

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 650 of 2022

[Arising out of order dated 17.05.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi in CP (IB) No. 1765/ND/2018]

IN THE MATTER OF:

**Gaurav Dhawan
N-68, Greater Kailash, Part-1,
New Delhi – 110 048**

...Appellant

Versus

**1. EE Limited & ANR
Trident Place, Mosquito Way,
Hatfield Hertfordshire, AL 10 9BW
U.K.**

...Respondent No. 1

**2. Falcon Business Resources Pvt Ltd.
Through Interim Resolution Professional
Nitish Kumar Chugh
D-158-B, Okhla Industrial Area, Phase-I
New Delhi**

...Respondent No. 2

Present:

For Appellant: Mr. Saurabh Kalia, Mr. Siddharth Tandon, Advocates

For Respondents: Mr. Rishabh Govila, Advocate for R-2

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' in short) by the Appellant arises out of order dated 17.05.2022 (hereinafter referred to as 'Impugned Order') and was

passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court-III) in CP (IB) No.1765/ND/2018. By the impugned order, the Adjudicating Authority admitted the application filed under Section 9 of the IBC by the Operational Creditor, present Respondent No. 1 and initiated Corporate Insolvency Resolution Process (**CIRP** in short) against the Corporate Debtor. Aggrieved by this Impugned Order, the present appeal has been preferred by the suspended Director of the Corporate Debtor.

2. The brief facts of the case, as brought before us by the Appellant, are that M/s Falcon Business Resources Private Limited, the Corporate Debtor entered into EE Framework Reseller Agreement (hereinafter referred to as the Agreement) dated 20.03.2015 with EE Limited, the Operational Creditor/Respondent No.1 by which the Operational Creditor was to provide SIM cards to the Corporate Debtor for reselling to Indian clients travelling to U.K. to provide them mobile telecom services in U.K. The Agreement guaranteed the Operational Creditor a minimum spend commitment over 2 years of GBP 4,50,000 and required the Operational Creditor to maintain 7000 accounts. The agreement was valid for a period of 24 months and the parties had agreed on the price to be levied on the customers and also sharing all revenue between them. The contract between the two parties was terminable by giving 30 day notice.

3. Admitting that the Agreement was operationalised and the Operational Creditor had started providing the services, the Learned Counsel for the Appellant submitted that the Corporate Debtor had raised a complaint with

the team of the Operational Creditor that the SIM cards provided by the Operational Creditor was not connected to the network and hence unusable. This complaint e-mail was sent by the Corporate Debtor to the Operational Creditor on 07.07.2015 as placed at page 69 of Appeal Paper Book (**'APB'** in short) clearly stating that the Corporate Debtor has not been able to use the EE Sim Cards for 3 months and therefore not able to generate revenues.

4. It was also emphatically submitted that the Corporate Debtor had regularly exchanged Call Details Record (**"CDR"** in short) with the Operational Creditor to substantiate the wrong charging of tariffs and that they had claimed credits due to them. Stating that the Operational Creditor had repeatedly submitted wrong and inflated invoices, these billing discrepancies were communicated from time to time. It is submitted that disputes regarding January CDR was raised on 10.03.2016 and that later on 05.07.2016, the Corporate Debtor had mentioned that 13000 GBP was to be received from the Operational Creditor against inflated invoices raised by the Operational Creditor for the preceding months. Similarly, billing discrepancy on data bundle from May to July had also been sent on 03.08.2016 by the Corporate Debtor to the Operational Creditor. The ongoing credit issues with the Operational Creditor and wrong charging of tariffs had persisted even in September, October and December 2016. In-spite of such regular communications having been sent to the Operational Creditor to settle the billing error related disputes, no proper remedial action was taken.

5. Advancing the arguments further, it was pointed out by Learned Counsel for Appellant that there is evidence of admission on the part of the Respondent No. 1 in their communication (at page 120 of APB) dated 04.05.2016 and repeat communications later that their invoices were inflated and will be credited back. It was also added that towards reconciling the billing discrepancies, the Operational Creditor was approached several times for holding a meeting. However, these requests were not responded to and therefore the disputes persisted between the parties. Even for other types of complaints lodged by the Appellant with the Operational Creditor like the non-working of data services, meetings were sought for purpose of resolution, which did not materialize. The Learned Counsel for the Appellant also stated that the Corporate Debtor had also claimed entitlement to damages for sub-par service levels and compensation for suffering business loss.

