

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III
IB-112(ND)/2020**

Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. CHIPSAN AVIATION PRIVATE LIMITED

Having its Registered Office at:

234, Vasant Enclave, Vasant Vihar, New Delhi-110057

Through Its Authorised Representative/Director

Mr. Sunil Kattundynarayan

.....Operational Creditor

VERSUS

M/s. PUNJ LLYOD AVIATION LIMITED

Having its Registered Office at:

Punj Llyod House, 17-18, Nehru Place, New Delhi-110019.

Through Its Authorised Representative/Director

Mr. Joginder Singh

.....Corporate Debtor

Order Delivered On: 12.12.2023

CORAM:

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Applicant : Mr. Barun Kumar Sinha, Ms. Pratibha Sinha, Ms.
Nidhi Vardhan, Advs.

For the Respondent : Mr. Karan Luthra, Adv.

ORDER

PER: BENCH

1. This Application has been filed by M/s. Chipsan Aviation Private Limited, the Applicant/Operational Creditor on 17.12.2019 before this Adjudicating Authority under Section 9 of the Insolvency and

IB-112(ND)/2020

Date of Order: 12.12.2023

Bankruptcy Code, 2016 (“IBC” or “Code”) r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (“Adjudicating Authority Rules”), for initiating the Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against M/s. Punj Llyod Aviation Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of Rs. 60,00,000/- (Rupees Sixty Lakh Only) and Rs. 37,40,055/- (Rupees Thirty Seven Lakh Forty Thousand and Fifty Five Only) as interest @18% p.a., totaling to Rs. 97,40,055/- (Rupees Ninety Seven Lakh Forty Thousand and Fifty Five Only). As per the Form-5, Part-IV, the date of default in the present application is 08.11.2017, as no payment has been refunded by the Corporate Debtor to the Operational Creditor when the Corporate Debtor failed to perform its obligation and was asked to refund the money.

2. **Brief Background of the Case**

- i. This Adjudicating Authority vide order dated 06.01.2022 dismissed the present Section 9 application bearing IB-112(ND)/2020 on the ground that:

“the alleged advance does not fall within the four corners of the Operational Debt as defined under Section 5(21) of IBC, 2016.”

- ii. Thereafter, the Operational Creditor preferred an appeal bearing Company Appeal (Insolvency) No. 261/2022 before the Hon’ble National Company Law Appellate Tribunal (NCLAT). The Hon’ble NCLAT vide order dated 10.11.2022 set aside the order dated 06.01.2022 passed by this Adjudicating Authority (Court-3) in view of the findings of the Hon’ble Supreme Court in the matter of **Consolidated Construction Consortium Limited vs. Hitro Energy Solutions Private Limited** reported in (2022) 7 SCC 164 and held that:

*“***** advance payment is covered within the definition of Operational Debt. Hon’ble Supreme Court came to consider the definition of Operational Debt as contained in IBC.”*

The Hon’ble NCLAT further held that:

*“The Section 9 Application being IB-112/ND/2020 is revived before the Adjudicating Authority to be heard and decided afresh after hearing both the parties. *****”*

- iii.** The Corporate Debtor challenged the Order dated 10.11.2022 passed by the Hon’ble NCLAT before the Hon’ble Apex Court in Civil Appeal No. 306 of 2023. The Hon’ble Apex Court vide order dated 27.01.2023 upheld the Order dated 10.11.2022 passed by the Hon’ble NCLAT and held that:

*“******

*2 The National Company Law Appellate Tribunal has reversed the above decision while relying upon the decision of this Court in **Consolidated Construction Consortium Limited vs Hitro Energy Solutions Private Limited**, where it has been held that Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the Corporate Debtor which ultimately leads to an operational debt.*

3 The NCLT in its original order had not considered the other defences that were raised by the applicant to the application under Section 9 of the IBC. Hence, on remand, all the rights and contentions of the parties on the merits of the case are kept open to be urged before and decided by the NCLT.

******”*

- iv.** Hence the present Section 9 Application is revived and remanded before this Adjudicating Authority.

