NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 83 of 2024

[Arising out of the Impugned Order dated 26.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench-II in CP (IB) No. 205(ND)/2023]

In the matter of:

R.A.J. KRISHNA CONSTRUCTION COMPANY PRIVATELIMITED
Having its registered office at S-28,
Greater Kailash -2, New Delhi-110048
(CIN: U70102DL2009PTC190415)

...Appellant

Versus

NEWERA SOLUTIONS PRIVATE LIMITED
Having its registered office at:
149/5, G/F, Ring Road, Kilokri
New Delhi South Delhi - 110014
Email: satyaomrealtors@gmail.com
(CIN: U74899DL1998PTC094973)

...Respondent

Present:

For Appellant : Mr. Harshit Khare, Mr. Prafful Saini, Mr. Shaleen Srivastava and Ms. Angna Dewan, Advocates.

For Respondent : Mr. R.K. Gupta and Ms. Swaralipi Deb Roy, Advocates.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 26.10.2023 (hereinafter referred to as '**Impugned Order**') passed by the

Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-II) in CP (IB) No. 205(ND)/2023. By the impugned order, the Adjudicating Authority has dismissed the Section 9 application filed by the Operational Creditor for initiating Corporate Insolvency Resolution Process (**'CIRP'** in short) against the Corporate Debtor-New Era Solutions Private Limited. Aggrieved by the said impugned order, the present appeal has been filed by the Appellant-R.A.J. Krishna Construction Private Limited.

2. Making his submissions, Shri Harshit Khare, the Ld. Counsel for the Appellant-Operational Creditor submitted that the Appellant is engaged in the business of project management and consultancy and turnkey construction of infrastructure projects. The Appellant was awarded a work by Home & Soul (**'H&S'** in short) vide a work order dated 12.10.2018. (For convenience, we shall hereinafter refer to the work order of 12.10.2018 as 'original work order'). Subsequently, an addendum to the work order of 12.10.2018 was issued on 09.01.2019. Attention was also adverted to another addendum to original work order which was signed on 14.12.2020 between the Operational Creditor and H&S. Elaborating on the relevant clauses of the addendum of 14.12.2020, the Appellant asserted that clause-1 of the addendum made the Corporate Debtor responsible for execution of the original work order. In terms clause-2 of addendum of 14.12.2020, the Appellant was mandated to raise the Running Account Bills (**'RA Bills'** in short) upon the Corporate Debtor while clause-3 thereto directed that the Appellant was to raise all invoices directly on the Corporate Debtor. In pursuance of clause-3, the Appellant claimed that it raised invoices on the Corporate Debtor from 03.02.2021 onwards and the Corporate Debtor also released payment against these invoices to the Operational Creditor.

3. It was also submitted that a Memorandum of Understanding (**'MoU'** in short) dated 07.12.2020 was also entered into between the Appellant and Corporate Debtor, which MoU according to the Appellant, transferred the rights, titles, obligations and interests of H&S under the original work order and related addendum upon the Corporate Debtor. With the project having come under the complete management and control of the Corporate Debtor, it was canvassed by the Appellant that the contractual relationship between the Operational Creditor and H&S ceased to exist. Thus, it was asserted that the Corporate Debtor had stepped into the shoes of H&S. To buttress their argument that the Corporate Debtor had stepped into the shoes of the H&S, it was submitted that this could be inferred from the fact that the Corporate Debtor issued an addendum on 14.03.2022 extending the time for completion of the work under the original work order. It was strenuously contended that with the execution of the MoU and the addendum, the common intent and understanding between the Operational Creditor, Corporate Debtor and H&S was that there was a novation and alteration of the original work order giving rise to a new contract in terms of Section 62 of the Indian Contract Act, 1872.

4. Elaborating their contentions further, it was submitted that inspite of the novated contract, on 01.10.2022, H&S unilaterally and unauthorisedly issued a letter directing the Appellant-Operational Creditor to demobilize from the project site and payments were stopped. The amount payable, after making adjustments, as on November 2022 by the Corporate Debtor to the Operational Creditor as per RA Bills stood at Rs.9.21 cr. It was also contended that the ledger statement of the Appellant clearly shows that ad-hoc payments to the tune of

Rs. 6.24 cr. had been made by the Corporate Debtor against the RA Bills raised by them which substantiates acknowledgement of debt liability on the part of the Corporate Debtor. Since payment to them stopped, the Appellant issued Section 8 demand notice on 25.02.2023 and the due amount qua the Corporate Debtor stood at Rs. 2.96 cr. The Corporate Debtor did not reply to the demand notice within 10 days but sent a belated reply on 17.03.2023. The Corporate Debtor also did not make any further payments within the stipulated time of ten days as provided for under the IBC.

