

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

**IA No. 247/2022
And
CP (IB) No. 207/Chd/Pb/2021**

**Under Section 9 of the Insolvency
and Bankruptcy Code, 2016.**

In the matter of:

**M/s NTT Data Business Solutions Pvt. Ltd.
(formerly known as Itelligence India Software
Solution Pvt. Ltd.)**

having its registered office at
Softsol Tower 2, 3rd Floor, B-Wing,
Software Unit Layout, Infocity, Madhapur,
Hyderabad 500081
through its Authorized Signatory
Mr. JS Kalyan Chakravarthy,
Sr. Manager-Legal & Company Secretary
CIN No. U72200TG2013PTC085463

...Petitioner-Operational Creditor

Vs.

**M/s Trident Ltd.,
Trident Group, Sanghera Complex,
Raipur Road, Barnala
through its Managing Director
CIN No. L99999PB1990PLC010307**

...Respondent-Corporate Debtor

IA No. 247/2022

M/s Trident Ltd.,Applicant

Vs.

M/s NTT Data Business Solutions Pvt. Ltd.Respondent

Judgement delivered on: 17.07.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

IA No. 247/2022
And
CP (IB) No. 207/Chd/Pb/2021

For the Petitioner- Operational Creditor/ Respondent in IA No. 274/2022 : 1). Mr. Vishal Aggarwal, Advocate
2). Mr. Aayush Aggarwal, Advocate

For the Respondent- Corporate Debtor/ Applicant in IA No. 247/2022 : 1). Mr. Anand Chhibbar, Senior Advocate
2). Mr. Vaibhav Sahni, Advocate
3). Mr. Shekhar Verma, Advocate
4). Satyam Tandon, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT in CP (IB) No. 207/Chd/Pb/2021

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC' / 'Code'**), by **M/s NTT Business Solutions Pvt. Ltd. formally known as (Intelligence India Software Solutions Pvt. Ltd.)** through its Senior Manager-Legal and Company Secretary Mr. J.S. Kalyan Chakravarthy (**for brevity 'Operational Creditor' / 'Petitioner'**), with a prayer to initiate Corporate Insolvency Resolution Process (**CIRP**) in case of **M/s Trident Ltd. (for brevity 'Corporate Debtor' / 'Respondent')**.

2. The Corporate Debtor, namely, M/s Trident Ltd., is a Company incorporated on 18.04.1990 under the provisions of the Companies Act, 1956 with CIN No. L99999PB1990PLC010307 with its registered office at Raipur Road, Barnala, Punjab India. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of master data of the corporate debtor is attached with the main petition and marked as Annexure-A.

3. The facts of the case, briefly, as stated in the petition are that the Operational Creditor is in the business of providing Software Solutions in SAP Consulting, Technology and Outsourcing Services. Corporate Debtor having used SAP products was desirous of implementing SAP S4 HANA Software or its higher version. Both parties entered into Agreement dated 27.01.2020 and a timeline of 14 months was given to complete the said work. Thereafter, invoices were raised. It was less than two months complete lockdown was imposed on account of Covid-19 and the Corporate Debtor put the project on hold stating that hardware could not be delivered. The hardware was received by Corporate Debtor in May 2020 however, there was difficulty in accessing the same due to restricted travels. Thereafter, Corporate Debtor changed its requirements. Several emails were exchanged between the parties wherein Corporate Debtor was showing to cooperate and admitting the lapses on its part. The Corporate Debtor has acknowledged/accepted and agreed to pay Rs. 3,81,13,654/- to the Operational Creditor. The invoices raised by Operational Creditor were duly accepted by Corporate Debtor stating that payment was under process and invoices would be paid. There is no dispute regarding work completed and invoices raised. The Operational Creditor stated that the non-release of payment is causing a huge cash crunch and difficulty in continuing with the project. Most of the work stands completed and the project is in the final stage. The Operational Creditor after several reminders sent an email stating that in case of failure to release payment, it shall not be in a position to continue with support which shall stand withdrawn w.e.f. 10.06.2021. The

