

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH (COURT-II), CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**CP (IB) No. 196/Chd/Hry/2022
Under Section 9 of the Insolvency
& Bankruptcy Code, 2016**

In the matter of:

Industrial Forging Industries Pvt. Ltd.

Through its Director and Authorized Signatory, Mr. Amit Daga

having its Registered office at:

Jalan Complex, Gate No.-1, Jangalpur NH-6,

Biprannapara, Howrah, West Bengal-711411

CIN : U74900WB2016PTC209531

....Petitioner-Operational Creditor

vs.

A2Z Infra Engineering Ltd.

through its Director

0-116, 1st Floor, Shopping Mall,

Arjun Marg, DLF City,

Phase-1, Gurugram-122002 (Haryana)

CIN No. L74999HR2002PLC034805

...Respondent-Corporate Debtor

Judgment delivered on: 08.12.2022

Coram: HON'BLE DR. P.S.N PRASAD, MEMBER (JUDICIAL)

HON'BLE MR. UMESH KUMAR SHUKLA, MEMBER (TECHNICAL)

Present:

For the Petitioner-Operational Creditor: Ms. Shruti Aggarwal, Advocate

For the Respondent-Corporate Debtor: 1. Mr. Anand Chhibbar, Senior Advocate
2. Mr. Vaibhav Sahni, Advocate

PER: DR. P.S.N PRASAD, MEMBER (JUDICIAL)

MR. UMESH KUMAR SHUKLA, MEMBER (TECHNICAL)

ORDER

1. The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/'Code'), by Industrial Forging Industries Pvt. Ltd. through its Director and Authorized Signatory, Mr. Amit Daga, (for brevity 'Operational Creditor'/'Petitioner'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) in case of A2Z Infra Engineering Ltd., (for brevity 'Corporate Debtor'/'Respondent').

2. The Corporate Debtor, namely, A2Z Infra Engineering Ltd., is a Company incorporated on 07.01.2002 under the provisions of the Companies Act, 1956 with CIN No. L74999HR2002PLC034805 with its registered office at 0-116, 1st Floor, Shopping Mall, Arjun Marg, DLF City, Phase-1, Gurugram-122002, (Haryana) India. Hence, the territorial jurisdiction lies with this Adjudicating Authority. A copy of the master data of the corporate debtor is attached with the main petition by the petitioner and marked as Annexure P-2.

FACTS OF THE CASE

3. The petitioner company is engaged in the business of manufacturing and exporting products such as Electrical Fittings, Pin Insulator, Suspension Clamps, etc.,

whereas the corporate debtor is engaged in the business of providing services to the power transmission and distribution sector.

4. For the purpose of its business and operations, the corporate debtor has purchased different types of materials for various projects from the operational creditor on the terms and conditions as set out in the respective work orders issued by the corporate debtor. Upon and against the supply of the requisitioned goods, the operational creditor has raised invoices upon the corporate debtor. The last of such invoices raised by the operational creditor is dated 25.05.2017 being invoice No.13/IFI/EXP/17-18.

5. Against the invoices raised by the Operational Creditor, the corporate debtor was making payments from time-to time to the operational creditor, which was being adjusted by him against the corporate debtor's total dues payable.

6. As there was outstanding dues towards supply by the operational creditor, a settlement agreement dated 3rd July 2018 was entered into between the operational creditor and corporate debtor. The relevant terms of the settlement agreement are reproduced below:

"C.As per the books of accounts of IFIPL, as on date an amount of Rs.2,76,29,940/- (Rupees Two Crore Seventy Six Lakh Twenty Nine Thousand Nine Hundred Forty Only) is outstanding towards A2Z ("Outstanding amount").

D. That there were certain disputes/conflicts regarding the outstanding amounts between the Parties (herein to be referred as the "Dispute")

E. The parties have mutually discussed the matter and have decided to amicably settle the matter by way of a one-time settlement ("OTS") as more particularly and in details mentioned set out in point no. 3.2 of this agreement.

F. In view of the said OTS agreed between the parties hereto, it is now agreed that all existing claims in respect of the outstanding amount, including under disputes, shall stand fully and finally settled in lieu of payment/s of agreed amounts by the company to IFIPL in the manner set out in this Settlement Agreement.

