

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

Company Appeal (AT) (Insolvency) No. 115 of 2024

[Arising out of the Impugned Order dated 28.08.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Court-II in CP (IB) No. 1058/KB/2019]

In the matter of:

Innovators Cleantech Private Limited

(Formerly known as Innovators Cleantech Private Limited)

[CIN U74999MH2013PTC241458,],

having its registered office at:

204, Bldg No. B-65, Jaydeep Chs Ltd. Sector No. 1

Shanti Nagar Mira Road - East, Thane- 401107;

Through its authorised representative

...Appellant

Versus

Pasari Multi Projects Private Limited

[CIN U51909WB1993PTC058525]

having its registered office at:

35, Ballygunj Park, Kolkata – 700019.

.... Respondent

Present:

For Appellant : Mr. Anuj Bhandari, Advocate.

For Respondent : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Ashok Kumar Jain and Mr. Amit Kasera, Advocates.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 28.08.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Court-II) in CP (IB) No. 1058/KB/2019. By the impugned order, the Adjudicating Authority has rejected Section 9 application. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

2. The relevant facts which required to be notice for deciding the present matter before us are as follows:-

- The Operational Creditor-Innovators Facade Solutions Private Limited was engaged by the Corporate Debtor-Pasari Multi projects Private Limited to provide design-built services in building construction for a project-Biowonder which was a commercial-cum-Hotel project. A Letter of Intent (**'LoI'** in short) was issued on 09.07.2015 for Rs.10.68 crore by the Corporate Debtor to the Operational Creditor for this project.
- The Project was commenced by the Operational Creditor on 09.07.2015 and the first Running Account Bill (**'RAB'** in short) was raised on 15.03.2016. Corporate Debtor failed to discharge payment for RAB-19 of Rs. 4.68 crores raised by the Operational Creditor despite reminders.
- Since the Corporate Debtor failed to make payments, the Operational Creditor issued a demand notice in Form-3 for an amount of Rs. 4.91 crore including interest. This first demand notice was issued on 12.02.2019. The Operational Creditor withdrew this first demand notice due to certain alleged clerical error made by them in the computation.
- The Corporate Debtor terminated the contract with the Operational Creditor on 14.02.2019 and also filed a Civil Suit No. 371 of 2019 on 16.04.2019 against the Operational Creditor.
- After withdrawal of the first demand notice, the Appellant thereafter issued another demand notice dated 25.04.2019. This second demand notice according to the Corporate Debtor was a revised demand notice for an amount of Rs.4.75 crores after adjusting certain payments received by

the Operational Creditor. There was thus a reduction in the claimed amount from the original demand notice.

- The Corporate Debtor replied to the second demand notice dated 25.04.2019 disputing the amount payable to the Operational Creditor. The notice of dispute was dated 03.05.2019.
- The Operational Creditor filed the Section 9 application under IBC on 20.07.2019.
- The Adjudicating Authority after considering the matter dismissed the Section 9 application on the ground of pre-existing dispute.

3. Making his submissions, Shri Anuj Bhandari, Ld. Counsel for the Appellant submitted that the Corporate Debtor had issued a Work Order for Rs. 10,68,79,250/- to the Appellant. The Appellant raised bills RAB 01 to RAB-18 against which the Corporate Debtor paid Rs. 5,51,56,183/- to the Appellant. The Appellant thereafter raised RAB-19 for Rs. 4,91,72,294/- which was not paid by the Respondent. The Appellant therefore issued Demand Notice dated 12.02.2019 for Rs. 4,91,72,294/- which was purportedly despatched by the Appellant on 12.02.2019 by Speed-Post. Realising that one of the payments made by the Corporate Debtor had not been factorised while computing the due demand, the Appellant issued a revised Demand Notice for Rs. 4,75,70,047/- on 25.04.2019 after reducing the amount which had not been factorised earlier. As the Corporate Debtor did not make the due payment, the Appellant filed the Section 9 application which however the Adjudicating Authority erroneously dismissed on the ground of pre-existing dispute that the Corporate Debtor had filed a civil suit against the Appellant on 16.04.2019. This civil suit could not be

treated as pre-existing dispute since it was filed after the first demand notice was issued on 12.02.2019 and the second demand notice was a continuation of the first demand notice.

