

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

**Company Appeal (AT)(Insolvency) No. 1251 of 2023**  
**& I.A. No.4417, 4356 of 2023**

**[Arising out of order dated 16.06.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Jaipur Bench in CP (IB) No.84/9/JPR/2019]**

**IN THE MATTER OF:**

**Amrop India Private Limited  
Global Business Park, 7<sup>th</sup> Floor,  
Tower B, Mehrauli – Gurgaon Road,  
Gurgaon - 122002**

**...Appellant**

**Versus**

**The Hi-Tech Gears Limited  
A-589, Industrial Complex,  
Bhiwadi, Alwar - 301019**

**...Respondent**

**Present:**

**Appellant:                    Mr. Angad Varma and Mr. Prashat Kumar,  
Advocates.**

**For Respondent:            Mr. Nishant Datta, Mr. Pradeep Bharwat, Mr.  
Chirag Rathi, Mr. Aditya Narain, Advocates.**

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

**[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 16.06.2023 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Jaipur Bench) in CP

(IB) No.84/9/JPR/2019. By the impugned order, the Adjudicating Authority rejected the Section 9 application filed by the Operational Creditor (the present Appellant) seeking initiation of Corporate Insolvency Resolution Process (“CIRP” in short) against the Corporate Debtor-M/s Hi-Tech Gears Ltd. (the present Respondent). Aggrieved by this impugned order, the present appeal has been preferred by the Operational Creditor.

2. The brief factual matrix of the case is that the Corporate Debtor had entered into two separate contracts dated 12.02.2018 and 08.03.2018 with Amrop India Consultants Pvt. Ltd. (“**AICPL**” in short) for filling up two vacancies in their company. AICPL raised four invoices for the services rendered. AICPL subsequently sold their business to Amrop India Pvt. Ltd., the present Appellant by entering into a Slump Sale Agreement with them. Claiming that all properties, assets, liabilities, rights, benefits and interests of AICPL stood transferred to them, the Appellant sent a letter on 28.06.2018 demanding payment of Rs.29,65,732/- from the Corporate Debtor. The Corporate Debtor replied on 13.07.2018 denying the outstanding amount and instead raised a counter-claim of Rs.137.53 lakh. The Appellant thereafter sent a demand notice under Section 8 of IBC to the Corporate Debtor on 30.07.2018 to which the Corporate Debtor sent a notice of dispute on 09.08.2018. The Appellant then filed the Section 9 application before the Adjudicating Authority to which the Corporate Debtor filed reply affidavit on 29.03.2022. The Adjudicating Authority passed the impugned order on 16.06.2023 rejecting the Section 9 application. Assailing the impugned order, the Operational Creditor has preferred this appeal.

3. The Learned Counsel for the Appellant while making his submissions stated that the Adjudicating Authority after examining the Slump Sale Agreement had gone into the question of whether an operational debt had become due and payable to the Appellant. The Adjudicating Authority had rightly held that in view of the Slump Sale Agreement, the invoices raised by AICPL on the Corporate Debtor had become payable to the Appellant. However, where the Adjudicating Authority went wrong was in coming to the conclusion that there was a pre-existing dispute between the parties by relying on certain emails of the Corporate Debtor in which the deficiency of services had been raised. It was pointed out that the emails by which the Corporate Debtor had raised allegations of dispute were not applicable to the payments claimed in the first invoice raised by the Operational Creditor against the Corporate Debtor. Hence, the alleged disputes do not constitute a pre-existing dispute in the context of the outstanding operational debt which has been claimed by the Appellant. It was also submitted that all the ingredients of a Section 9 application were fulfilled since there was an operational debt which had become due and payable and the said debt was free of any pre-existing dispute. It was therefore emphasized that the rejection of the Section 9 application by the Adjudicating Authority does not satisfy the test of a reasoned order.

4. Rebutting the arguments advanced by the Appellant, it was contended by the Learned Counsel for the Respondent that the Adjudicating Authority after considering all facts and circumstances had arrived at the correct finding that there was sufficient material on record which evidenced pre-existing disputes. It was also contended that the Operational Creditor was trying to hoodwink the existing disputes by trying to create a confusion that the

Executive Search Contract was not a composite contract by contriving artificial stages in the contract. It was also pointed out that the Operational Creditor had been informed by an email dated 29.04.2018 about gaps in the performance of the search contract which were followed up by several other emails highlighting their performance failure in filling up the two vacancies as per the search contract besides calling them for meetings to discuss how to find a solution to the impasse which had arisen. These emails having been issued prior to the Section 8 demand notice clearly signify the existence of pre-existing disputes. It was also pointed out by the Learned Counsel for the Respondent that due to gross deficiencies in the services of the Operational Creditor, the Corporate Debtor had to suffer substantial damages due to non-appointment of executives and opportunity costs. The Corporate Debtor had claimed from the Operational Creditor Rs.137.53 lakhs towards damages and loss caused to them. It was also submitted that the Corporate Debtor had not unequivocally agreed to making any payments but had made them conditional upon resolution of performance issues. It has therefore been contended that the Adjudicating Authority was fully justified in rejecting the Section 9 application of the Operational Creditor.