6. Despite the Operational Creditor acknowledging the invoice related issues, the Learned Counsel for the Appellant submitted that the Respondent No.1 not only took no steps to correct the situation but instead disconnected the SIM cards in January 2017, which even by the contract date was 3 months earlier than the date of termination, without giving notice. This was a breach of Clause 20 of the Agreement which stipulated 30 days' notice prior to disconnection. Ignoring the fact that this sudden disconnection created inconvenience to the customers of the Corporate Debtor and caused huge loss and damage to the business of the Corporate Debtor, the Respondent No.1 had instead made a baseless demand of GBP 50000 in January 2017 to reinstate the network lines.

7. Eventually, the Indian Collection Agency of the Operational Creditor demanded GBP 78,296.31 from the Corporate Debtor and threatened initiation of legal proceedings in October 2017. This was contested by the Corporate Debtor on grounds of the Operational Creditor having breached the Agreement; by not providing credits for staged technology fund and staged airtime; non-revision of pricing; faulty invoicing system; inflated billings and claim for damages etc. To the Notice under Section 8 of IBC issued by the Operational Creditor on 23.06.2018, it was submitted by Learned Counsel for Appellant that the Corporate Debtor replied on 29.06.2018 denying the claim as false and fraudulent and that no adjudicated amount was due from them. Further, the Operational Creditor was also informed about the counter-claim against them. The Operational Creditor thereafter filed the Section 9 IBC application dated 08.10.2018 claiming a total debt of GBP 76,394.16 along with interest at the rate of 18% per annum. The Adjudicating Authority issued notice and after hearing the parties admitted the Section 9 application. The Learned Counsel for the Appellant contended that since the alleged debt claimed by the Operational Creditor being a disputed debt and in the face of sufficient cause to show that there was pre-existing dispute, admission of the Section 9 application by the Adjudicating Authority was erroneous.

8. We have duly considered the detailed arguments advanced by the Learned Counsel for the Appellant and perused the records carefully. The Respondent No. 1 was not represented during the final hearing.

9. To appreciate the facts of the case, at the outset, it would be useful to refer to Section 8 of the IBC regarding conditions for admission of Section 9 application:—

“8. Insolvency resolution by operational creditor-

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of the record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation: For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.”

10. A reading of Section 8 of IBC indicates that the requisite conditions necessary to trigger CIRP under Section 9 of the IBC are existence of a debt due and its default by the corporate debtor; that there has taken place delivery of demand notice of an unpaid and undisputed debt; that there has been no payment of the unpaid and undisputed debt within the period of 10 days of receipt of demand notice and no real pre-existing dispute is discernible.

11. This now brings us to the impugned order which has been assailed by the Appellant. The relevant portion of the analysis and findings of the Adjudicating Authority is as reproduced below:

“21. This application complies with the basic requirements of Section 8/9 of IBC, 2016 and rules and regulations made thereunder. The crux of the matter is that whether there exists a dispute between the parties prior to delivery of notice of demand U/s 8 of IBC. If it is

so, the other question which arises for our consideration is whether undisputed amount of outstanding liability is more than the threshold limit as prescribed U/s 4 of IBC, 2016. As far as first aspect is concerned, there have been a number of communications between the operational creditor and corporate debtor which make it apparent that there are certain strong differences between the two. Thus, it becomes imperative for us to find out what is the undisputed amount of liability.

22. To find an answer to the above query, we have carefully gone through the emails exchanged between them. As per the email dated 31.07.2017 firstly the corporate debtor has agreed at a sum of GBP 23,544.13. Subsequently, an email was written by the corporate debtor on 24.08.2017, wherein various claims have been made. On this basis of this email, the corporate debtor has stated that corporate debtor had not agreed for the amount mentioned in the earlier email referred above.

23. We have noted the contents of the email dated 24.08.2017, it is of general nature, wherein claims for recovery of damages through litigation has been made. However, subsequently an email dated 18.09.2017, GBP 10,000 have been agreed as a full and final settlement

by the corporate debtor. In this email, it has also been mentioned that such offer was without any prejudice to the legal rights and claims by the corporate debtor for damages due for loss of business and reputation due to un-professional behaviour on the part of operational creditor. It is now settled that the use of words “without any prejudice” have got no adverse bearing on the acknowledgement of debt. Thus, the use of these words in no manner gives any respite to the corporate debtor.