5. In their belated reply to the demand notice dated 17.03.2023, the Corporate Debtor raised the issue of pre-existing dispute based on invocation of arbitration by issue of notice on 19.01.2023. It was contended that the Adjudicating Authority wrongly held the invocation of the arbitration notice as a pre-existing dispute. The Ld. Counsel of the Appellant emphatically asserted that this arbitration notice cannot be a ground for pre-existing dispute as this arbitration notice was not issued by the Corporate Debtor but had been issued by H&S to the Appellant. Even endorsement of the arbitration notice by H&S was not sent to the Corporate Debtor. When the Corporate Debtor was not a party to the arbitration notice, the notice cannot be held to be a ground for pre-existing dispute between Operational Creditor and Corporate Debtor. The Adjudicating Authority had failed to appreciate that in terms of Section 5(6)(b) of the IBC, the pre-existing dispute was required to be between the Operational Creditor and Corporate Debtor. It was also contended that the Adjudicating Authority had grossly erred in interpreting Section 8(2) of the IBC by taking a view that the arbitration notice issued by a third party other than the Corporate Debtor

amounted to pre-existence of dispute. Reliance has been placed on the judgment of this Tribunal in ***Chetan Sharma vs. Jai Lakshmi Solvents Pvt. Ltd. 2018 SCC Online NCLAT 240*** to buttress their argument that a dispute under Section 5(6) of the IBC has to be between the Corporate Debtor and the Operational Creditor.

6. It was also pointed out that there was a novation of the original contract contained in the original work order. Therefore, on the novation of the contract, the arbitration notice issued by H&S cannot be treated as an arbitration notice issued by the Corporate Debtor. It was mentioned that since the rights, titles of H&S under the original work order stood transferred to the Corporate Debtor, H&S had no right to invoke arbitration as there was no privity of contract existing any longer between them and the Appellant. The arbitration clause was contained in the original work order which original work order was not an adequately stamped document and hence not a valid document.

7. Rebutting the argument raised by the Appellant, Shri R.K. Gupta, the Ld. Counsel for the Respondent submitted that the contention of the Operational Creditor that there was novation of contact is misplaced because the conditions precedent for novation of contract were not fulfilled. Firstly, the addendum letter of 14.12.2020 was not signed by the Corporate Debtor as the signatories therein were only the Operational Creditor and H&S. Secondly, no novated work order was issued by the Corporate Debtor replacing the original work order even after 14.12.2020. Thirdly, the Operational Creditor has also referred only to the original work order issued by H&S in their reply to arbitration invocation on 10.02.2023 and not referred to any novated work order issued by the Corporate Debtor. Lastly, all running invoices/payment advice issued by Operational

Creditor also bear reference to the original work order of 12.10.2018 issued by H&S. It was also submitted that even the Hon'ble High Court of Delhi while considering the application under Section 11(5) and (6) of Arbitration and Conciliation Act filed by H&S held on 01.02.2024 that there has been no novation of the contract as placed at Annex R2 of their Reply affidavit.

8. It is also contended by the Respondent that the Operational Creditor has provided copies of unsigned and unverified running bills with their demand notice of 25.02.2023. RA Bills at Sl. Nos. 1 to 22 related to work order issued by H&S on 12.10.2018. The Corporate Debtor on receipt of the demand notice had in their reply clearly and specifically stated that these bills were not signed by the Operational Creditor nor verified by the billing team of H&S and the Corporate Debtor and hence been based on fraud and fabricated document. This aspect had been brought to the knowledge of the Adjudicating Authority in the Corporate Debtor's reply to the Section 9 application at pages 375-387 of APB. The Operational Creditor never refuted the reply of the Corporate Debtor that the payment advice/invoices are forged. It was also pointed out that the payment advice placed at pages128 to 131 and 137 to 144 of the Appeal Paper Book (**"APB"** in short), there is clear evidence of their business practice that RA bills were always verified by the billing team of H&S and the Corporate Debtor. However, no such verification was carried out in the case of invoices against which the Section 8 demand notice had been issued. Hence, the claim in the demand notice was not tenable. Moreover, in the absence of existence of any tax invoice with the notice of demand, it cannot be said that there was any default on the part of the Corporate Debtor.