Operational Creditor sent a notice dated 11.06.2021 for clearing outstanding dues. An undated letter was received by Operational Creditor on 14.06.2021 prematurely and without authority under the Agreement decided to invoke arbitration. A meeting was held between the parties and certain terms and conditions were agreed for resuming the work, however, later on, the corporate debtor altered that payment shall be considered after 2 weeks. The Corporate Debtor email dated 18.06.2021 reverted, to which Operational Creditor replied that milestones worth Rs. 45-50 lakhs is pending. The operational Creditor gave a reply to the notice sent by Corporate Debtor invoking arbitration stating that there has been no dispute in respect of milestones completed or payments for invoices that were already agreed and acknowledged. The Corporate Debtor then invoked Bank Guarantee on 26.06.2021 alleging that there was a failure on the part of the Operational Creditor to perform the contract. The Operational Creditor has already filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim relief in relation to the invocation of a bank guarantee which is pending for adjudication.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Rs. 3,81,13,654/- (Rupees Three Crore Eighty One Lakhs Thirteen Thousand Six Hundred and Fifty Four Only). The default occurred on 20.06.2021 i.e. date on which the last invoice was raised. Copy of the Statement of Invoices (Annexure C), Agreement (Annexure P1), Emails (Annexure P2 to P7, P9, P11-14), notices (Annexure

P10A, 10B, P16, P18), Letter dated 28.06.2021 (Annexure P17), Termination Letter (Annexure P20) are attached with the main petition.

5. A demand notice in Form 3 is stated to be issued by the operational creditor on 28.06.2021 and the same has been delivered to the corporate debtor (Annexure-P18) as the corporate debtor gave a reply dated 06.07.2021 to demand notice wherein it is stated that the invoices raised have been issued for the work which is still incomplete and there are deficiencies in the work carried out. Vide email dated 18.06.2021 received from the Operational Creditor stated to complete the work and remove deficiency by 30.06.2021. On 10.06.2021, the Operational Creditor abruptly abandoned the work serving a threatening letter dated 09.06.2021. On 14.06.2021, the respondent invoked Section 21 of the Arbitration and Conciliation Act, 1996 and issued a Statutory Notice appointing Mr. Justice R.K. Jain (Retd.) as one of the Arbitrators. Thereafter, the meeting was scheduled on 17.06.2021 and 18.06.2021 and was agreed to remove the deficiencies. The Operational Creditor filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 at Barnala, Punjab conceding the existence of a dispute between the parties. The invoices mentioned are disputed (Annexure-P19).

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The corporate debtor has filed a reply vide diary No.00983/01 dated 07.01.2022, wherein it is stated that the amounts mentioned are disputed. The team deployed by the Operational Creditor for the completion of the project was inexperienced.

The invoices generated were for deficient and incomplete service which cannot be considered for payment. The Operational Creditor has failed to provide timely correct information. The hardware was to be purchased as per the advice and recommendation of the Operational Creditor. The Operational Creditor gave incomplete details and Corporate Debtor ordered hardware on 04.02.2020 which was to be delivered within 8-12 weeks, hardware reached India on 18.03.2020. There was no delay. On 31.03.2020, the operating system was installed. Vide Notice dated 25.06.2021 given by Corporate Debtor, a request was made to resolve the issue in terms of the Agreement whereas only three days' notice under Section 8 dated 28.06.2021 was issued. The minutes of the meeting dated 04.06.2021 clearly indicate acknowledgment on the part of the Operational Creditor regarding pending issues. The Arbitration Clause under the Agreement read as "*In the event of a continuing dispute between the parties in connection with this Agreement which could not be resolved*". The Corporate Debtor replied by citing the existence of Arbitration vide reply dated 06.07.2021. The Operational Creditor did not appoint Arbitrator and Corporate Debtor was constrained to file Arbitration Case No. 351 of 2021 at the Hon'ble Punjab & Haryana High Court.

7. The rejoinder was filed vide Diary No.00983/2 dated 30.08.2022, wherein it is stated that the Corporate Debtor has duly admitted the debt. The dispute regarding the maintainability of the petition has been raised to avoid payment of invoices that are already admitted by the Corporate Debtor. The Corporate Debtor has defaulted in payment of the amount.

Notice invoking arbitration was premature and without exhausting the process of amicable settlement specified in the Arbitration Agreement dated 27.01.2020. There was no dispute till the time Operational Creditor served a notice dated 11.06.2021 which was prior to notice issued by Corporate Debtor dated 14.06.2021. The petition filed under Section 9 was filed to restrain the corporate debtor from using funds received by it wrongly invoking a bank guarantee issued by Operational Creditor. There was no dispute regarding the amount due. The pendency of proceeding under Section 11 of the Arbitration and Conciliation Act, 1996 was initiated after the operational creditor served notice upon the corporate debtor.

8. The short written submissions have been filed by the petitioner vide Diary No.00983/4 dated 22.02.2023 and by the respondent corporate debtor vide diary No.00983/5 dated 02.03.2023,

9. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

10. The first issue for consideration is whether the demand notice in Form 3 dated 28.06.2021 (Annexure-P18) and the same has been delivered to the corporate debtor as the corporate debtor gave a reply dated 06.07.2021 to the demand notice (Annexure-P19). Therefore, the demand notice was duly served.

11. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by way of an affidavit by the operational creditor that there is no dispute of unpaid operational debt pending between the parties in any court of law.

However, the corporate debtor in its reply has submitted that there was an Arbitration Clause in the Agreement dated 27.01.2020. For ready reference, the arbitration clause mentioned in para 28 of the Agreement dated 27.01.2020 is produced as under:-

“28. Arbitration

The Parties agree that in the event of a continuing dispute between the Parties in connection with this Agreement which could not be resolved, the Parties shall refer such dispute to arbitration to be decided as per the provisions of the Arbitration and Conciliation Act, 1996 and the rules made thereunder. Accordingly, each party shall appoint one Arbitrator and the two arbitrators in turn shall nominate the third arbitrator who shall Chair the proceedings”.

This arbitration clause clearly states that before approaching this Adjudicating Authority, it was incumbent upon the parties and especially upon the operational creditor to have resort to the arbitration clause and to that effect, the corporate debtor had already issued a statutory notice dated 14.06.2021 much before the service of the demand notice dated 28.06.2021. The corporate debtor served a statutory notice under Section 21 of the Arbitration and Conciliation Act, 1996 appointing Mr. Justice R.K. Jain (Retd.) as one of the Arbitrators on 14.06.2021. Thereafter, the operational creditor requested for the joint meeting which was opposed by the corporate debtor. On 17.06.2021, the operational creditor agreed to resolve all concerns of the corporate debtor without insisting for payments for which wrong invoices have been issued. On 18.06.2021, another meeting was convened between the parties. On 19.06.2021, VPN access for NTT Team was provided as per request confirmed by Mr. Rajesh Patel as per an email

dated 21.06.2021. On 25.06.2021, the operational creditor gave a reply refusing to appoint 2nd Arbitrator. On 29.06.2021, the corporate debtor invoked Section 9 of the Arbitration and Conciliation Act, 1996. The petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, came up for hearing on 23.07.2021 filed before Hon'ble Punjab and Haryana High Court by a corporate debtor. Therefore, Section 11 petition under Arbitration and Conciliation Act, 1996 is pending for adjudication filed by the corporate debtor and the petition under Section 9 Arbitration and Conciliation Act, 1996 was dismissed by the Ld. Civil Court, Barnala on 16.08.2021.

The dispute existed between the parties much before the issuance of the demand notice dated 28.06.2021 (Annexure-P18). The reliance can be placed upon the judgment of the Hon'ble Supreme Court, **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353** wherein it was held that:

“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.

43.*We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).*

45. *Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability”.*

(Emphasis Supplied)

The definition of a ‘dispute’ as provided in the Insolvency and Bankruptcy Code, 2016 is as follows-

*“5. Definitions. – In this Part, unless the context otherwise requires, –
(6) “dispute” includes a suit or arbitration proceedings relating to–
(a) the existence of the amount of debt;
(b) the quality of goods or service; or
(c) the breach of a representation or warranty;”*

In the case in hand, it may be noted that there is a pre-existing dispute between the parties as it is evident from the meeting dated 18.06.2021 and the email dated 18.06.2021 received from the operational creditor in which it agreed to complete the work and remove deficiency by 30.06.2021. However, petitioner issued demand notice on 28.06.2021 i.e. two days before the timeline given by operational creditor itself to complete the work and remove the deficiency.

12. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 28.06.2021 in Form 3 attached as (Annexures P18) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default i.e. 20.06.2021 i.e. date on which the last invoice was raised. This

application was filed vide Diary No. 00983 on 12.08.2021 and was refiled on 31.08.2021. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

13. As a sequel to the above discussion and the facts as well as circumstances since there is a pre-existing dispute between the parties as well as pendency of arbitration proceedings before Hon'ble Punjab and Haryana High Court as per the arbitration clause in the agreement dated 27.01.2020, thus, the petition is not maintainable under Section 9 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.

IA No. 247/2022

14. The present application has been filed by the Corporate debtor, **M/s Trident Ltd.** under Section 60(5) read with Section 9(5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016 seeking rejection of the main petition against the Operational Creditor.

