheques were paid as advance rent. The offer of possession by Corporate Debtor vide letter dated 10.10.2020 is in violation of the rent agreement as a prior 3 months' notice is required before handing over the possession. Rent falls within the definition of operational debt as per settled proposition of law as held by NCLAT/NCLT. No agreement for waiver of rent for one month i.e. April 2020 was entered into between the parties. There was no pre-existing dispute between the parties.

13. The Corporate Debtor filed an IA No. 2171/2023 in the main Petition under Rule 11 of NCLT Rules, 2016 and other applicable provisions of IBC read with Rule 6 of The Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. In the IA, the Corporate Debtor submitted that the Petitioners had been collecting GST from the Corporate Debtor without depositing the same with the department, thus causing a huge loss of the input credit to the Corporate Debtor. Therefore, the Corporate Debtor was constrained to shift the premises urgently. Thereafter, the Corporate Debtor wrote a letter dated 01.06.2023 to the GST authorities

to confirm the authenticity of invoices raised by the Operational Creditor, which the Corporate Debtor had never received. In response to the said letter, GST authorities, vide letter dated 26.06.2023, confirmed that the invoices in the subject matter of the present dispute are forged and the tax collected from Corporate Debtor has not been deposited since the year 2018. The Operational Creditor was not entitled to raise any GST invoices since GST number stands cancelled. Thus, the invoices themselves are non-est in the eyes of law. The importance of GST compliance as proof of the genuineness of the invoices is apparent from the amendment brought about in Rule 7 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 which provides for copies of the relevant extracts of Form GSTR-1 and Form GSTR-3B and copy of e-way bill as proof of claim. The Corporate Debtor demanded GST returns from Operational Creditor vide letter dated 08.12.2020. However, the same have never been supplied, which caused huge loss of input on GST for tax given till July 2020.

14. The Petitioner/Operational Creditor filed a reply to the IA, wherein it has been submitted that: (i) The Operational Creditor had filed GST-3B returns up to June, 2018 and that too only in lumpsum in June, 2018 including the arrears thereof and GST registration of Operational Creditor was cancelled by GST authorities suo-moto on 21.10.2019, which came to the knowledge of Operational Creditor in the month of February, 2022. (ii) The Corporate Debtor paid the GST/arrears of GST along with GST interest

up to the month of June 2018, which was duly and promptly deposited with the GST authorities. (iii) The possession of the premises was handed over to the Operational Creditor on 24.08.2021 before ASP (South), Chandigarh Police. Therefore, the Operational Creditor filed Application under Section 9 of Insolvency and Bankruptcy Code claiming rent up to the month of June, 2021 and the Corporate Debtor left the premises without clearing the outstanding dues towards the electricity and water consumption. (iv) The GST authorities have responded in the most callous manner by giving a finding of forgery without confirming from the Operational Creditor, as to whether the amounts due under the invoices in question have been paid or not, and that too without informing the Operational Creditor that his GST registration has been cancelled suo-moto.

15. Further, being aggrieved of the same, the Appellant/Operational Creditor filed application for recall of the order dated 01.03.2024 which has not been disposed of as yet.

Analysis and Findings

16. The Appellant's Petition under Section 9 of the Code was dismissed by the Adjudicating Authority on the grounds of a pre-existing dispute and other issues were not examined due to pre-existing dispute. The Appellant contends that the Adjudicating Authority's decision was erroneous and seeks a reversal of the Impugned Order.

17. Appellant contends that Adjudicating Authority's decision favoured the Respondent/Corporate Debtor, who claimed there was a pre-existing dispute and that the claim did not meet the threshold of Rs. 1 crore. The Appellant argues that this conclusion is erroneous based on the documentary evidence. Specifically, the Appellant asserts that eviction proceedings do not constitute a pre-existing dispute, as the matter was settled with the delivery of possession. Furthermore, the Appellant highlights that the Corporate Debtor has not paid the outstanding rent, which qualifies as an operational debt under the definition provided by the Code. The Appeal argues that the Adjudicating Authority's Order was flawed and requests a review of the decision.

18. We have heard the Appellant and perused all documents on record.

19. The core issue before this Appellate Tribunal is whether a pre-existing dispute existed between the parties at the time of filing the Section 9 Petition, which would bar the initiation of Corporate Insolvency Resolution Process (CIRP) under the Code.