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

6. Before dwelling on the facts of the present case, a quick glance at the relevant statutory construct of IBC would be useful. 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. Section 8 of the IBC is as follows:

**“8. Insolvency resolution by operational creditor-** (1) *An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

(2) *The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*

(a) *existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*

(b) *the payment of unpaid operational debt—*

(i) *by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*

(ii) *by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*

*Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate*

*debtor demanding payment of the operational debt in respect of which the default has occurred.”*

7. This now brings us to the statutory construct of IBC post issue of demand notice by the Operational Creditor as laid down in Section 9 of IBC. Under Section 9(1), if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, he may file an Application under Section 9(1) of the Code.

8. For convenience, we reproduce Section 9(1) of IBC which is to the following effect:

**“9. Application for initiation of corporate insolvency resolution process by operational creditor.-** *(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.”*

Section 9(5)(ii) is as follows:

*“(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order—*

*(i).....*

*(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—*

*(a) the application made under sub-section (2) is incomplete;*

*(b) there has been payment of the unpaid operational debt;*

*(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;*

*(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*

*(e) any disciplinary proceeding is pending against any proposed resolution professional:*

*Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.”*

9. From a plain reading of the above provisions, it is clear that the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 30.07.2018 and notice of dispute raised by the Corporate Debtor on 09.08.2018. It is also an undisputed fact in the present matter that the Operational Creditor did not receive any payment from the Corporate Debtor and therefore proceeded to file an application under Section 9 of IBC.

10. It is the case of the Appellant that as per their contract terms, the first invoice became due and payable upon the signing of the contract. It was

asserted that the first invoice pertained to payments which had become due and payable on confirmation of the assignment/signing of the contracts. The amount payable against this invoice had become due and payable on the signing of the contract itself and therefore this payment cannot be linked to the quality of services delivered by the Operational Creditor. There were no disputes surrounding the first invoice. As such the disputes which have been levelled by the Corporate Debtor relate only to the second stage/milestone of payment which has no nexus with the first invoice. Hence the claim of pre-existing dispute lacks foundation. It is also the contention of the Appellant that the Corporate Debtor in their emails/communications dated 29.04.2018 and 30.04.2018 had on their own volition stated therein that they would like to make good the outstanding payments which shows that they had never disputed these outstanding amounts. The disputes now being raised are an afterthought and therefore should have been disregarded by the Adjudicating Authority.

11. It is the case of the Respondent that the Executive Search contract was a single, composite contract and the Operational Creditor not having discharged their primary obligation in terms of the contract, they were not entitled to their claims of payment. There have been gross deficiencies in the services rendered by the Operational Creditor. The candidates sent for the relevant positions clearly did not meet the specifications. When the objection was raised by the Corporate Debtor, the Managing Partner of the Operational Creditor on 04.04.2018 admitted error on her part in sending the list of the candidates who did not meet the specifications. Thereafter, the deficiencies in the services have been pointed out by the Corporate Debtor repeatedly in their emails dated 29.04.2018, 11.05.2018, 28.05.2018 which pre-dated the



issuance of demand notice. Thus, the debt claimed by the petitioner is highly disputed and requires a proper and thorough adjudication which does not fall within the purview of the summary jurisdiction of the Adjudicating Authority. It is also the case of the Corporate Debtor that a civil suit demanding damages of Rs. 137.53 lakhs stood registered as Civil Suit which also testifies a dispute.

12. It is a well settled proposition 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.

13. Given this backdrop, it will be useful to find out how the Adjudicating Authority has considered the spectrum of facts to arrive at the conclusion that there existed pre-existing disputes. The relevant portions of the impugned order is extracted hereunder:

*“19. It is apparent that the Corporate Debtor has employed the services of the Applicant for engaging candidates for the post of CFO and Business Head. **As per the trail of e-mails, it appears that the candidates provided were not as per the specifications laid down by the Corporate Debtor.** The same has been pointed out by the Corporate Debtor in its e-mails as well as letters preferred to the Applicant.*

*20. The Corporate Debtor, in such circumstances, **time and again through e-mails sought a meeting with the Applicant to amicably settle the dispute which has arisen.** Also, the Corporate Debtor has vide e-mails and letters repeatedly stated that the Board of the Corporate Debtor has incurred significantly cost due to not hiring for the 2 business critical roles. Moreover, it is noted that all the e-mails and letters are dated prior to the issuance of the Demand Notice under section 8 of the Code i.e. 30.07.2018 and the Corporate Debtor in the reply to the demand notice on 09.08.2017 has again raised the aspects which were earlier contended in the emails and letters. Owing to the circumstances mentioned in the e-mails, it is clear that the **Corporate Debtor is rightly alleging a pre-existing dispute on the basis of deficiency in services.***