4. It was vehemently contended that the Adjudicating Authority had failed to appreciate the fact that the Operational Creditor had issued the first demand notice on 12.02.2019 which demand notice was issued before the filing of the civil suit. The Adjudicating Authority also failed to consider that the Corporate Debtor had even replied to the first demand notice. The first demand notice therefore clearly pre-dated the filing of the title suit on 16.04.2019. Admittedly the first demand notice had to be revised due to a clerical error but it was strenuously contended that merely because the first Demand Notice had to be revised for bonafide reasons, it cannot be overlooked that the Civil Suit had been filed after the receipt of the first demand notice by the Corporate Debtor and hence did not qualify to be a pre-existing dispute. It was also emphatically asserted that for any dispute to be treated as a pre-existing dispute under Section 8(2)(a) of IBC, the dispute has to arise prior to the receipt of demand notice by the Corporate Debtor. The Civil Suit in the instant case therefore cannot be considered as a pre-existing dispute and hence the impugned order was contrary to the ratio of the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd (2018) 1 SCC 353*** in that dispute has to be raised prior to issue of Section 8 demand notice.

5. It was also stressed that there were no other actual or real disputes between the parties. This is evident from the fact that RABs 1 to 18 raised by the Operational Creditor were cleared by the Corporate Debtor without raising

any dispute or demur. The emails referred to by the Corporate Debtor to buttress their argument of pre-existing disputes are frivolous disputes and a spurious defence to stave off the Section 9 application. It is also the contention of the Appellant that the Corporate Debtor had terminated the contract with the Operational Creditor on 14.02.2019 which termination was subsequent to the issue of first demand notice on 12.02.2019 and hence not a pre-existing dispute. It has been contended that the Corporate Debtor filed the Civil Suit well after receipt of first demand notice as an afterthought.

6. While admitting that the demand notice was amended after filing of the Civil Suit, it was contended by the Appellant that the amended demand notice would relate back to the date of original demand notice. Amendment of the demand notice on account of clerical error and subsequent issue of a corrected demand notice cannot be viewed as a fresh demand notice. Since the second demand notice for all legal purposes was a continuation of the first demand notice, the Civil Suit cannot be treated as a pre-existing dispute as it had been filed after the receipt of the first demand notice by the Corporate Debtor. The Adjudicating Authority had therefore wrongly non-suited the Operational Creditor on the ground that the Civil Suit was filed before the second demand notice. In support of their contention that an amended demand notice would relate back to the date of original demand notice, reliance was placed on the judgment of this Tribunal in the matter of ***Dinesh Gupta vs. Hajura Singh Bhim Singh & Anr. in CA (AT) (Ins) No. 99 of 2018*** wherein it was held that even after withdrawal of first Section 9 application on technical grounds and subsequent issue of fresh demand notice, the application under Section 9

remains maintainable. It was submitted that the present case was fit to be remanded back to the Adjudicating Authority to adjudicate the matter on merits since the Corporate Debtor has filed voluminous documents which were not part of the record of the Adjudicating Authority.

7. Refuting the contentions raised by the Appellant, it was submitted by Shri Abhijeet Sinha, Ld. Senior Counsel for the Respondent-Corporate Debtor that the present appeal petition is misconceived. The Adjudicating Authority had rightly held that the Section 9 application was not maintainable since there were pre-existing disputes between the parties. The Title Suit No. 371 of 2019 which had been filed by the Corporate Debtor on 16.04.2019 was prior to the issue of the demand notice of 25.04.2019 which clearly demonstrates pre-existing disputes. Besides the civil suit, there were several other disputes between the two parties which had its origin prior to the second demand notice of 25.04.2019 basis which the Section 9 application had been filed. Elucidating further it was submitted that the LoI dated 09.07.2015 clearly provided that the duration of the project was 12 months and had to be completed in 7 months from the date of acceptance of the LoI. However, the Operational Creditor had delayed in performing their part of the obligations in a timely manner in terms of the LoI. On the modalities of payment, it was submitted that both parties had agreed to a procedure by which running bills were to be raised by the Operational Creditor by way of proforma invoices and that after due certification by the Corporate Debtor of the proforma invoices and the works done, payments used to be made in respect of said bills. It was pointed out that there were disputes regarding these bills as the Operational Creditor raised inflated bills and therefore the