20. The pleadings from both parties reveal that disputes existed long before the Section 8 demand notice was issued on 10.06.2021 concerning the debt amount claimed by the Petitioner. This is evident from several events, which have been noted by the Adjudicating Authority in its order dated 01.03.2024 in IA No 2171/ 2023 and CP(IB) No. 203/CHD/CHD/2021 and as indicated in the following paragraphs.

21. In a letter dated 27.10.2020, the Operational Creditor acknowledged that the Corporate Debtor had offered to vacate the premises. However, the Operational Creditor insisted that the Corporate Debtor must provide a clear 3-month advance notice as per paragraph 15 of the lease deed, and also demanded rent and outstanding GST. In response, in a letter dated 08.12.2020, the Corporate Debtor asked the Operational Creditor to take possession and submit their GST returns.

22. Subsequently, on 03.03.2021, the Operational Creditor issued a legal notice to vacate the premises. In response, the Corporate Debtor replied via letter dated 06.04.2021, stating that neither rent nor GST was due, and that the premises had already been vacated. The Debtor also claimed that possession had been offered on multiple occasions, but the Operational Creditor had not taken over the premises.

23. The Operational Creditor filed complaints dated 04.12.2020 and 21.01.2021 with the police authorities, after which the possession of premises was given before the police authorities on 24.08.2021 and the statement of Operational Creditor was also recorded that the Operational Creditor and Corporate Debtor had arrived on a compromise and no further matter is pending, so he did not wish to pursue the proceedings.

24. A letter from the GST authorities, submitted by the Corporate Debtor, stated that the GST numbers of all three taxable persons were cancelled suo-motu by the department due to default in return filing. So, these individuals were not authorised to issue GST invoices or collect GST after their GST

numbers were cancelled. Furthermore, no GST had been paid by them following the cancellation, and the GST invoices submitted for verification were found to be forged, with no details available in GSTR-01 for these taxable persons.

25. The Respondent has provided documentary evidence, including communications and police complaints, that demonstrated ongoing disputes related to the possession of the leased premises and the payment obligations under the lease.

26. The Adjudicating Authority rightly considered these disputes as substantial and pre-existing, thereby rendering the Section 9 Petition non-maintainable under the Code. It is a well-settled principle that the existence of a pre-existing dispute, regardless of its merit, disqualifies an Operational Creditor from initiating CIRP under Section 9 of the Code. Reliance can be placed on ***Mobilox Innovations Pvt Ltd vs Kirusa Software Pvt Ltd (2018)***

1 SCC 353 wherein it was held:

"40. 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.

43. We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5 (6).

45. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defense as vague, got-up and motivated to evade liability."

27. Upon careful examination of the materials on record and submissions, it is evident that there was indeed a pre-existing dispute between the Appellant (Operational Creditor) and the Respondent (Corporate Debtor) regarding the lease agreement and the outstanding dues. The Respondent provided documentary evidence, including communications and police complaints before the Adjudicating Authority that demonstrated ongoing disputes related to possession of the leased premises and the payment obligations under the lease.

28. Since it is a clear case of pre-existing dispute and the Appeal can be dismissed on this ground alone, therefore we are not looking into other issues in this Petition. But without going into the merit of each of them, they are just noted for record as like it could fail on the ground of not meeting the threshold of Rs. 1 crore as prescribed under Section 4 of the Code. Also likely to fail on the grounds that there are discrepancies in the amounts claimed by the Appellant, which when adjusted for prior payments, advance rent, and

security deposits, could fall short of the requisite threshold. There are also claims of fabrication of invoices etc.

29. The Appellant's claim for rental dues up to 24.08.2021 is fundamentally flawed, as it ignores the fact that the Respondent had offered possession as early as 01.08.2020. The Adjudicating Authority correctly interpreted that the liability for rent ceased upon the offer of possession, and any subsequent claim for rent is untenable.

Conclusion

30. In light of the above findings, it is clear that the Appeal lacks merit. The Appellant has failed to demonstrate that the Adjudicating Authority erred in its decision to dismiss the Section 9 Petition.

Order

31. The Appeal is hereby dismissed. The Impugned Order of the Hon'ble National Company Law Tribunal, Chandigarh Bench, dated 01.03.2024, is upheld. The Appellant is directed to bear the costs of this Appeal.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi
September 11, 2024

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