3. Submission of the Applicant/Operational Creditor

- i. The Operational Creditor through its Director was in business with the Corporate Debtor for charter services of aeroplanes & helicopter

- hired on long-term basis from non-scheduled operators/owners by/from the Corporate Debtor.
- ii. On 28.03.2016, the Operational Creditor transferred Rs. 60,00,000/- to the Corporate Debtor's account on the assurance of direct dealing with the Corporate Debtor.
 - iii. It is the case of the Operational Creditor that the calculations done are based upon the ledger account and reflect a principal balance amount of Rs. 60,00,000/- and interest amount @18% per annum is Rs.37,40,055/- totaling to Rs. 97,40,055/- which is due by the Corporate Debtor on refund of advance and supply of services.
 - iv. It is submitted that the Operational Creditor had requested the Corporate Debtor to pay the due amount, however, the Corporate Debtor paid no heed to the requests of the Operational Creditor and till date no amount has been paid towards the existing dues by the Corporate Debtor.
 - v. As on 31.03.2016, the principal balance amount of Rs. 60,00,000/- was shown as Advance from the customer under Note-8 "Current Liabilities" in the Balance Sheet of the Corporate Debtor.
 - vi. On 26.03.2019, the Operational Creditor filed a complaint against the Corporate Debtor with the Registrar of Companies (RoC) Delhi & Haryana.
 - vii. The Operational Creditor sent a Demand Notice dated 19.08.2019 in Form 3 under Section 8 of the Insolvency and Bankruptcy Code, 2016, which was duly delivered and received by the Corporate Debtor on 21.08.2019 at its Registered Office Address. The Corporate Debtor did not reply to the Demand Notice dated 19.08.2019. There has been no repayment of the unpaid operational debt till date. No notice of dispute has been received by the Operational Creditor from the Corporate Debtor.

4. Submission of the Respondent/Corporate Debtor

- i. The Respondent/Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant and submitted that from a bare

perusal of the pleadings in the captioned application, the alleged debt of Rs. 60,00,000/- (Rupees Sixty Lakh Only) is not a claim in respect of provision of goods or services.

ii. The Operational Creditor claims the sum of Rs.60,00,000/- as a refund of an "advance" paid by the Operational Creditor to the Corporate Debtor in lieu of services to be rendered by the Corporate Debtor to the Operational Creditor. Accordingly, the following is borne out:

a) The Operational Creditor is not providing any service to the Corporate Debtor nor are any goods being supplied by the Operational Creditor to the Corporate Debtor;

b) The Corporate Debtor is the service provider or the entity rendering the service;

c) As per the Operational Creditor, the sum of Rs. 60,00,000/- represents an "advance" paid to the Corporate Debtor;

d) The alleged default is the non-refund of the above said advance.

iii. It is submitted that since it is an admitted position that the Operational Creditor was not providing any services and/or supplying any goods to the Corporate Debtor there is no "Operational Debt" in existence and M/s. Chipsan Aviation Private Ltd. is not an "Operational Creditor" under the IBC, 2016. Accordingly, the present Application under Section 9 of the IBC is not maintainable.

iv. The Corporate Debtor submits that the Operational Creditor has with malafide intent to bring the alleged debt within limitation has wrongly and falsely mentioned the date of default in the Application under Section 9 of the IBC as 08.11.2017. The fact that the date of default has been falsely mentioned as 08.11.2017 is evident from the following:

a) The interest calculated by the Operational Creditor is from date i.e. 01.04.2016 and not from 08.11.2017;

b) The Operational Creditor in the Demand Notice dated 19.08.2019 at Page 96 of the Application has stated that the amount is due from 01.04.2016.

- v. It is settled law that the right to recover the alleged advance would be for a period of three (3) years from the date on which the money was paid by the Operational Creditor i.e. 28.03.2016, which expired on 27.03.2019. Accordingly, the alleged debt is time barred and no application under Section 9 of the IBC is maintainable for the default of debt barred by limitation.
- vi. The Corporate Debtor further submits that there is no amount due and payable by the Corporate Debtor to the Operational Creditor since the amount of Rs.60,00,000/- paid by the Operational Creditor stands adjusted towards the charges due from the Operational Creditor for the use of the Corporate Debtor's Aircraft Gulfstream G200 bearing Registration No. VT PLA Serial No. 77 ("G200 Aircraft")
- vii. It is submitted that the Corporate Debtor never provided its G200 Aircraft for hire and use directly and used the services of Brokers such as M/s. Nexus Aviation and M/s. Buildarch Aviation for the hire and use of its G200 Aircraft.
- viii. It is submitted that the Corporate Debtor had executed an Agreement dated 01.04.2016 with an entity namely M/s. Buildarch Aviation, whereunder M/s. Buildarch Aviation was appointed as a Broker on behalf of the Corporate Debtor and was permitted to enter into Agreements with prospective clients for the hire and use of the G200 Aircraft owned by the Corporate Debtor.
- ix. It is submitted that payments were being made by the Operational Creditor to M/s. Buildarch Aviation who would pay to the Corporate Debtor in terms of the Agreement dated 01.04.2016 executed with the Corporate Debtor.
- x. The Corporate Debtor submits that the sum of Rs. 60,00,000/- was duly adjusted against the amounts due and payable under the Agreement dated 01.04.2016.
- xi. The Corporate Debtor submits that the Operational Creditor is arm-twisting the Corporate Debtor to accept the illegal demands of the Operational Creditor. The Operational Creditor had filed a complaint before the Registrar of Companies. The notice dated 11.04.2019

received from the Registrar of Companies was duly replied to by the Corporate Debtor vide its letter dated 21.06.2019. Thereafter no proceedings have been initiated by the Registrar of Companies on the baseless complaint made by the Operational Creditor.