9. It was also vehemently contended that Section 9 application by an Operational Creditor cannot be sustained in case there is evidence of existence of dispute and such dispute has been communicated to the Operational Creditor as has happened in the present case. The dispute should however come into existence before the receipt of Section 8 notice. In the present case, an arbitral notice dated 19.01.2023 which indisputably preceded the date of issue of Section 8 demand notice had been brought to the knowledge of the Appellant-Operational Creditor and the dispute related to the quality of service in respect of the original work order dated 12.10.2018 was issued. Further, the Appellant in their reply to arbitration notice had categorically referred to the original work order of H&S and not to any other novated or fresh work order. Even their response to the arbitration notice was sent to both H&S and the Corporate Debtor on 10.02.2023 as placed at page191 of APB. Thus, it is a clear admission on the part of the Operational Creditor that they were aware that arbitration was invoked by H&S on 19.01.2023 in relation to the original work order of 12.10.2018. Since the Section 8 Demand Notice was issued on 23.02.2023, it was clearly subsequent to the notice of invocation of arbitration of 19.01.2023. Moreover, the arbitration notice raised several disputes like delay in completion of work and losses on account of delay, improper maintenance of site, unsatisfactory work, etc. In the wake of such pre-existing disputes as raised in the arbitral proceedings, the Adjudicating Authority had not committed any error in rejecting the Section 9 application.

10. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully. The short point for consideration is whether there was any genuine pre-existing dispute

surrounding the debt claimed by the Operational Creditor to be due and payable to them by the Corporate Debtor.

11. A look at the relevant statutory construct of IBC at this juncture would be useful. Section 8 of the IBC requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. After issue of demand notice by the Operational Creditor, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Section 8(2), he may file an Application under Section 9(1) of IBC. From a plain reading of the above provisions, it is clear that the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. It is an undisputed fact in the present matter that the Operational Creditor did not receive any payment from the Corporate Debtor and had therefore proceeded to file an application under Section 9 of IBC.

12. It is also a well settled proposition of law that for a pre-existing dispute to be a ground to nullify an application under Section 9, the dispute raised must be truly existing at the time of filing a reply to notice of demand as contemplated by Section 8(2) of IBC or at the time of filing the Section 9 application. In the present case, the pre-existing dispute has been predicated on notice invoking arbitration dated 19.01.2023 prior to the issue of Section 8 Demand Notice on 25.02.2023 as was highlighted by in the Notice of dispute of the Corporate

Debtor dated 17.03.2023, the relevant paragraphs of which are as reproduced below:

> *"Subject: Response to your Demand Notice dated 25.02.2023 issued by you under section 8 of the Insolvency and Bankruptcy Code, 2016 for and on behalf of R.A.J.*
>
> *2. That being counsel for a client you are also well aware of the fact that on account of willful inactions on the part of your clients, your client failed to discharge its contractual obligations, and on account of such failure and/ or inactions, our client has already raised dispute and invoked the arbitration clause i.e. clause 52 of the Work Order No. H&S/P-3/18-19/14 dated 12.10.2018 on 19.1.2023. This invocation of arbitration clause and notice is duly responded by you for an on behalf of your client on 10.02.2023 raising frivolous grounds. The copy of the notice dated 19.01.2023 issued by our client invoking the arbitration clause and reply thereto by you on 10.02.2023 for and on behalf of your client are marked and annexed herewith as **Annexure-1** and **Annexure-2** of this response, and be read and parcel of this reply and not repeated for the sake of brevity.*
>
> *3. That owing to the pre-existence of disputes in relation to the alleged dues forming part of the demand notice under reply, please note that the adjudication of the dispute and/ or amount due and payable, if any, either by our client and/ or by your client, can only be adjudicated in the arbitration proceedings as contemplated in the agreement read with the notice of invocation of arbitration clause dated 19.1.2023 by the Ld. Arbitrator to be appointed for adjudication of such disputes. Also please note that no such demand of can ever be made and/or proceedings can be filed under the Insolvency and Bankruptcy Code, 2016 for a 'disputed debt', and therefore the notice under reply issued by for and on behalf of your client is nothing more than the abuse of process of law."*
>
> (*Emphasis supplied*)

13. The above reply to the Section 8 Demand Notice clearly articulates the ongoing arbitration between the two parties which predated the Section 8 demand notice.

