



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)
KOLKATA**

C.P. (IB) No. 90/KB/2022

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

Ashika Stock Broking Limited [CIN U65921WB1994PLC217071], having its registered office at 'Trinity', 226/1 A.J.C. Bose Road 7th Floor, Kolkata - 700020 Kolkata Kolkata WB 700020 IN;

....Operational Creditor

-Versus-

India Power Corporation Limited [CIN L40105WB1919PLC003263], having its registered office at Centre for Excellence, Plot No.X-1, 2 & 3,Block EP, Sector V, Salt Lake, Kolkata – 700091;

...Corporate Debtor

**Date of hearing: 06 January, 2023
Order Pronounced on: 04 August, 2023**

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Operational Creditor : Mr. Sourojit Dasgupta, Adv.
Mr. Samik Sarkar, Adv.

For the Corporate Debtor : Mr. Rishav Banerjee, Adv.
Mr. Rajarshi Banerjee, Adv.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

ORDER

Per: Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Kamal Kishore Dalmia (***‘Operational Creditor’***) duly authorised *vide* Board Resolution dated 15 December, 2021¹ for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against India Power Corporation Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on ***26 February, 2022*** before this Adjudicating Authority. The total amount claimed in default is Rs.1,44,12,091/- (Rupees One Crore Forty Four Lakh Twelve Thousand Ninety One only) including. The ***date of default*** is stated to be as on ***30 June, 2018*** i.e., 30th day from the date of the invoice dated 31st May, 2018;
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.17,00,00,00,000/- (Rupees Seventeen Hundred Crore only) with subscribed share capital of Rs.97,37,89,640/- (Rupees Ninety Seven Crore Thirty Seven Lakh Eighty Nine Thousand Six Hundred Forty only). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Corporate Debtor had approached the Operational Creditor for opening a Dematerialised Account (***‘Demat Account’***), in order to undertake transactions in shares. Subsequently, the Corporate Debtor filled up the Operational Creditor’s KYC Form on 09 July, 2013.
 - 5.2 Thereafter, as per the usual procedure, a formal agreement (***‘Agreement’***) was entered into on 11 July, 2013 in the format prescribed by the NSDL. Under clause 1 of the Agreement, the Corporate Debtor expressly agreed to

¹At page 38 of the Petition.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

pay all the charges as per rated mentioned in Schedule – A of the Agreement.

- 5.3 The Corporate Debtor is concerned with the Pledge charges, which was, mentioned to be 0.02% of the Value (Min. Rs. 50/- per transaction). It is pertinent to mention that the pledge charges include the pledge invocation charges. In pursuance thereof, the Demat Account, being DP Account No. 10018633, was opened and the Corporate Debtor started undertaking transactions thereat. The Corporate Debtor never raised objection with regard to the quality of the services of the Operational Creditor.
- 5.4 The Corporate Debtor, in due discharge of its liability and in acknowledgement and admission of the charges, including “pledge charges” levied by the Operational Creditor, had duly made payment thereof till the financial year 2017-2018.
- 5.5 It is pertinent to note that the Corporate Debtor has not made payment of the interest portion levied during the financial year 2018-2019. However, on and from the year 2018, the Corporate Debtor has failed to discharge its payment obligations towards the Operational Creditor.
- 5.6 On 31 May, 2018, the Operational Creditor raised an invoice amounting to Rs.89,95,156.25/- on the Corporate Debtor for the payments to be made towards the services.
- 5.7 By repeated reminders and requests i.e., on 30 August, 2018, 10 May, 2019, 12 June, 2019, 12 November, 2020, 19 November, 2020 and 30 January, 2021, the Operational Creditor, both by itself and through its lawyers, called upon the Corporate Debtor to make.
- 5.8 In the interregnum, the Corporate Debtor had proposed a settlement of its dues and requested the Operational Creditor to accept a lesser amount, which was immediately refused by the Operational Creditor on 09 January, 2019.
- 5.9 Finally, in response to the letter dated 30 January, 2021, the Corporate Debtor responded by issuing a letter dated 04 February, 2021 through its advocate, by frivolously and illegally contending that no charge is payable

