

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL  
BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1035 of 2021**

**IN THE MATTER OF:**

**Puneet Kumar  
(Suspended Director of  
Nysa Communications Pvt. Ltd.)  
Z-26, A Meghdutam Apartments,  
F-21 C, Sector – 50, Noida, UP  
201 301  
Email: [puneet@nysaasia.com](mailto:puneet@nysaasia.com)**

**... Appellant**

**Vs.**

**1. Computer Junction Private Limited.  
C-129, Phase-1  
Naraina Industrial Area,  
New Delhi – 110028  
Email: [finance@cjpl.in](mailto:finance@cjpl.in)**

**... Respondent No. 1**

**2. Navjit Singh  
(Interim Resolution Professional of  
Nysa Communications Pvt. Ltd.)  
218-A, 1<sup>st</sup> Floor, Shop No. 4,  
Rama Market, Pitampura, New Delhi  
Email: [navjit92ca.ip@gmail.com](mailto:navjit92ca.ip@gmail.com)**

**... Respondent No. 2**

**Present:**

**For Appellant: Mr. Abhijeet Sinha, Mr. Milan Singh Negi  
and Mr. Nikhil Kumar, Advocates.**

**For Respondents: Mr. Tushar Thareja, Advocate for R-1.  
Mr. Arun K. Sinha and Mr. Sumit Sinha,  
Advocates for R-2.**

## **J U D G M E N T**

**(Date : 09.05.2022)**

**[Per.: Dr. Alok Srivastava, Member (Technical)]**

This Appeal has been filed by the Appellant Puneet Kumar assailing the order dated 13.10.2021 in CP No. (IB) 556(ND)/2020 (hereinafter called 'impugned order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) on an Application filed by the Operational Creditor 'M/s Computer Junction Pvt. Ltd.' (in short 'CJPL') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') against the Corporate Debtor Nysa Communications Pvt. Ltd. (in short 'NCPL').

2. In brief, the facts of the case are that a Facilities Agreement was signed between Computer Junction Pvt. Ltd. and Nysa Communication Pvt. Ltd. effective from 25.05.2018 for a period of three years. According to this agreement NCPL obtained end to end infrastructural support and laptop servers for the work relating to booking and facilities at examination centres from CJPL with their partner Testpan India Pvt. Ltd. This agreement was entered into by the parties in connection with a contract obtained by NCPL from the Indian Council of Agriculture Research (in short 'ICAR'). The scope of work of CJPL/Operational Creditor covered activities which included providing DVR facility for recording the examination proceedings at each centre along with CCTV cameras, with Nysa designated manpower responsible for taking backup of recordings from these locations in server or any other medium provided by Nysa. The Facility Agreement also provided that 'in case CJPL /Testpan does not provide any of the facilities mentioned in the documents at

the centre(s), penalty will be imposed on the basis of feedback received from the concerned government body/university representatives deployed at centre. The Facilities Agreement further provided that the storage device of CCTV surveillance recording was to be arranged by NCPL. After the examination had taken place, some complaints were received by ICAR from All India Agricultural Students Association (AIASA)) regarding irregularities, cheating and mismanagement in the All-India Entrance Examination 2018 conducted in online mode on 22.06.2018, whereupon the Assistant DG of ICAR requested NCPL vide email dated 29.06.2018 to provide the CCTV footage of 27 examination centres whose details were given in an email (attached at pp. 70-71 of Appeal paper book Vol. II). Thereafter, the CCTV footage was sought by the Corporate Debtor from the Operational Creditor and on non-availability of the CCTV footage and many other irregularities, ICAR decided to terminate the contract with NCPL vide letter dated 30.07.2018, and also forfeiting performance security of Rs. 35.00 Lakhs deposited by NCPL. The Appellant has further stated that it was, therefore, constrained to impose penalty on CJPL and made reduced payments for the work done by CJPL. Upon not receiving full payment from the Corporate Debtor, the Operational Creditor/CJPL sent demand notice under Section 8 of IBC on 23.12.2019 which was replied to by the Corporate Debtor vide letter dated 15.01.2020, and thereafter on not receiving requisite payment, the Operational Creditor filed application under Section 9 against the Corporate Debtor which was admitted vide order dated 13.10.2021 of the Adjudicating Authority.