amounts would require to be reduced by the Corporate Debtor after performance certification. It is also the case of the Corporate Debtor that the Operational Creditor had delayed the project and abandoned the work in breach of contract. The Corporate Debtor also submitted that there were several disputes between parties as is evident from a series of emails exchanged between the two parties regarding measurement, quality, quantity and delay in work. It was pointed out that inspite of disputes regarding measurement, quality, quantity and delay cause by the Operational Creditor, the Corporate Debtor had continued to make payments of RA Bills so that the work progress did not get delayed. It is also the contention of the Corporate Debtor that the Section 9 application was filed by the Operational Creditor with the sole object of recovery of dues on account of alleged damages and compensation which in fact are not payable and cannot constitute to be the basis of a Section 9 application.

8. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

9. The short point for consideration is whether there was any genuine pre-existing dispute surrounding the debt claimed by the Operational Creditor to be due and payable to them by the Corporate Debtor.

10. Before we return our analysis and findings on the tenability of the impugned order passed by the Adjudicating Authority, it may be useful to have a look at the relevant statutory framework of IBC. Section 8 of the IBC requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt

of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. From a plain reading of the above provision, it is clear that the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8.

11. It is however the case of the Appellant that they had issued two demand notices under Section 8 of IBC. The first demand notice was withdrawn as it was admittedly erroneous and subsequently a revised demand notice was issued on 25.04.2019 in continuum of the first demand notice. It is therefore their case that since the pre-existing dispute has been predicated on a civil suit dated 16.04.2019 which was instituted after the issue of the first demand notice, the civil suit did not qualify to be treated as pre-existing dispute.

12. Per contra, it is the contention of the Respondent that the first demand notice cannot be treated as a demand notice under Section 8 of the IBC since this demand notice was abandoned as withdrawn before sending the second Demand Notice on 25.04.2019 which was followed by filing of an application under Section 9 of IBC on 20.07.2019. Thus, the Section 9 application was filed by the Appellant basis the fresh demand notice dated 25.04.2019. Seen from the date of issue of the fresh second demand notice, it was contended by the Respondent that the institution of civil suit on 16.04.2019 clearly preceded the fresh second demand notice of 25.04.2019. It was also contended that the Corporate Debtor had already terminated the contract on 14.02.2019 which date also predated the fresh second demand notice of 25.04.2019. Hence it was asserted the Adjudicating Authority had rightly concluded that the Section 9 application was not maintainable in view of pre-existing disputes.

13. Given this backdrop of rival submissions, it will be useful to find out how the Adjudicating Authority had considered the facts at hand to infer whether the disputes were pre-existing. The basis for holding the disputes raised by the Corporate Debtor to be pre-existing by the Adjudicating Authority was that the civil suit was filed prior to the second demand notice and that this second demand notice was a fresh demand notice which cannot be held to be in continuation of the first demand notice. The relevant excerpts of the impugned order are as reproduced below:

“12. It is discernible that a demand notice was sent on 12 February, 2019 [Annexure – H at page 114 of the Petition], which said as under;

<i>And the date from which such debt fell due</i>	<i>o Debt fell due from 15.2.2017 o Last payment received on 22.9.2017 o Last Invoice raised on 10.12.2018</i>
<i>Amount claimed to be in default and the date on which the default occurred</i>	<i>Default Amount as on 15th February, 2017 is Rs 4,91,72,294/- (Rupees Four Crore Ninety-one Lakh Seventy Two thousand Two hundred ninety Four only</i>

13. The fresh demand notice dated 25.04.2019 [Annexure – I at pages 123-124 of the Petition] reads;

“IFSPL had issued a demand notice (Form no.3) dated 12.02.2019 to PMPPL. However, due to an inadvertent error the amount claimed therein was not correctly stated. Hence, after correcting the error, we hereby issue the present fresh demand notice.”