21. The Adjudicating Authority while examining an application under Section 9 of the Code has to ensure that **there exists no dispute between the parties from the documents placed before it.** Dispute does not necessarily suit or arbitration proceedings pending before receipt of a Section 8 notice but **can also be inferred from correspondence between the parties to the case regarding the existence of the amount of Debt, the quality of goods or services or the breach of representation or warranty.** Correspondence between the parties is general proof of dispute in matters pertaining to Section 9 of the Code. From the documents put before us, **we can safely conclude that there exists a genuine dispute** between the parties to the Case.

22. In the present matter, there exists a pre-existing dispute between the parties to the case. The **conditions laid down under Section 9 of the Code are not fulfilled. Therefore, we are not inclined to initiate CIRP** of the Corporate Debtor as envisaged under the provisions of IBC. This order shall not act as a bar to the Applicant in pursuing any other remedies available to it, under the prescribed provisions of law.”

**(Emphasis supplied)**

14. Before we go into the reply filed by the Corporate Debtor to the Section 8 Demand Notice, we feel it pertinent to notice the reply which had been filed by the Corporate Debtor on 13.07.2018 in response to the legal notice dated 28.06.2018 sent to them by the Operational Creditor. The reply clearly articulates the ongoing disputes between the two parties as may be seen from the excerpts of the said reply as under:

*“13th July, 2018  
To,  
MS.SANJU PREET KAUR  
AMROP INDIA PRIVATE LIMITED  
GLOBAL BUSINESS PARK,  
7TH FLOOR, TOWER B,  
M.G.ROAD, GURGAON-122002,  
HARYANA.*

*Dear Ma'am,*

Kindly refer to your legal notice dated 28.6.2018 which was received by us on 30.6.2018 through hard copy. In this regard all the allegations and claims made in the said legal notice are denied except those specifically referred to in this response. It is stated as follows:

1. At the outset, it is stated that the **demand being made by Amrop India Private Limited is without any basis and In fact, The Hi-Tech Gears Ltd., have a substantial claim against you on account of time, cost and opportunity cost due to the significant non-performance by Amrop.**

2. While discussing the engagement with Amrop India Private Limited, It was represented by you that Amrop having been in this field of offering services in Executive search, had a substantial database and network which could be tapped for suggested candidates for the position of CFO and Business Head (South). Based on this representation and the assurances given by Amrop India Private Limited that they would give priority as well as their best professional services, HTG had considered the engagement of Amrop India Private Limited as a Consultant.

3. ....

4. ....

5. You had also made a representation that you had the capability and the experience to deliver a CFO and the Business Head in line with the specifications laid down by the company.

6. As various correspondences exchanged between the The Hi-Tech Gears Ltd., and Amrop India Private Limited, shows that **despite the company having given specific needs and requirements for the two positions, you had not adhered to the specifications** and sent a list of candidates which did not meet the specifications set out by the company.

7. **There were gross deficiencies in the services of Amrop India Private Limited.** At your request that the candidates would meet the specifications, the company organized an interview of the suggested candidates with the Board Committee for 3rd and 4th April, 2018. As mentioned above, this was a very high level Board Committee consisting of various professionals who had taken time away from their professional assignments to attend this meeting. The candidates sent by you clearly did not meet the specifications and two candidates did not even bother to attend, one was not keen on the role and one was not qualified as per the specifications. **This clearly shows that you were never serious about carrying out this assignment and sent a list which was not in adherence to the specifications.**

8. Immediately after this fiasco, the representatives of the company had a reflection session with **Ms Preety Kumar, Managing Partner, Amrop India Private Limited** and it was **admitted by her that there was a gross error on their part in sending a list of candidates** who did not meet the specifications. She also admitted during this session that:

- a. The candidates presented were not as per the specification given by HTG
- b. Candidate assessment by Amrop was inadequate
- c. Candidate assessment parameters were to be re-done and signed off by the Board Selection committee

9. Post this meeting, the Company has been requesting representatives of Amrop India Private Limited to come and have a discussion and to explain as to how Amrop India Private Limited could make up for the significant non-performance but despite various e-mails and telephonic requests and Amrop India Private Limited having undertaken to come up with a revised hiring plan and valuation criteria on 9.4.2018, **no steps were taken by Amrop India Private Limited to address the issue of non-performance and deficiency of service.**

10. In fact, after the fiasco of the meeting on 3rd and 4th April, 2018, Amrop India Private Limited has realised from the contract and taken no further steps. Our clients having banked on Amrop India Private Limited carrying out their obligations as represented by them **have suffered substantial damages on account of delay in appointment of the CFO as well as the Business Head, South.** Besides this, as mentioned earlier, a substantial amount of the Board's time has been wasted and the company has incurred substantial cost in regard to this by way of meetings organized on 3rd and 4th April, 2018 based on your assurances that you had the candidates suitable for these posts which were admitted by you subsequently that this was an Incorrect assurance given by you. ....