3. We heard the arguments submitted by the Ld. Counsels of both sides and perused the record.

4. Ld. Counsel for the Appellant has argued that during the consideration of Section 9 application filed by the CJPL, the Corporate Debtor was not afforded opportunity of hearing thereby denying him opportunity to state his case and defend himself. He has elaborated by stating that no notice of hearing on 06.09.2021 and 07.10.2021 was served upon the Corporate Debtor by either the Respondent/Operational Creditor or the Registry of NCLT, New Delhi and therefore he could not attend the hearings to present his case. The Ld. Counsel for the Appellant has added that upon receipt of notice in Section 9 application both the Applicant and the Respondent/Corporate Debtor appeared before the Adjudicating Authority on 11.03.2020, but on the next date of hearing on 24.03.2020 no hearing could take place due to 'lockdown' imposed as a result of Covid-19 pandemic. After a long gap, the case was listed on 01.12.2020 when no one from either party appeared and the petitioner was directed to intimate the date of hearing to the respondent and file an affidavit of service. Thereafter, the case was listed and heard on 18.01.2021 when only the Ld. Counsel for the Applicant/Operational Creditor appeared but since hearing could not take place, the case was re-notified on 31.03.2021 and again on 26.02.2021 and later on 31.03.2021. He has stated that the case could not be heard on the appointed dates and was again re-notified on 14.04.2021, 26.04.2021 and 26.07.2021. The matter was again listed on 06.09.2021 and on this date the Adjudicating Authority ordered that the Respondent be proceeded ex-parte since no one appeared on behalf of the Respondent on this date. On this date the Adjudicating Authority also ordered that a copy of the order be served on the Corporate Debtor which was not complied with, according to the Ld. Counsel of Appellant. He has submitted that in such an event the case was finally decided ex-parte vide impugned order dated 13.10.2021.

5. The Ld. Counsel for Appellant has further argued that based on an incorrect statement of the Operational Creditor before the Adjudicating Authority on 06.09.2021 (order attached at Pg. 113 of appeal paper book) that the Corporate Debtor had appeared before the Adjudicating Authority on 11.03.2020 and thereafter had appeared intermittently but not filed reply, the case was proceeded ex-parte against him and thus he was not provided any opportunity to reply to the Section 9 application, which was decided in the absence of his reply and proper defence.

6. In addition, the Ld. Counsel for the Appellant has stated that the payments claimed by the Respondent/ Operational Creditor CJPL pertained to the period 26.05.2018 to 10.08.2018 against 16 invoices sent by the Operational Creditor during this period were agreed upon mutually, and accordingly payments were made to the Operational Creditor. The Ld. Counsel of Appellant has further stated that the amount of invoice No. 1149 dated 10.08.2018 was reduced to Rs. 1,13,30,756/- after oral agreement over telephone. He has further stated that there is mismatch in the invoices attached with the demand notice under Section 8 and Section 9 application which shows that the amounts claimed to be due and in default of payment are disputed and therefore Section 9 application should not be admitted. He has added that in part IV of the Section 9 application, details of transactions on account of which debt has fallen due and the date from which such debt has fallen due have also not been disclosed which makes the Section 9 application defective and liable to be rejected.

7. The Ld. Counsel for the Appellant has argued that in pursuance of the Facilities Agreement between the Corporate Debtor and the Operational Creditor dated 30.05.2018, the Operational

Creditor was required to supply goods /materials /equipment/services at designated centres on specified dates and times. The operational creditor did not perform the actions required under the Facilities Agreement and these flaws and deficiencies which were brought to the notice of the Corporate Debtor vide email dated 29.06.2018 addressed by Assistant DG of ICAR (attached at Pg. 70 of appeal paper book) which was forwarded to the Operational Creditor for providing the CCTV footage for Centres No. 1408, 1427 and 1428 amongst others. Regarding the flaws and deficiencies in services, he has elaborated that in particular the facilities agreement required that CCTV cameras be installed at the examination centres and recording of footage be maintained and saved which had to be provided to the Corporate Debtor but this was not done by the Operational Creditor. He has further argued that despite painstaking efforts by the Corporate Debtor, the CCTV footage could not be obtained since the Operational Creditor did not install the required hardware of CCTV cameras at many venues and at some places where such cameras were installed the CCTV footages were deleted in haste, and as a result the ICAR terminated the contract with the Corporate Debtor vide letter dated 30.07.2018 (attached at pp. 78-80 of appeal paper book). He has also claimed that the responsibility regarding maintaining CCTV footage and other arrangements at the examination centres was entirely upon the Operational Creditor in accordance with clauses 3(iii)(c) and 3(vi) of the Facilities Agreement, which it had failed to do and, therefore, while there was a dispute regarding services provided by the operational creditor the corporate debtor did make some mutually agreed payments after deductions for deficient services.