24. Thereafter, we have also perused an email dated 15.02.2019, which is a verbatim repetition of the email dated 24.08.2017. Hence, in view of its mail dated 18.09.2017, it does not support the claim of the corporate debtor that it had not accepted liability to pay any amount. Further, this email is of general nature and the corporate debtor in this email has not stated that the amount of liability accepted by it in earlier emails dated 31.07.2017 or 18.09.2017 were not payable. Thereafter, correspondences with the counsel of the operational creditor has also happened and finally the legal counsel of the operational creditor vide its email dated 15.02.2019, it has been informed that outstanding dues of GBP 78,296.31 were required to be paid by the corporate debtor and failing to do so would result into

initiation of legal proceedings against the risk and cost of the corporate debtor.

25. After carefully considering this chain of communication, we have no hesitation in holding that at two stages, definite liability to pay has been acknowledged and accepted by the corporate debtor. The said liability in both the situations is more than the threshold limit. Hence, having regards to various judicial decisions rendered by the Hon'ble NCLAT that in case of dispute, if the undisputed liability is more than the threshold limit, the application could be admitted."

(Emphasis supplied)

12. From the findings of the Adjudicating Authority, we find that the Adjudicating Authority has held that there have been a number of communication exchanged between the operational creditor and corporate debtor which make it apparent that there "are certain strong differences" between the two. In other words, the Adjudicating Authority has endorsed that there has been dispute between the two parties on the claims amount. However, going ahead therefrom, the Adjudicating Authority has taken a conscious decision to further find out if any part of the liability on the part of the Corporate Debtor is undisputed and if the amount exceeded the threshold limit to qualify for admission of the Section 9 application.

13. We would however like to proceed by analyzing from the facts of the case firstly, as to whether there was an admitted debt which was due and payable and, if so, whether, that a default in payment had been committed and thereafter find out whether the debt was disputed or not so as to take a considered view on the legal tenability of the impugned order. This analytical approach makes more sense being in consonance with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353** ('Mobilox' in short) while examining an application under Section 9, the relevant excerpts of which are as follows: -

“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 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.”

14. We note from the excerpts of the impugned order at Para 11 above that the Adjudicating Authority reached the conclusion that the Corporate Debtor had admitted a debt of GBP 23544.13 on 31.03.2017 and GBP 10000 on 18.09.2017 and since a definite liability to pay has been acknowledged and accepted by the Corporate Debtor and the liability amount having crossed the threshold limit of Rs. 1 lakh, Section 9 of IBC is attracted. It has also been held that in their email dated 18.09.2017, the Corporate Debtor had agreed to GBP 10000 as a full and final settlement and though this offer of settlement was made by the Corporate Debtor ‘without any prejudice’ to their legal rights and claims for damages, it has no adverse bearing on the acknowledgement of debt.

15. Interestingly, the impugned order also notes that with respect to liability of payment, the Corporate Debtor in an email dated 24.08.2017 addressed to the Operational Creditor raised some issues of general nature but held that these issues were not as if the Corporate Debtor had not accepted the liability to pay any amount. Though the contents of the e-mail

dated 24.08.2017 as placed at page 334 of APB is self-explanatory, for reasons of clarity, we think it prudent to reproduce the contents of the said email. This e-mail is addressed to one Sarah of the EE Ltd., Operational Creditor by one Mohan, the representative of the Corporate Debtor is as reproduced below: -

"Hello,

Please be informed, currently we are in discussion with your client for the mentioned O/s, due to several reasons as mentioned below. We are in discussion to settle the dispute and are in discussions with mary.mcginin@ee.co.uk & steven.2.winter@bt.com, and also mail was sent looping you, attached for your reference.

We have already informed EE & they have accepted:

- *Overcharge in invoicing.*
- *Agreed to providing credit for invoicing and outstanding*
- *Compensate us* *for disruption of service caused due to faulty invoicing, non responsive attitude & not providing services on time.*

EE suspended service on all our lines without proper or prior notice. This breach of contract has caused us significant loss of hard earned clients, revenue and reputation for our Company & EE have accepted it in written/ on calls that the problem is at their end.