15. The brief facts of the case are that the applicant had two business locations namely, Barnala and Budhni. The corporate offices at Chandigarh, Ludhiana, Gurgaon, New Delhi, Mumbai, United Kingdom and the United States of America. An agreement dated 27.01.2020 was executed between the parties. The total consideration of the contract was Rs.8.40 crores plus taxes and as per the agreed timelines of the project, work was to be completed within 14 months. Immediately, after the execution of the agreement, the operational creditor committed defaults on 24.03.2020 after a delay of about two months, an advance bank guarantee was submitted. Due

to the nationwide lock down the corporate debtor was able to procure the hardware on 20.05.2020. During the implementation of the project, the team of operational creditor was unable to perform as per the terms of the contract and assurances given by them. Various deficiencies in services were noticed during the demonstration conducted on 04.10.2020. In March 2021, considering defaults on the part of the operation Cater the corporate debtor decided to invoke an advance bank guarantee. On 24.03.2021 draft addendum to the original agreement for its consent was provided to the operational creditor. The operational creditor agreed to the revised timelines which shows that the acknowledged default on its part and delay in the initiation of the final process against it including not limited to the invocation of the bank guarantee. on 04.06.2021 meeting was conducted between the parties regarding the pending issues. on 14.06.2021 the corporate debtor invoked the Arbitration clause contained in the Agreement dated 27.01.2020 and served a statutory notice under Section 21 of the Arbitration and Conciliation Act, 1996 upon the operational creditor. Hon'ble Mr. Justice Rakesh Kumar Jain, a former judge of Punjab and Haryana High Court was appointed as the arbitrator. Thereafter, the operational creditor requested for a joint meeting on 17.06.2021. An email was received on 18.06.2021 from the senior official of the operational creditor expressing satisfaction with the discussions held in the meeting. On 19.06.2021 the operational creditor arbitrarily withdrew from the project with effect from 10.06.2021. On 21.06.2021 a senior official of operational creditor informed that his team will resume work only after further instructions from the company. Thereafter,

several emails were exchanged between the parties and discussions took place. On 29.06.2021 the corporate debtor invoke Section 11(6) of the Arbitration and Conciliation Act, 1996 and filed an Arbitration Case No. 351 of 2021 in the Hon'ble Punjab and Haryana High Court. The Hon'ble Punjab and Haryana High Court was pleased to issue a notice. The corporate debtor terminated the agreement on 26.07.2021. The petition under section 9 of the Arbitration and Conciliation Act, 1996 was dismissed by the Ld. civil court at Barnala.

16. The reply was filed by the respondent vide Dairy No. 00042/01 dated 30.08.2022 wherein it is stated that the corporate debtor has duly admitted the debt. The corporate debtor had tried to project that the present petition is not maintainable as per section 9 (5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016 as in case the notice of dispute is served upon the person claiming to be operational creditor then no further proceedings can be initiated under IBC 2016. The corporate debtor had defaulted in making payment of the amount due which is not even disputed in the reply filed by the corporate debtor. The corporate debtor has avoided all issues raised by operational creditor. Not even a single explanation for all the emails dated 14.04.2021, 20.04.2021 and 05.05.2021 have been given. There is no denial to the fact that the project was 90% completed while the payment made is much less. The management of the corporate debtor had malafide intentions that they don't want to make the payment. The notice invoking arbitration was premature and without exhausting the process of an amicable settlement. The arbitration petition filed by the operational creditor or by the

corporate debtor under section 11 of the Act pursuant to the notice issued by the operational creditor in no manner can be construed as an admission to the dispute between the parties, especially qua seven invoices. The petition under section 9 was to restrain the corporate debtor from using the funds wrongly invoking a bank guarantee issued by the operational creditor.

17. The rejoinder was filed by the applicant-corporate debtor vide Dairy No.00042/3 dated 09.01.2023 wherein it is stated that the dispute is established on record and parties are already before the Hon'ble Punjab and Haryana High Court in proceedings under section 11 of the Arbitration and Conciliation Act, 1996. The petition process had commenced in terms of Section 21 of Arbitration and Conciliation Act, 1996 much before the filing of initiation of the present proceedings. The corporate debtor is entitled to compensation and damages on account of default and breach of contract between the parties. The dispute can only be resolved through Arbitration which has already commenced. The invoices are disputed. The disputes are well established on record indicating a failure on the part of an operational creditor to discharge his obligation under the contract. The corporate debtor has suffered immense financial losses on account of the failure of the operational creditor.

18. After hearing Ld. counsel for both the parties and careful perusal of the application it may be noted that the present application is maintainable. Keeping in view, the detailed reasons and observations given while disposing of the main petition under Section 9, the present application succeeds. It was incumbent upon the operational creditor to have resort to

arbitration proceedings instead of approaching this tribunal under Section 9 of the Code.

19. In the result, the present IA No. 247/2022 is allowed and stands disposed of accordingly.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

July 17, 2023
VN/TB