8. The Ld. Counsel for the Respondent No. 1/Operational Creditor has further argued that the notice of Section 9 application was issued by the order of the Adjudicating Authority on 25.02.2020

*Company Appeal (AT) (Insolvency) No. 1035 of 2021*

and the matter was posted for hearing on 11.03.2020. He has stated that the Appellant appeared before the Adjudicating Authority on 11.03.2020 whereafter the case was re-notified for 24.03.2020 but could not be heard since the 'lockdown' was imposed on 24.03.2020 in view of Covid-19 pandemic. He has further submitted that the case application under Section 9 was taken up on 01.12.2020, 11.01.2021, 18.01.2021, 23.02.2021, 26.02.2021 and 31.03.2021 but there was no appearance on behalf of the Appellant. Thereafter, the case was again notified on 14.04.2021, 02.07.2021, 26.07.2021 and 06.09.2021 when the matter was taken up for consideration on 06.09.2021 and the Adjudicating Authority ordered that the Respondent is proceeded ex-parte. Thereafter, the case was heard on 07.10.2021 and in the absence of the Respondent the order was reserved which was passed admitting section 9 application on 13.10.2021. He has also pointed out that the legal counsel for the Respondent No. 1 communicated the date of hearing on 23.02.2021 vide email dated 20.02.2021 and again for hearing on 31.03.2021 vide email dated 19.03.2021 (copy of emails attached at Pg. 18 of the Reply of Respondent No. 1) and these emails were addressed to Messrs. Sonu, Ruchir and Puneet, all employees of the Corporate Debtor but the Corporate Debtor chose not to appear for hearing on 06.09.2021, and again 07.10.2021 when the case was heard ex-parte and the final order was passed on 13.10.2021.

9. In his arguments, the Ld. Counsel for the Respondent No. 1 has submitted that the responsibility for providing backup and storage devices in accordance with the Facilities Agreement was of the Corporate Debtor, which it did fulfil, and therefore, since the operational creditor is not at any fault it is entitled to receive the requisite payment from the corporate debtor.

10. The Ld. Counsel for the Respondent No. 1/Operational Creditor has further submitted that the work regarding conduct of examination for ICAR is defined in the scope of services provided in the facilities agreement dated 30.05.2018 and certain responsibilities were upon the corporate debtor. He has further submitted that the Respondent No. 1 perform its part of the agreement fully and the Appellant even after receiving due services from the Operational Creditor and acknowledging the same failed to make payments against duly raised invoices w.e.f. 10.08.2018. In this manner, he has submitted that a total amount including principal and interest of Rs. 3,54,54,483.49/- was payable to the Respondent No. 1 by the Appellant and the Respondent No. 1 sent a demand notice under section 8 of the IBC which was delivered to the Appellant on 27.12.2019. He has further argued that in reply to the said demand notice the Appellant has raised false, vexatious dispute in order to avoid due and just payment to the Respondent No. 1.

11. The Ld. Counsel for the Respondent No. 1/Operational Creditor has also submitted that the dispute raised by the Corporate Debtor in his reply to the demand notice sent under Section 8 of IBC is a sham and imaginary dispute. He has contested the claim of the corporate debtor that the amount of invoice No. 1149 (attached at Pg. 230 of the appeal paper book) was reduced to Rs. 1,13,30,756/- from Rs. 3,75,83,000/- but it is not supported by any documentary proof. He has pointed out that the correct invoice No. 1149 bearing seal and signature of the Appellant is attached at Pg. 212 of the appeal paper book, where no reduction in the amount of invoice is shown and, therefore, full payment has not been made by the corporate debtor. He has urged that, in the same way, the correct invoice bearing No. 1152 is attached at Pg. 232 of the appeal paper book which also does not have any noting of reduction in amount but only partial payment was made by the corporate debtor.