(Emphasis supplied)

<i>And the date from which such debt fell due</i>	<i>o Debt fell due from 05.01.2018 o Last payment received on 26.12.2017 o Last Invoice raised on 10.12.2018</i>
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<i>Amount claimed to be in default</i>	<i>Rs 4,75,70,047/- (Rupees Four Crore Seventy Five Lakh Seventy Thousand and Forty Seven only)</i>
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14. The intention of the Operational Creditor is quite clear that it intended to issue a fresh demand notice with modified particulars and the fresh notice (dated 25 April, 2019) was not intended to be in continuation of the previous one, i.e. 12 February, 2019. Hence, previous erroneous notice dated 12 February, 2019 should be ignored and the fresh notice u/s 8 dated 25 April, 2019 should be taken into account, and it is evident that before it could be served the civil suit already stood filed on 06 April, 2019.”

14. Coming to our analysis and findings, it is an undisputed fact that the Operational Creditor had initially sent a Demand Notice on 12.02.2019 to the Corporate Debtor. This demand notice was purportedly despatched by the Appellant by speed post on the same date. When we look at the material placed on record, it is clear that the first Demand Notice was however received by the Corporate Debtor only on 16.02.2019 as evident from the Tracking Report placed at page 118 of Appeal Paper Book (**‘APB’** in short). More significantly, the first demand notice was admittedly withdrawn by the Operational Creditor on grounds of typographical error in that they had failed to take into account certain payments already received by them from the Corporate Debtor.

15. Given this factual backdrop that the demand notice of 12.02.2019 under Section 8 of the IBC was withdrawn, we now proceed to analyse whether the second demand notice of 25.04.2019 can be held to be in continuation of the first demand notice or a fresh notice. We find that that the second demand notice itself mentions of being a “fresh notice”. The second demand notice also nowhere mentions that it was a continuation of the first demand notice. In such circumstances, there is force in the contention of the Corporate Debtor that the

first demand notice having been withdrawn stood abandoned. When we look at the ground cited by the Appellant behind the revision of the first demand notice, it was claimed to have been actuated by clerical/typographical errors. However, the ground of clerical error lacks credence as we find that there were substantial changes in the second demand notice from the first demand notice with regard to amounts of default, date of default, date on which last payments was received etc. The Adjudicating Authority in paragraphs 12 and 13 of the impugned order has belaboured in outlining the modified particulars which has already been extracted at para 13 above. The second demand notice was clearly a novated demand notice with particulars of debt and default and date of default being at variance from the first demand notice. Hence the Adjudicating Authority did not commit any infirmity in adjudicating on the pre-existence of disputes from the perspective of the date of the issue of the fresh second demand notice. We would also like to add here that the reliance placed by the Appellant on the ***Dinesh Singh judgement supra*** does not come to the help of the Appellant since in that case the first Section 8 notice had been issued by the Advocate and therefore replaced by a demand notice issued by the Operational Creditor. Thus in that case the second demand notice was issued on purely technical grounds without modification of particulars unlike in the present facts of the case.

16. This brings us to the aspect of whether the civil suit qualified as a pre-existing dispute. It is also a well settled proposition of law that for a pre-existing dispute to be a ground to nullify an application under Section 9, the dispute raised must be truly existing at the time of filing a reply to notice of demand as contemplated by Section 8(2) of IBC or at the time of filing the Section 9

application. In the present case, the pre-existing dispute has been predicated on civil suit dated 16.04.2019. This civil suit was also highlighted in the Notice of dispute of the Corporate Debtor in response to the second demand notice. We have no doubts in our mind therefore that the civil suit had been filed prior to the issue of second Section 8 Demand Notice on 25.04.2019 and was a pre-existing dispute and therefore there is no infirmity committed by the Adjudicating Authority in treating the civil suit to be a pre-existing dispute.