14. Given this backdrop, it will be useful to find out how the Adjudicating Authority has considered the facts at hand to infer whether there existed pre-

existing disputes. The relevant portions of the impugned order are as extracted hereunder:

> ***"12.*** *As can be seen from Section 5 (6) (b) of the IBC 2016, the dispute includes a suit or arbitration proceedings relating the quality of goods or service. It does not provide that the same should be between the OC and the CD only. It is not the case of the OC that the amount of defaulted operational debt referred to by him pertain to any work other than the one involved in work order dated 12.10.2018 referred to in the arbitral notice dated 19.01.2023. We can also see from the Section 8 (2) of IBC 2016 that the dispute should exist before the receipt of notice or invoice in relation to such dispute. Even the said provision also does not talk of the dispute being raised by CD only. The construction of Section 8 (2) (a) of IBC 2016 can only be that the dispute needs to be qua the work/ service/ goods, with reference to which the demand is raised in terms of the provisions of Section 8 (1) of IBC or the invoices.*
>
> ***13.*** *The petitioner itself has enclosed the arbitration notice dated 19.01.2023 as Annexure-I to the petition.*
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> ***14.*** *As can be seen from the Section 21 of the Arbitration and Conciliation Act 1996, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for the dispute to be referred to arbitration is received. In the wake, the dispute qua the quality of service in question could arise on 19.01.2023. The demand notice being dated 25.02.2023, there was apparently a pre-existing dispute qua the quality of service rendered by the OC, for which the defaulted amount of debt was demanded. It may be so that the reply to the demand notice was given after expiry of ten days, but by now it is stair decisis that irrespective of the reply being given by the CD in terms of Section 8(2) of IBC, 2016, the Adjudicating Authority while considering an application filed under Section 9 of the IBC 2016 for admission, need to see the material available on record to ascertain as to whether there was pre-existing dispute or not. In the present case it is not so that the CD did not give any reply to the demand notice. Indubitably, the OC had received the reply to demand notice on 17.03.2023.*
>
> ***15.*** *In terms of the provisions of Section 9 (5) (d) of IBC 2016, the Adjudicating Authority should admit the application only if there is no record of dispute or no notice of dispute has been received by the OC. In the present case, apparently the arbitral proceedings commenced on 19.01.2023 i.e., prior to issuance of demand notice 25.02.2023, by*

the OC. The petitioner itself has enclosed the arbitration notice as Annexure-J to the petition."

(*Emphasis supplied*)

15. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 25.02.2023 and a notice of dispute raised by the Corporate Debtor on 17.03.2023 wherein the issue of invocation of notice of arbitration of 19.01.2023 on was articulated as a ground of pre-existing dispute.

16. To conclude whether commencement of such arbitral proceedings constitutes pre-existing disputes, we may fall back upon the landmark judgement in the ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.*** in ***Civil Appeal No. 9405 of 2017,*** wherein the Supreme Court clarified the scope of pre-existing disputes in paragraph 40 which reads as follows:

"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."

17. The pre-existing dispute must relate to the transaction or debt that forms the basis of the Section 9 application. Clearly the debt in this case arises out of RA Bills relating to the original work order of 12.10.2018. When an arbitration notice is served in respect of disputes stemming from the original work order and the arbitration notice was issued before the Section 8 demand notice, clearly it signifies that a dispute already existed between the parties. As an arbitration notice is a formal communication from one party to the other, initiating arbitration proceedings, the arbitration notice evidences a pre-existing dispute. This therefore constitutes sufficient ground for rejection of a Section 9 application.

18. Considering the overall facts and circumstance of the present case, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant. There is no merit in the Appeal. Appeal is dismissed. It will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 08.01.2025

Harleen/Abdul