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

by the Corporate Debtor to the Operational Creditor. The contentions of the Corporate Debtor as made in the said letter dated 04 February, 2021 are not only contradictory to the stance taken by Corporate Debtor previously, but the same is also sham, untrue, incorrect, illegal, and mala fide. The Corporate Debtor has never raised any dispute with regard to legitimate claims of the Operational Creditor

6. *Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:*

- 6.1 That, the instant Company Petition is liable to dismissed in limine and the threshold as the purported in the statutory demand notice dated 08 February, 2022 [at pages 110 - 198 of the Petition] has not been issued by the Operational Creditor in the correct and proper 'Form 3'. The demand notice has failed to comply with the requirements stipulated by section 8 (1) of the Code.
- 6.2 The Operational Debt as alleged by the Operational Creditor and payable by the Corporate Debtor to it does not exist, as the Corporate Debtor bears no payment obligation to Operational Creditor for the said Invoice for 'Pledge Invocation' raised de hors the terms of the Agreement dated 11 July, 2013.
- 6.3 The statutory demand notice issued by the Operational Creditor admittedly only adduced one invoice raised on 31 May, 2018 for Rs. 89,95,155.36 [At 96 of the Petition]. Further, the 'Invoice Description' thereof that the charges levied therein is for 'Pledge Invocation' and not for 'Pledge creation/closure charges'.
- 6.4 The only charges apropos pledged shares pledging of shares that have been stipulated in the said schedule of charges are those stipulated in Sr. Nos. 9 and 10 which only levy charges for 'Pledge creation' and 'Pledge Closure Confirmation Unpledge', respectively, and does not levy any charge for any invocation of pledged shares by third parties.
- 6.5 As per the Frequently Asked Questions ('FAQs') related to pledge in the National Securities Depositories Limited ('NSDL').The relevant FAQ is "Q. If the loan is not repaid, how is the pledge closed in the depository

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

system? ".The NSDL itself has answered *that invocation of pledged shares by a pledgee (usually a lender) does not require any confirmation by pledgor (here, the Corporate Debtor)*. It is natural that neither can a pledge get created by such invocation.

- 6.6 NSDL has explicitly stated under 'Procedure for Pledge Hypothecation' that closure of pledge and invocation of pledge are two distinct and different actions by stating that 'Pledge/hypothecation so created can either be closed on repayment of loan or invoked if there is a default. Furthermore, NSDL has stated that *'After the pledgor has repaid the loan to the pledgee, the Pledgor initiates the closure of pledge/hypothecation through its Depository Participant and the pledgee instructs its Depository Participant to confirm the closure of the pledge/hypothecation. If the pledgor defaults in discharging his obligation under the agreement, the pledgee may invoke the pledge/hypothecation.'*
- 6.7 Therefore, necessary inference is that closure of pledge necessarily presupposes repayment of loan and a positive act by the pledgor to actually initiate closure of pledge. In marked contrast, invocation of pledge presupposes a default by the pledgor and the pledgee - and not the pledgor - actively taking steps to invoke the pledge. Therefore, invocation of a pledge by pledgee cannot attract any fee under any head in the said Schedule of Charges. Such invocation of pledge does not tantamount to closure of pledge. Invocation of pledge is an involuntary act insofar as the Corporate Debtor is concerned.
- 6.8 The Corporate Debtor through its advocate had issued the letter dated 04 February, 2021 [At Pages 106 - 107 of the Petition] much before the receipt of the purported statutory demand notice dated 08 February, 2022. The Corporate Debtor had specifically stated therein that no charge was payable by it for invocation of pledged share as per the agreement and disputed the very rationale and existence of the alleged Operational Debt.
- 6.9 In an email dated 09 January, 2019, the Corporate Debtor had duly highlighted that the Operational Creditor has itself admitted [At Page 105 of

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

the Petition] that ‘no rate was finalized to settle DP bill’. Therefore, there was no agreement or contractual stipulation for payment of any rate/amount for invocation of pledge by pledgee.