17. Apart from the civil suit as a ground for pre-existing dispute, we notice that the Corporate Debtor had also terminated the contract with the Operational Creditor on 14.02.2019 which date preceded the second demand notice and for that reason even predated receipt of the first demand notice by the Corporate Debtor. The Corporate Debtor also adverted attention to a series of emails exchanged between the two parties which substantiates the evidence of disputes between them. At page 74 of Reply Affidavit, an email has been placed on record stating that the Appellant wanted the relocation of the rainwater pipe from its original position which was objected to by the Corporate Debtor as it tantamount to compromising with the design, quality and specification from the terms of the LOI in order besides causing delay of the project. At pages 76–77 of the Reply Affidavit, an email dated 12.06.2017 can be seen which highlights several disputes raised between the parties including issues related to the measurement of the facade work, claim of excess bill quantities beyond the scope of certified drawings made by the Appellant and the existence of pending work. At page 79 of the Reply Affidavit, an email dated 17.07.2017 from the Corporate Debtor records the stoppage of work by the Appellant with respect to panel installation

and demand for advance payment prior to completion of the work which was contrary to the terms of the LoI. At page 80 of the Reply Affidavit, an email dated 01.08.2017 has been placed on record which alleges the Appellant's failure to supply the required materials. At page 81 of the Reply Affidavit, an email dated 17.08.2017 brings to light the loss caused to the Respondent due to the Appellant's continued non-supply of materials, despite the Respondent having made full payment for the same. At page 84 of the Reply Affidavit, an email dated 13.10.2017 cites multiple issues concerning the Appellant, including delays in the performance of the project, the introduction of new commercial conditions beyond the agreed terms of the work order, and the overall non-completion of the work. At page 89 of the Reply Affidavit, a communication dated 17.02.2018 records the challenges by the Respondent of the Appellant's demand for escalation charges. Further, between 05.03.2018 and 07.03.2018, as recorded at page 90-91 of the Reply Affidavit, there is mention of disputes arising from intended demobilization of team and machinery by the Appellant due to unresolved commercial issues. At pages 92-102 of the Reply Affidavit, it is recorded that between 19.03.2018 and 03.09.2018, there were repeated amendments to the payment terms, scope of work, and time schedule for project completion, all necessitated due to persistent delays on the part of the Appellant. Further, at page 104 of the Reply Affidavit, a communication dated 26.10.2018 documents the Respondent's objection to the Appellant's introduction of new financial terms, which were in direct contravention of the original terms outlined in the LoI. The tone and tenor of the emails exchanged between the two parties clearly manifest existence of dispute which antedates Section 8 demand notice.

18. It is well settled that a Section 9 application filed by an Operational Creditor cannot be sustained in case there is evidence of existence of dispute and if such disputes have been communicated to the Operational Creditor before the receipt of Section 8 notice as has happened in the present case. In the present case, the contract termination notice and civil suit had both preceded the date of issue of Section 8 demand notice on 25.04.2019. In addition, we notice that disputes relating to the quality of work; delay in execution of work; disputes relating to imposition of new commercial condition beyond the scope of LoI; introduction of new financial terms; claim of excessive bills; losses on account of delay etc. had also been brought to the knowledge of the Appellant-Operational Creditor vide a string of emails sent from time to time as already summarised above. The notice of dispute of 03.05.2019 had also highlighted breach of contract, delay of project and its abandonment by the Appellant, issue of inflated bills and that project related disputes had been raised by emails prior to the Section 8 demand notice. Cumulatively seen, it clearly signifies that a dispute already existed between the parties which constituted sufficient ground for rejection of a Section 9 application. In the face of such pre-existing disputes, the Adjudicating Authority had not committed any error in rejecting the Section 9 application. It is misconstrued on the part of the Appellant to contend that that the impugned order is contrary to the ***Mobilox judgement supra.***

19. To our minds, the Adjudicating Authority did not commit any error in returning this finding of pre-existing disputes keeping in mind that IBC bestows only summary jurisdiction upon the Adjudicating Authority. Once plausibility of a pre-existing dispute is noticed, it is not required of the Adjudicating Authority

to make further detailed investigation. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent court. It is well settled that in a Section 9 proceeding, the Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding the operational debt. There was no requirement for the Adjudicating Authority in the present case to go under the skin of dispute and therefore the Adjudicating Authority rightly held that the Section 9 application was not maintainable in the present factual matrix.

20. Considering the overall facts and circumstance of the present case, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant. We find no good reasons to disagree with the findings of the Adjudicating Authority. There is no merit in the Appeal. Appeal is dismissed. It will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

Place: New Delhi

Date: 09.07.2025

Harleen/Abdul