5. Analysis and Findings:

- i.** We have heard the Ld. Counsel appearing for both parties. We have also perused the documents on record.
- ii.** As per the directions of the Hon'ble Supreme Court of India, we are deciding the following issues:
 - a) Whether the present application is within the Limitation period to initiate the CIRP against the Corporate Debtor or not.
 - b) Whether there is a pre-existing dispute with respect to the amount claimed to be due in the application or not.

iii. First Issue- Limitation

As per law laid down by the Hon'ble Supreme Court, in the case of **B.K. Educational Services Pvt. Ltd. versus Parag Gupta and Associates** in Civil Appeal No. 23988 of 2017, Law of Limitation i.e., Article 137 of the Limitation Act, 1963 is applicable to the Application filed under section 9 of the Code. Article 137 of the Limitation Act, 1963 provides a 3 (Three) years of Limitation Period from the date when "Right to Apply" accrues. "The Right to Apply", accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act.

- iv.** In the present case, as per the Form-5, Part-IV, the date of default in the present application is 08.11.2017. However, no such invoice dated 08.11.2017, has been placed on record by the Operational Creditor to support the date of default in the Section 9 application. On the contrary, the Corporate Debtor contended that the Operational Creditor in the Demand Notice (dated 19.08.2019 at Page 96 of the Application) has stated that the amount is due from 01.04.2016. The Operational Creditor calculated the interest from 01.04.2016 and not

from 08.11.2017. It is also contended by the Corporate Debtor that the Operational Creditor transferred Rs. 60,00,000/- to the Corporate Debtor on 28.03.2016.

- v. The Limitation Period of 3 (Three) years, if calculated from 01.04.2016, shall expire on 31.03.2019 and if calculated from 28.03.2016, shall expire on 27.03.2019. Whereas the present Application under section 9 of the Code has been filed on 17.12.2019 which is beyond the period of limitation and hence, the Application filed under section 9 of the Code is barred by the Law of Limitation..
- vi. The first issue is answered accordingly and we are of the considered view that the present Application under Section 9 of the Code is barred by the limitation and is not maintainable.
- vii. **Second Issue- Pre-Existing Dispute**

It is the case of the Corporate Debtor that the amount of Rs. 60,00,000/- paid by the Operational Creditor stands adjusted towards the dues of M/s. Buildarch Aviation on whose behalf and for whose benefit the amount was paid by the Operational Creditor. The Operational Creditor was very well aware of this adjustment and this is admitted by the Operational Creditor in the Complaint dated 01.03.2019 (prior to the demand notice dated 19.08.2019) filed to the RoC, wherein it was stated as follows:

“That after four hours of fruitless wait and meeting Respondent Company's discourteous and unprofessional attitude, it was apprised through the Accounts Department's Mr. Surender Bharadwaj who attended my client apprised that Rs. 60,00,000/- (Rupees sixty Lacs) have been since adjusted, further apprised nothing is due to us. In spite of demanding details of the adjustment(s) without the knowledge and authority no details were furnished nor any statement of account was furnished.”

- viii. It is amply clear from the above-cited paragraphs of the Complaint dated 01.03.2019 (prior to the demand notice dated 19.08.2019) filed to the RoC, that it is established that the Corporate Debtor had raised

certain issues relating to the “advance” and “no dues”, much before the issue of the statutory demand notice by the Operational Creditor. It is well settled that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument it would suffice for the Adjudicating Authority to reject the application filed under Section-9 of the Code.

- ix.** While determining second issue, we are of the considered view that the Corporate Debtor has been able to raise a plausible contention regarding the pre-existence of the dispute between the parties.
- x.** In view of the above findings, we are of the considered view that the present application under Section 9 of the IBC, 2016 ought to be **dismissed** on the grounds of Limitation as well as on pre-existence of dispute.

6. In view of the above, we are satisfied that the present application fails to fulfil the criteria laid down under Section 9 of the Code. It is accordingly ordered as follows:

- i.** The Application bearing **IB-112/ND/2020** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **dismissed**.
- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
No order as to costs.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**