- 6.10 Reliance by the Operational Creditor in its Rejoinder [*para 3 vi, vi & viii, at page nos. 3-6 of Rejoinder*] on the Interrogatories in a pending Money Suit No.1 of 2022 filed by the Corporate Debtor before the Ld. Commercial Court at Alipore itself proves that the very issue of the Operational Creditor being entitled to any operational debt for invocation of pledged shares is admittedly a disputed fact in a pending suit.
- 6.11 None of the purported e-mails forming annexure/attachments of the Petition evidence any specific admission by the Corporate Debtor. Neither, does it admit the existence of any operational debt.
- 6.12 The Operational Creditor is attempting to take undue advantage of an honest attempt on part of the Corporate Debtor to maintain cordial relations between the two commercial entities who shared a commercial relationship by construing an

Analysis and Findings

7. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
8. ***Issue 01: Whether the threshold barrier is met?***
- 8.1 From, the records it is evident that the invoice raised on 31 May, 2018 is of Rs.89,95,156.25/-. However, as per the arrangements between the parties² on failure of the Corporate Debtor to pay the charges to the Depository Participant (i.e., the Operational Creditor), the Depository Participant is entitled to charge interest on the amount due or unpaid not exceeding 18% per annum. Hence, the default is Rs.1,44,12,091/- (Rupees One Crore Forty Four Lakh Twelve Thousand Ninety One only)[*Principal - Rs.89,95,156.25/- and Interest – 54,16,934.75*]. The application meets the threshold barrier.

²Clause 2 – Fees, Charges, & deposits – at page 66 of the Application.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

9. Issue 02: Is the Application within limitation?

- 9.1 The date of default is stated to be as on 30 June, 2018, which means the limitation is ending as on 29 June, 2021 (i.e., three years from the date date of default). However, the Hon'ble Supreme Court *vide* its order dated 10 January, 2022 in *Re: Cognizance for Extension of limitation*³ has held that; “In cases where the limitation would have expired during the period between 15.03.202 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”

(Emphasis Supplied)

This instant Application has been filed on 26 February, 2022. This means the Application is within limitation.

- 10.** From the facts its seen that the the Corporate Debtor had approached the Operational Creditor, i.e., Ashika Stock Broking Limited, for opening of Demat Account. Subsequently, the shares in the Demat Account of the Corporate Debtor were pledged by them to the third party i.e., the pledgee. Thereafter, the third party i.e., the pledgee invoked the pledged shares. Upon invocation the Operational Creditor approached the Corporate Debtor stating that Invocation of a pledge by the third party attracts brokerage fees, since they are acting as an intermediately.

11. Issue 03: Is brokerage an Operational Debt?

- 11.1 From the facts it is clear that the Operational Creditor is a depository participant for trading and settlement of dematerialised securities in equity. They act as an intermediary and provide the service of the demat account to the Corporate Debtor.
- 11.2 Further, from the definition of ‘Operational Debt’ in the Code envisages, as follows,

³Suo Moto Writ Petition (C) No.3 of 2020

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

“(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

11.3 Hence, on a bare perusal of the facts and the definition in juxtaposition, it is unambiguous that the service of the demat account provided by the Operational Creditor to the Corporate Debtor; and the brokerage charged by the Operational Creditor is nothing but a fee to provide an intermediary services between two parties.

12. Issue 04: Does Invocation of pledge by the third party attract brokerage as per the Schedule/Arrangements entered between the parties?