If EE continues to pursue any of the overcharges, we will be required to pursue damages from EE for numerous breach of contracts, culminating with the disconnection of services. This clearly shows EE bad faith in its dealings with us, its wilful disregard of its contractual obligations, and its desire to cause damage to us and our customers. In light of all this, EE must immediately provide credit for all wrong invoicing & settle credits for poor service. To this point it is clear that despite our continued efforts, EE has not made any good faith efforts to resolve our claims.

*We find it very disingenuous that **despite our disputes and documented overcharges & EE acceptance of the same.***

We would advise you to immediately refund all overcharges & compensate us for disruption of services, or we will be required to pursue recovery of damages through litigation.

(Emphasis supplied)

16. A plain reading of the contents of the said e-mail dated 24.08.2017 indicates that the Corporate Debtor had disputed in unambiguous terms the claim amount on grounds of numerous breach of contract, faulty billing, overcharge in invoicing, etc. and had infact even raised a counter claim. A letter reiterating the disputes on same lines was issued again on 13.10.2017 as placed at Page 342-343 of APB with the additional sentences “*Please be aware your client will be liable for extortion, breach of trust & compensation for fraudulent invoicing / loss of business. This email is without any prejudice to our legal rights.*” This validates the fact that both parties were aware of the invoice disputes and that counterclaims were made by the Corporate Debtor

by way of demanding compensation for service disruption and damages for business loss. These two emails of 24.08.2017 and 13.10.2017 clearly indicate that there was serious ongoing dispute surrounding the liability amount which has erroneously not been taken into reckoning by the Adjudicating Authority.

17. Further, that the Corporate Debtor had not admitted definite liability has infact been acknowledged by the Operational Creditor themselves as is evident from an email sent by the Operational Creditor to the Corporate Debtor on 23.03.2017 seeking confirmation as to when payment will be received for “any undisputed amount”. The e-mail as placed at page 281 of APB is as reproduced below: -

Hi Mohan,

I hope you are well?

A couple of things from me if I may,

- ***Can you confirm when payment will be received for any undisputed amount?***
- *When would you be free to discuss the future trading options in detail?*

Kind regards,

Steven

(Emphasis supplied)

We also find emails dated 24.03.2017 and 30.03.2017 as placed at page 280 of the APB where the Corporate Debtor had sought updated statement of

accounts including adjustment of credits and there is no admission of any definite liability on their part.

18. More importantly, the provision under Section 8(2)(a) of IBC makes it clear that the Corporate Debtor has to bring to the Operational Creditor the fact of the existence of a dispute within ten days of the receipt of the demand notice. We find that the Corporate Debtor in its reply on 29.06.2018 to the Section 8 notice dated 21.06.2018 has denied the claim raised by the Operational Creditor on the grounds that they are not legally due or payable besides making a mention of ongoing and unresolved disputes related to the debt amount that has been claimed. It will be useful to extract the reply sent by the Corporate Debtor to Section 8 Notice placed at page 345 of APB:

“1. That the claim of EE Ltd, Trident Place, Mosquito way, Harsfield, Hertfordshire, AL 109 BW, UK are false and fraudulent and totally lacking in details of the services rendered.

2.That they have already admitted wrong billing and as such there is no settled amount payable to them.

3.That there is no adjudicated amount due to them.

4.That we are advised that such fraudulent claims which have not been adjudicated do not come in the scope of proceedings under THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

5.That due to summer holidays in the court our counsel is not available and a detailed reply by him will follow.

6.That in fact we have a counter claim against the EE LIMITED for disruption of the services and losses suffered by us.”

(Emphasis supplied)

Thus, in the background of these communications/correspondences, we are of the considered view that present is not a case where the Corporate Debtor has unconditionally admitted to any outstanding amount.

19. We now come down to examine whether mention was made of any pre-existing dispute by the Appellant / Corporate Debtor prior to or during the stage of notice under Section 8 of the IBC or whether there was any dispute on the date of filing the application by the Operational Creditor under Section 9 of the IBC.