...

2.1..... It is agreed between the parties hereto to settle the total dues of Rs.2,76,29,940/- (Rupees Two Crore Seventy-Six Lakh Twenty Nine Thousand Nine Hundred Forty Only) including all outstanding and as confirmed by IFIPL ("outstanding amount") for Rs.80,12,700/- (Rupees Eighty Lakhs Twelve Thousand Seven Hundred Only) "Settlement Amount") to be paid by the company to IFIPL in the form and manner as more particularly mentioned in this agreement at point 3.2

.....

3. TERMS OF SETTLEMENT

3.1 The parties agree that final settlement shall be effective on and from the final settlement date, which shall occur on the payment of final installment of the settlement dues as mentioned in clause 3.2 and shall occur within a period of 15 months from the date of this settlement agreement unless mutually extended ("Final Settlement date")

3.2 Conditions of final settlement: To achieve the final settlement the parties shall undertake the following respective action by the other party:

A. The company shall pay the settlement amount of Rs.80,12,700/- (Rupees Eighty Lakhs Twelve Thousand Seven Hundred Only) in the following manner:

i) An amount of Rs.1,12,700/- (Rupees one lakh twelve thousand seven hundred only) has been paid as token amount at the time of signing the settlement agreement through cheque bearing no. 000484 drawn on Kotak Mahindra bank New Delhi branch.

ii) And Balance amount of Rs.79,00,000/- (Rupees Seventy Nine Lakh only) shall be payable in four equal quarterly installments of Rs.19,75,000 (Rupees Nineteen lakh Seventy five thousand only) each. First installment shall be payable within three months from the date of signing of the settlement agreement through cheque/RTGS/NEFT or any other mode.

iii) If the company defaults in making payment up to a maximum of Rs.19,75,000/- (Rupees Nineteen Lakh Seventy five thousand only) ("Defaulted amount") on any occasion towards payment set out in clause 3.1(ii), then such defaulted amount shall

be payable within a cure period of 3 (three) months from the date of such default along with penal interest of 15% p.a.

b. It is agreed between the parties hereto that upon execution of this settlement agreement all outstanding liability including interest, penal interest or any other outstanding charges/payment of company shall be written off in the books of IIFPL.

c. This is further undertaken by each of the party that after signing of the settlement agreement, they will not initiate any further legal proceeding in any manner against each other and all the existing disputes between the parties, if any, shall stand void-ab-initio.

.....

6.5 Specific Performance. The Parties agree that unless expressly excluded in this Settlement Agreement, the rights and obligations of the Parties under this Settlement Agreement shall be subject to the right of specific performance and may be specifically enforced against a defaulting party.”

7. In terms of the settlement agreement, the Corporate debtor paid Rs.1,12,700 as a token amount on 03.07.2018 and balance amount of Rs.79,00,000 was due for payment in four equal quarterly installments of Rs.19,75,000 each; against Rs.51,12,700 has been paid as detailed below:

Date	03.07.2018	17.10.2018	17.10.2018	18.05.2019	13.09.2019	Total
Amount (Rupees)	1,12,700	10,00,000	10,00,000	20,00,000	10,00,000	51,12,700

8. The operational creditor has submitted that despite repeated requests and reminders including a reminder via its letter dated 02.09.2019, the corporate debtor did not adhere to the terms of the said Settlement Agreement and did not make payment of the agreed sum of Rs.80,12,700/- by 03.10.2019. As such, the said Settlement Agreement dated 03.07.2018 stands repudiated and the corporate debtor is liable to pay the outstanding amount that had been subject to settlement in the manner aforesaid. As the corporate debtor failed to make the payment as per the

settlement payment, the operational creditor has filed the Section 9 petition for the initiation of CIRP against the corporate debtor.

9. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Rs.2,25,17,240/- (Rupees Two Crores Twenty-Five Lakhs Seventeen Thousand Two Hundred and Forty Only) along with interest upon it calculated @ 15% p.a. including interest amount. The total amount of debt is Rs.2,25,17,240/- is arrived at after giving credit to the corporate debtor for the sum paid by it after July, 2018 being a sum of Rs.51,12,700/- paid to the Operational creditor between July, 2018 to September, 2019 from the amount appearing as confirmed on July, 2018 being Rs.2,76,29,940.