12.1 In this regard, the Corporate Debtor contends that as per the arrangement between the parties there are no charges leviable by the Operational Creditor on pledge invocation. The invoice raised by the Operational Creditor is for ‘Pledge invocation’ [at page 96 of the Petition], whereas, the Agreement dated 11 July, 2013 between the parties intentionally and purposefully did not provided for charges to be levied upon the Corporate Debtor for invocation of charges by the third party [at page 65 of the Petition].

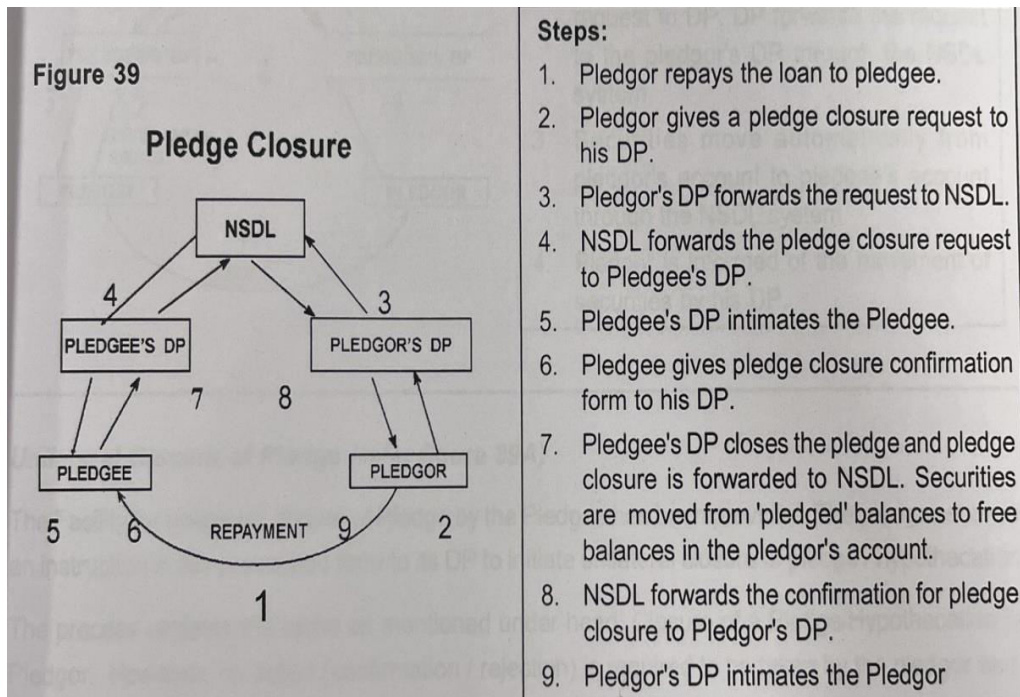
12.2 On the contrary the Operational Creditor submitted that invocation of Pledged results in closure of pledged shares and as such, the charges thereon have been specifically mentioned in the Agreement between the parties. The corporate debtor was always aware that charges are payable to the operational creditor, i.e., the depository participant in the event of invocation pledge.

13. Be that as it may, on the categorization of the activities as per the arrangement between the parties [at page 65 of the Petition], the activities that has been mentioned along with rated, namely, ‘Pledge creation’ and ‘Pledge Closure/Confirmation/unpledge’. Whereas, the invoice raised by the Operational Creditor itself states in the ‘Invoice Description’ thereof that the charges levied therein are for ‘Pledge Invocation’ and not for ‘pledge creation/ closure charges’, as alleged or at all.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