20. From the material of record, we find that one of the major areas of dispute was billing discrepancies arising out of inflated invoices which infact has been admitted by both parties. The Learned Counsel for Appellant has submitted that on 05.07.2016, the Corporate Creditor had sent an email to the Operational Debtor mentioning that 13000 GBP was receivable against inflated invoices raised by the Operational Creditor as placed at Page 72 of the APB. It is also seen from page 75-76 of the APB that vide email dated 20.07.2016 the Operational Creditor had not only agreed to the calculations made by the Corporate Debtor regarding inflated invoices but also agreed to re-calculate the credit payable to the Corporate Debtor. Similarly, another communication on billing discrepancy on data bundle from May-July 2016 had also been sent on 03.08.2016 by the Corporate Debtor to the Operational

Creditor as placed at Page 77 of the APB. The ongoing credit issues with the Operational Creditor and wrong charging of tariffs had persisted even in subsequent months. Infact CDR disputes for the period as early as January 2016 had also been raised on 10.03.2016 as placed at page 109 of APB. We also note that on 09.05.2016, the Corporate Debtor took up the matter with the senior management of the Operational Creditor for early settlement of disputes relating to credits raised as placed at page 117 and 118 of APB and alongside raised issues on back-dating discounts applied on Data Bundles as well as applicability of 5 MB Rest of World Cap on their accounts. We also cannot lose sight of the fact that the Corporate Debtor had sent emails to the Operational Creditor on 26.08.2016, 10.10.2016 and 24.10.2016 (as respectively placed at pages 168, 180 and 199 of APB) seeking a meeting with the Operational Creditor in UK to discuss the ongoing inflated invoice and to reconcile and settle these discrepancies. It is also the Appellant's case that the dispute between them and Respondent No.1 was on several counts and both parties were engaged in regular discussions with each other on this count. Moreover, the fact that these disputes had an early start is also noted from page 69 of APB wherein the Corporate Debtor has sent a communication on 07.07.2015 to the Operational Creditor that they have hit a roadblock since the Sim cards given to them were not working and affecting their commitments of getting revenue. Even the issue of non-working of data services was raised on 14.10.2016.

21. We find that the above instances of dispute were not isolated in nature and that they cogently establish that billing disputes between the two parties

existed much before the issue of Section 8 notice and thus we find that there is sufficient force in the contention of the Appellant that the claims are genuinely disputed.

22. As to whether a dispute is a pre-existing dispute, the Learned Counsel for Appellant has correctly relied upon the judgment of the Hon'ble Supreme Court in Mobilox supra in support of his contention. In this judgement, the Hon'ble Apex Court while interpreting Sections 8 and 9 of IBC lays down the guiding principle that the dispute must exist before the receipt of the demand notice or issue of invoice. It may be useful to notice the relevant part of the judgment as reproduced below:

“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.”

23. If we apply the above-cited test laid down by the Hon’ble Supreme Court to the facts of the present case, it is clear that the defence which was raised by the Corporate Debtor in its reply to Demand Notice as well as detailed reply filed in Section 9 Application cannot be said to be moonshine. The Appellants case is that there is voluminous correspondence exchanged between the Corporate Debtor and the Operational Creditor over a long period of time which clearly establishes that there was real pre-existing dispute. That pre-existing dispute was very much there is amply supported by material on the record. We do not wish to go into each and every correspondence as it is not the remit of IBC to investigate all related contractual disputes and look into

their merits as long as it suffices that a plausible defence has been raised as has been done in the present case. In the present factual matrix, the defence raised by the Corporate Debtor cannot be held to be moonshine, spurious, hypothetical or illusory. And for such disputed amounts, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor.

24. What also heavily weighs on our mind is that both the objective of the IBC and the settled proposition of law laid down by the Hon'ble Supreme Court is that the provisions of IBC cannot be turned into a debt recovery proceedings. Reliance has also been placed by the Appellant on the judgement of the Hon'ble Apex Court in **M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. MANU/SC/1146/2022** which has held that:

“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.”

Where operational creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which however is not so borne out by the facts of the present case. We are of the considered opinion that the Adjudicating

Authority committed serious error in admitting Section 9 application in the facts of the present case.

25. With the aforesaid discussion, we are of the considered view that the Adjudicating Authority has erroneously admitted the application under Section 9 of the IBC. We therefore set aside the impugned order. The orders passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor and appointing Interim Resolution Professional and all other orders pursuant to impugned order are declared illegal and set aside. The Corporate Debtor company is released from the rigours of CIRP and is allowed to function independently through its board of directors with immediate effect. The appeal is allowed with the aforesaid observations. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 22.11.2022

PKM