10. The petitioner/operational creditor along with his application has submitted a copy of the Authorization by way of Board Resolution dated 27.01.2020 (Annexure P-3), unpaid Invoices (Annexure P-4), Ledger Statement of CD (Annexure P-5), Settlement Agreement dated 03.07.2018 (Annexure P-6), and the Bank Statement is said to be annexed as Annexure P-9, however upon perusal of Annexure P-9, instead of the Bank statement, an undertaking is annexed which is reproduced hereinafter,

“Dear Sir / Maam, Please note that the Annexure P-9 i.e. Bank Statement is not available at the moment. I undertake to file the same as soon as it will be available or as directed by the Hon’ble Tribunal. Therefore, I request this Hon’ble Tribunal to accept the above said matter.”

11. A demand notice under Section 8(1) of I&B Code, 2016 is stated to be issued by the operational creditor on 03.01.2020 and the same has been delivered to the corporate debtor through speed post as per the postal receipts and tracking reports are attached at Annexure P-7 of the Petition. The corporate debtor has not replied to the said demand notice.

12. The adjudicating authority vide order dated 25.07.2022 directed the petitioner to file the compliance affidavit of IBBI notification dated 14.06.2022, which was filed by the petitioner vide diary number 1970 dated 22.08.2022. Thereafter, the adjudicating authority vide order dated 14.10.2022 has ordered to issue notice of this petition to the respondent. Thereafter, the Reply was filed by the corporate debtor vide diary No. 01123/2 dated 17.01.2023 and the Rejoinder has been filed by the Operational creditor vide Diary No. 01123/3 dated 19.07.2023. The Adjudicating authority vide its order dated 28.07.2023 directed the petitioner and respondent to file the short written submissions, which were filed vide diary no. 01123/7 dated 28.08.2023 and 01123/6 dated 08.08.2023 respectively. The Arguments in this matter were heard on 11.09.2023.

REPLY BY THE CORPORATE DEBTOR

13. The corporate debtor has filed a reply vide diary No. 01123/2 dated 17.01.2023, wherein it has raised the following issues:

- a. Unpaid installments of a settlement agreement cannot be treated as an operational debt.
 - i. That during the course of the transactions, certain disputes had arisen between the applicant and the respondent with regard to the outstanding dues. In the background of the said disputes vis-à-vis the quantum of the outstanding dues, such disputes came to be settled by way of a settlement agreement dated 03.07.2018, whereby outstanding dues were settled for an amount of Rs.80,12,700 towards full and final settlement of all disputed dues. Even otherwise, without prejudice to the above it is an

admitted position that out of Rs.80,12,700, an amount of Rs.51,12,700 admittedly stands paid to the applicant.

ii. Upon perusal of the application, specifically paragraph 7 of Part IV, it becomes apparent that the applicant has approached the Hon'ble Tribunal pursuant to an alleged breach of the said settlement agreement dated 03.07.2018.

iii. Relying on the judgment of the Hon'ble NCLAT in the matter of Trafigura India private Limited vs TDT Copper Limited, Company Appeal(AT) (Insolvency) No. 742 of 2020 on the similar facts, it is submitted by the respondent that default in payment of instalments under a settlement agreement does not fall within the definition of 'operational debt'.

b. There exist bona-fide pre-existing disputes between the petitioner and the respondent.

i. From a bare perusal of the settlement agreement brought on record by the applicant itself, it is evident that there were certain disputes/conflicts vis-à-vis the alleged outstanding amount sought by the applicant herein prior to the issuance of the statutory demand notice and the institution of the present application.

ii. If any claims/debt as claimed by the operational creditor ought to be raised by the corporate debtor prior to the issuance of the statutory demand notice under the provisions of section 8 of the code, and if raised would warrant the dismissal of the application under section 9(5)(2)(d) of the code, in limine.