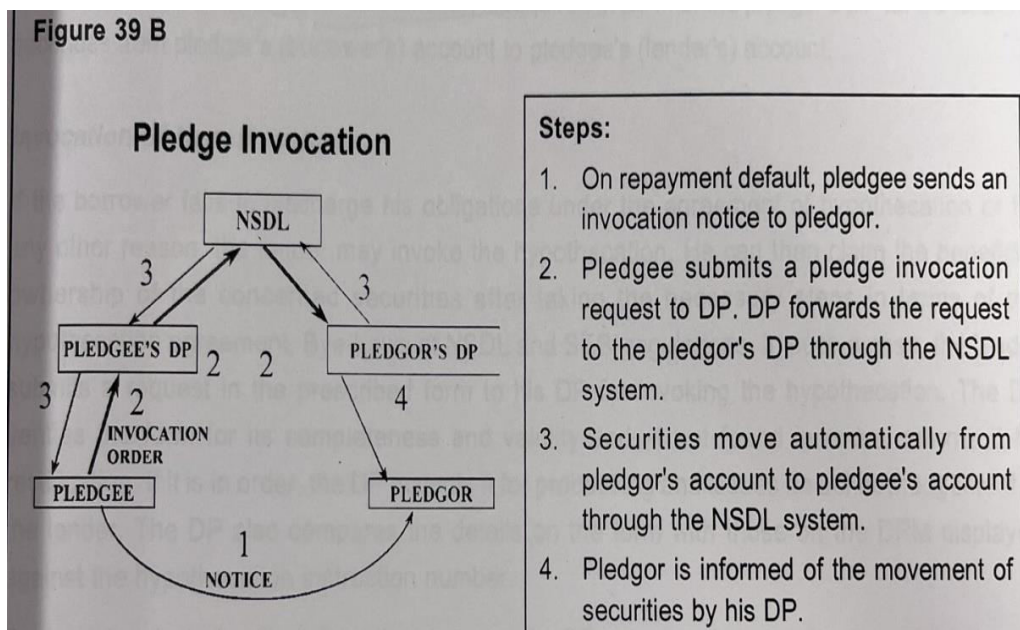
Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

- 14.** Even the necessary guidance documents of NSDL, palpably acknowledge pledge creation, pledge closure and pledge invocation to be entirely separate and distinct actions. Invocation of pledged shares by a pledgee (usually a lender) does not require any confirmation by the pledgor (here, the Corporate Debtor)



Steps:

1. Pledgor repays the loan to pledgee.
2. Pledgor gives a pledge closure request to his DP.
3. Pledgor's DP forwards the request to NSDL.
4. NSDL forwards the pledge closure request to Pledgee's DP.
5. Pledgee's DP intimates the Pledgee.
6. Pledgee gives pledge closure confirmation form to his DP.
7. Pledgee's DP closes the pledge and pledge closure is forwarded to NSDL. Securities are moved from 'pledged' balances to free balances in the pledgor's account.
8. NSDL forwards the confirmation for pledge closure to Pledgor's DP.
9. Pledgor's DP intimates the Pledgor



Steps:

1. On repayment default, pledgee sends an invocation notice to pledgor.
2. Pledgee submits a pledge invocation request to DP. DP forwards the request to the pledgor's DP through the NSDL system.
3. Securities move automatically from pledgor's account to pledgee's account through the NSDL system.
4. Pledgor is informed of the movement of securities by his DP.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

15. From the records it is evident that there was some dispute with respect to the invoices dated 31 May, 2018 as raised by the Operational Creditor, because the heading under which the invoice was raised was never the part of the arrangements between the parties.

16. Coming to the plea of pre-existing dispute, we seek to rely on ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited***⁴ where the Hon'ble Apex Court held that;

*“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2) (a)). **What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”***

The Hon'ble Supreme Court in ***Mobilox (Supra)*** has observed that all that the Adjudicating Authority has to see at 'the stage of Admission' 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 or a moonshine defence unsupported by tangible materials/evidence.***

⁴2017 (1) SCC onLine SC 353

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)

Ashika Stock Broking Limited v. India Power Corporation Limited
C.P. (IB) No. 90/KB/2022

17. In view of the above facts and circumstances, we find that there is a prima facie case pre existing dispute between the parties. Hence, **C.P. (IB) No. 90/KB/2022** is *dismissed*. The Petitioner is, however, at liberty to pursue other available remedies that may be available to it under any other law.
18. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 04th day of August, 2023

SA [LRA]