12. The Ld. Counsel for the Respondent No. 1 has submitted that the allegation made by the Appellant about manipulating the invoices are an after-thought and there was no dispute existing before issue of notice under Section 8 of the IBC. Therefore, in accordance with the Judgment of Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd, (Civil Appeal No. 9405 of 2017)** any dispute which is a sham dispute need not be taken into consideration in examination of Section 9 application. Finally, Ld. Counsel for the Respondent No. 1 has submitted that in the light of non-appearance of the Corporate Debtor despite sufficient notice to him regarding the dates of hearing and the operational debt being in default of payment, the Adjudicating Authority has correctly admitted Section 9 application filed by the Operational Creditor.

13. The Ld. Counsel for the Respondent No. 2/IRP has mentioned that the matter relating to alleged dispute in payment of invoiced amounts and the non-appearance of the Corporate Debtor in the proceedings before the Adjudicating Authority in Section 9 application are events that preceded his appointment, and therefore he is not in a position to make any comments on these issues. He mentioned non-payment of fees of RP by the bank concerned, though it is not a matter under consideration in this appeal.

14. We first examine the matter of non-appearance of the Corporate Debtor in the proceedings before the Adjudicating Authority. It is seen from the copies of the order sheet of the proceedings submitted by the Appellant between pp. 102 to 114 of appeal paper book Vol. II that the matter was first taken up on

25.02.2020 when orders were given for serving notice to the Corporate Debtor vide all modes. Thereafter, the matter was listed on 11.03.2020 when it could not be taken up due to paucity of time and renotified on 24.03.2020. Since 'lockdown' was imposed due to Covid-19 pandemic on 24.03.2020, the matter was next listed on 01.12.2020 when there was no appearance on behalf of the Corporate Debtor and the Petitioner/Applicant was directed to file affidavit of service within a week. Again when the matter was taken up on 18.01.2021, there is no mention in the order sheet at Pg. 106 of appeal paper book whether any service was affected on the Corporate Debtor nor submission of affidavit of service. The matter was renotified on 23.02.2021, 26.02.2021, 31.03.2021, 14.04.2021, 26.04.2021 and 26.07.2021 when no proceedings took place except that the matter was renotified for the next date. The matter was taken up on 06.09.2021 and the following is recorded in the concerned order of the Adjudicating Authority:-

*“Ld. Counsel for the Appellant states that the Corporate Debtor had appeared on 11.03.2020 and thereafter, intermittently but has not filed the reply.*

*None appeared for the respondent. Today also none appears for the respondent. The Respondent is proceeded ex-parte. Let the copy of this order be served to the Corporate Debtor.*

*List the matter for hearing on 07<sup>th</sup> October 2021.”*

15. A perusal of the order of the Adjudicating Authority given on 06.09.2021 we find that in the order a statement is recorded which is ascribed to the Ld. Counsel for the Appellant that the Corporate Debtor had appeared on 11.03.2020 and thereafter has appeared intermittently but did not file reply. The orders of the Adjudicating Authority given on various dates of hearings show that the Corporate Debtor did not appear on any date after 11.03.2020 nor was given an opportunity to file a reply. In fact, on all dates of hearing after

11.03.2020 the matter was renotified, except on 01.12.2020, when the Petitioner was directed to file an affidavit of service. From a perusal of record submitted, it is not clear if such a service was effected and whether the affidavit of service was filed by the Petitioner. Therefore, the statement of the Ld. Counsel for the Appellant that the Corporate Debtor had appeared intermittently after 11.03.2020 but not filed reply is not borne out by record. We further find that while the matter was proceeded ex-parte against the Corporate Debtor on 06.09.2021, a direction was given that a copy of the order be served on the Corporate Debtor. Again, there is no document submitted in the case to show that the copy of the order dated 06.09.2021 was served on the Corporate Debtor. We note the submission of the Respondent No.1/Operational Creditor that he has sent information through emails dated 19.03.2021 for hearing schedule on 31.03.2021 and email dated 20.02.2021 for hearing on 23.02.2021 (attached at pg. 18 of Reply of the Respondent No. 1), but we do not find that the order passed by the Adjudicating Authority on 06.09.2021 which was after the abovementioned emails of the Operational Creditor was served on the Corporate Debtor as was directed by the Adjudicating Authority.