- iii. The definition of dispute under Section 5(6) of the code, is an inclusive one and does not mean for the dispute to exist merely by way of a suit or an arbitration proceeding, but even an exchange of any letter, correspondence, email, etc., can show the existence of a dispute. The affidavit of no dispute filed by the applicant, stating on oath that no pre-existing dispute with regards to the alleged unpaid operational debt is false statement on oath.
 - iv. Relying on the judgment in Mobilox Innovations Private Limited vs. Kirsusa Software Private Limited (2018) 1 SCC 353, and the principle “existence of undisputed debt is sine qua non of initiating corporate insolvency resolution process” the instant matter is barred by pre-existing disputes.
- c. Mandatory threshold of Rs.1 Crore to initiate the proceedings under the provisions of the Code is not met in the present case.
- i. As per the Settlement Agreement dated 03.07.2018 between the applicant and the respondent, the amount of Rs.80,12,700 was arrived at being towards the full and final settlement of all disputed dues, including penal interest and other charges. Out of the aforesaid amount of Rs.80,12,700, an amount of Rs.51,12,700 already stands paid by the respondent and balance if any is only an amount of Rs.29,00,000/- (Rupees Twenty-Nine Lakh Only), as is also admitted by the applicant itself in its rejoinder.
 - ii. The petitioner in order to escape the stipulated mandatory threshold of Rupees One crore has made a patently false submission that on account

of the alleged breach on part of the respondent, the settlement agreement dated 03.07.2018 stands repudiated thereby entitling the applicant herein to an alleged amount of Rs.2,25,17,240/- along with interest at the rate of 15% p.a. The said submission is patently incorrect insofar as the Settlement Agreement itself accounts for a situation of default on part of either party under clause 6.5, which stipulates that specific performance of the settlement agreement can be sought from the defaulting party, thus establishing that the validity of the settlement agreement remains unaffected even in the event of breach by either party.

REJOINDER BY THE PETITIONER

14. The operational creditor filed the rejoinder vide Diary No.0123/3 dated 19.07.2023. The main issues raised in the Rejoinder are briefly summarized below:

- a. That the deponent of the affidavit is not authorized by the corporate debtor to affirm the affidavit on its behalf as the board resolution categorically provides for authorization to be through power of attorney/any other mode of authorizing is beyond the board resolution and the deponent has not been duly authorized to affirm the said reply and in such premise, the said reply cannot be acceptable by this Adjudicating Authority.
- b. There exists no bona-fide pre-existing dispute between the petitioner and respondent as alleged by the respondent.

ANALYSIS AND FINDINGS

15. We have heard the learned counsel for the petitioner and corporate debtor and have carefully gone through the pleadings and also the written submissions submitted by both the parties.

16. The first issue for consideration is whether there is an operational debt and whether the mandatory threshold of Rs.1 Crore to initiate the proceedings under the provisions of the Code is met in the present case. According to the settlement agreement, the total dues of Rs.2,76,29,940/- including all outstanding total amount were settled for Rs.80,12,700/-, out of which Rs.51,12,700/- has been paid by the respondent. Thus, Operational Creditor has already accepted part payment of the amount as agreed to in the Settlement Agreement and there is a default in the payment of the remaining amount. The Hon'ble NCLAT in its judgement delivered on 15.09.2022 in the matter of ***Trafigura India Pvt. Ltd. v. TDT Copper Ltd., (Company Appeal (AT)(Insolvency)No. 742 of 2020)*** while dismissing an appeal on similar facts and grounds, has affirmed that default in payment of installments under a Settlement Agreement does not fall within the definition of Operational debt. Therefore, we are of the considered view that the default in the payment of the remaining installments as stipulated under the Settlement Agreement cannot be said to fall within the definition of Operational Debt.

17. Further, once the settlement agreement has been agreed upon between the parties before the commencement of any application to initiate Corporate Insolvency against the Corporate debtor, the debt would be limited to as mentioned in the settlement agreement. The Settlement Agreement as mutually agreed and confirmed by the parties was for the total amount of Rs.80,12,700.00/-, out of which Rs.51,12,700/- has been paid by the respondent, therefore the remaining amount, is below the mandatory threshold of Rs.1 Crore as required by the provisions of the Code.

18. Another issue for consideration by this Adjudicating Authority is whether a default in the payment of the settlement amount under the Settlement Agreement results in a fundamental breach of the Settlement Agreement. The Operational Creditor has stated in Para 12 of its rejoinder that, *“As such on a harmonious reading of the various clauses of the agreement would stand fundamentally breached thereby giving rise to the claim being the confirmed outstanding amount. The Corporate Debtor has not made the payment of any amount over and above Rs.51,12,700/- thereby not having made the payment of Rs.80,12,700 by 3rd October, 2019 as agreed under the agreement therefore the agreement is breached and the amount being the outstanding amount stands revived and thus the claim of the operational creditor.”*

19. It transpires that the Settlement Agreement itself provides for the remedy in case of default on part of either party under clause 6.5. It is stipulated in the Settlement Agreement *that* specific performance can be sought from the defaulting party, thus, establishing that the validity of the settlement Agreement remains unaffected even in the event of default in payment by either party due to the fact that either party can claim a specific performance of its rights under the agreement. The said clause is reproduced hereunder,

“6.5 Specific Performance. The Parties agree that unless expressly excluded in this Settlement Agreement, the rights and' obligations of the Parties under this Settlement Agreement shall be subject to the right of specific performance and may be specifically enforced against a defaulting Party.”

20. As in the case of default in payment of installments, the remedy of specific performance is provided for in the settlement agreement and there is no specific clause regarding repudiation of the whole settlement agreement, we are of the

considered view that default in the payment of installments would not repudiate the settlement agreement and would not make the initial operational debt payable as there is no enabling provision in the Settlement Agreement.

21. The next issue is whether there was a pre-existing dispute. For admission of the Section 9 application, one of the principal requirements is that there should not be any pre-existing dispute between the Operational creditor and the Corporate debtor before issue of the Section 8(1) notice.

22. The Hon'ble Supreme Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (Civil Appeal No. 9405 Of 2017) passed on 21.09.2017 has held:

“We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists 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. The abovementioned judgment has again been reiterated by the Hon'ble Supreme Court in its judgement delivered on January 04, 2023 in the matter of Sabarmati Gas Limited vs. Shah Alloys Limited (Civil Appeal No. 1669 of 2020) has held:

“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. 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.”

24. In the light of the positions thus settled in Mobilox Innovations (P) Ltd. (supra) and Sabarmati Gas Limited, we have examined the question whether there was a ‘pre-existing dispute’ between the parties, warranting dismissal of the application for initiation of CIRP filed by the appellant.

25. It is deposed by way of an affidavit under Section 9(3)(b) by the Operational Creditor that no notice of dispute was raised by the Corporate Debtor regarding unpaid operational debt. However, upon consideration of the facts in the present case and from a bare perusal of the settlement agreement, it is evident that the settlement agreement was itself entered into to resolve the disputes between the parties. The relevant portion of the recital of the Settlement Agreement is reproduced hereunder:

“...D. that there were certain disputes/conflicts regarding the outstanding amounts between the parties (hereinafter, to be referred to as the ‘dispute’)”

26. As already discussed the settlement agreement was entered into on 03.07.2018 between the operational creditor and corporate debtor before issuance of section 8(1) notice by the operational creditor on 03.01.2020, which have mention of the disputes between the parties. After carefully perusing the facts and precedents relevant to the matter we are of the considered view that there was a pre-existing dispute between the parties, which was the reason due to which a settlement agreement was executed between the parties.

27. It is a settled principle of law that the proceedings before NCLT under IBC cannot be construed as recovery proceedings. The Hon'ble Supreme Court in its judgement delivered on 15.07.2023 in the matter of M/s S.S. Engineers Appellant(s) vs. Hindustan Petroleum Corporation Ltd. & ORS. has held:

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

32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational

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

28. In the light of the above, we are of the considered view that the petitioner has not made out a case for initiation of CIRP under Section 9 of the Insolvency and Bankruptcy Code, 2016, therefore, present Section 9 petition is dismissed without cost.

-Sd-
(Umesh Kumar Shukla)
Member (Technical)

-Sd-
(Dr. P.S.N. Prasad)
Member (Judicial)

December 08, 2023
VVC