16. In paragraphs 10 and 11 of the impugned order by the Adjudicating Authority the following is recorded:-

*“ 10. Since the Corporate Debtor has neither filed reply nor made any representation on later dates despite opportunities, it was proceeded ex-parte vide order of this adjudicating authority dated 06.09.2021.*

*11. After hearing submission of the Operational Creditor on 07.10.2021 and perusing the documents placed on record, this Bench observes that although, the Corporate Debtor has disputed its liability, however, there is nothing annexed with the notice of dispute dated 15.01.2020, which could suggest that there was a dispute existing, prior to the issuance of the*

*demand notice. Further, we find no explanation given by the Corporate Debtor in its notice of dispute as to how the debt claimed by the Operational Creditor is not an operational debt.”*

17. The above-stated inference of the Adjudicating Authority presumes that an opportunity was granted to the corporate debtor to file reply and also that it had occasion to submit representation for granting time to file reply after the ex-parte order. On this basis the Adjudicating Authority decided to proceed ex-parte against the corporate debtor vide order dated 06.09.2021. As stated in this Judgment earlier, there is no document submitted to show that in compliance of this order, the Corporate Debtor was communicated the order dated 06.09.2021. In such an event we find that the recording by the Adjudicating Authority in para 10 of the impugned order that opportunities were provided to the Corporate Debtor to make representations is not based on facts on record. We are of the view that the allegations of dispute vide his reply dated 15.01.2020 to the Section 8 Demand Notice raised by the Corporate Debtor can be looked into after getting a proper reply to Section 9 application from the Corporate Debtor. Therefore, the compliance of order dated 06.09.2021 to make the corporate debtor aware that case had been proceeded ex-parte against him and an opportunity to make representation to file a reply assumes significance and criticality in adjudicating Section 9 application.

18. The Ld. Counsel for the Appellant has referred to the Judgment of Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Ltd (Supra)** to contend that the issue of pre-existing dispute does not have to be decided on merits but the mere fact that the dispute is real one, and not a sham and vexatious one, should be seen by the Adjudicating Authority and if such a dispute

is found to exist before the issuance of demand notice, it is sufficient to reject the section 9 application.

19. The relevant portion in the **Mobilox Innovations Private Ltd (Supra)** Judgment is reproduced below:-

*“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.”*

20. The Judgment of Hon’ble Supreme Court in the matter **M/s Innoventive Industries Ltd. Vs. ICICI Bank & Anr. (Civil Appeal No. 8337-8338 of 2017)** filed by the Ld. Counsel for the Respondent No. 1 primarily points out the difference between section 7 and section 9 applications and how they should be dealt with. It also, inter alia, lays down that in case a real dispute which is not spurious, is found to exist before the issue of demand notice under section 8, it is sufficient to reject the section 9 application.

21. In the result, we find that the Adjudicating Authority gave an opportunity to the Corporate Debtor against whom the matter was proceeded ex-parte to appear before the Adjudicating Authority and present his case vide order dated 06.09.2021, but there is no record submitted by the parties to show that in compliance of the order dated 06.09.2021 the order was served on the Corporate Debtor. In the light of such deficiency, and also the issues raised by the Ld. Counsel for the Appellant that there was pre-existing dispute mentioned in his reply to the demand notice dated 15.01.2020, and also that in case the Corporate Debtor had been provided sufficient opportunity to reply to the Section 9 application he would have brought these facts before the Adjudicating Authority, we are of the opinion that the Adjudicating Authority has committed an error in proceeding ex-parte against the Corporate Debtor and not communicating order dated 06.09.2021 to him.

22. In view of the detailed discussion as above, we hold the view that it would serve the ends of the justice if the Corporate Debtor is provided an opportunity to submit his reply in Section 9 Application. We, therefore, allow the appeal and accordingly set aside the impugned order dated 13.10.2021. We further direct that the Corporate Debtor shall be free from rigours of Corporate Insolvency Resolution Process and other provisions of IBC. The case is remanded to the Adjudicating Authority for giving a notice to the Corporate Debtor and affording him opportunity to submit a reply and thereafter pass appropriate orders after due consideration in the Section 9 application filed by the Operational Creditor. We also make it clear that we are not giving any opinion regarding pre-existing dispute between the parties in the matter.

23. In view of the facts of this case, there is no order as to costs.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Dr. Alok Srivastava]**  
**Member (Technical)**

**[Ms. Shreesha Merla]**  
**Member (Technical)**

**New Delhi**

**09<sup>th</sup> May, 2022**

*/ SC /*