11. ....

12. Through this letter, **we hereby demand that you pay us the above amount of Rs.137.53 Lakh within the next 7 days of receipt of the present notice.**

We are open to any suggestions from you to resolve this matter amicably.

Sincerely,

Sanjay Singh  
For The HI-Tech Gears Ltd.”

**(Emphasis supplied)**

15. Now coming to the reply of the Corporate Debtor to the demand notice, as placed at pages 105-112 of Appeal Paper Book (“**APB**” in short), we notice that it has been clearly mentioned therein about the series of correspondences between the two parties from April 2018 onwards where disputes were raised. The reply notice of dispute also clearly makes a mention of the counter claim raised by the Corporate Debtor vide letter of 13.07.2018 which was prior to the demand notice. The reply notice also lists out the deficiencies in the services rendered by the Operational Creditor for having sent a list of candidates who did not meet the specifications and adverts to admission of these errors by the Managing Partner of the Operational Creditor. We also find that the Corporate Debtor has mentioned therein the inefficiency on the part of the Operational Creditor to carry out their obligations and therefore no right to claim any payment from the Corporate Debtor. The reply notice also highlighted that the Operational Creditor on the contrary had to pay them Rs.137.53 lakh on account of opportunity costs and for payment in lieu of damages suffered by them on account of business loss due to failure in positioning of critical manpower in a timely manner.

16. The Learned Counsel for the Appellant has contended that the Corporate Debtor cannot escape their liability to repay the claim raised in the first invoice. In support of their contention, reference has been made to the judgment of this Tribunal in **Aroon Kumar Aggarwal v. ABC Consultants Pvt. Ltd. in CA (AT) (Ins.) No. 409 of 2020** wherein it has been held that the plea of pre-existing dispute must co-relate with the amount claimed by the Operational Creditor and the dispute should be qua the payable debt to the Operational Creditor and default on the part of the Corporate Debtor thereto.

We however are of the view that the facts of the two cases are distinguishable since in that case the issue related to employment agreement and terms and conditions of termination contained therein but in the present case dispute has been raised on the tenability of payment with respect to part-invoice raised in respect of a consolidated, full-fledged contract in view of non-performance of obligations to be discharged by Operational Creditor. Thus, the facts being quite different, this ratio does not come to the help of the Appellant.

17. We also notice that the Adjudicating Authority has taken note of the correspondences exchanged between the two parties prior to the Section 8 demand notice to determine the issue of pre-existing dispute. Two of such communications dated 29.04.2018 and 30.04.2018 sent by the Corporate Debtor to the Operational Creditor have been reproduced at para 18 of the impugned order. From the email of 29.04.2018, it is clear that the Corporate Debtor gave opportunities to the Operational Creditor to sit across the table to sort out their problems amicably. In the other email issued on 30.04.2018 as extracted in the impugned order, the Corporate Debtor invited the Operational Creditor to share the revised work plan to take the process of Executive Search forward and made the payment contingent thereto. Besides these two emails reproduced in the impugned order, we find that in another email dated 28.05.2018 the Corporate Debtor highlighted that though significant costs had been incurred yet they were still not able to hire two senior management functionaries and hence had invited the Operational Creditor for a meeting for an amicable closure of this situation as placed on record at page 142 of APB. A similar letter was issued earlier on 11.05.2018 requesting for a meeting to discuss the matter to sort out the impasse as

placed at page 144 of APB. The very fact that the payment was made contingent upon holding meetings between themselves show that there were pre-existing disputes. Similarly, we also find emails from the Operational Creditor to the Corporate Debtor dated 29.04.2018 (at page 141 of APB), 30.04.2018 (at page 145-146 of APB), 12.05.2018 (at page 143 of APB) and 24.05.2018 (at page 142 of APB) highlighting that their invoices have remained held up and that payments be released. A holistic analysis of these emails leads us to the inescapable conclusion that genuine pre-existing disputes were there and the Adjudicating Authority therefore committed no error in drawing similar conclusion of pre-existing disputes.

18. In the present factual matrix, the defence raised by the Corporate Debtor therefore cannot be held to be moonshine, spurious, hypothetical or illusory. The tone and tenor of the emails exchanged between the two parties clearly manifest existence of dispute which antedates Section 8 demand notice. It is well settled that in Section 9 proceeding, there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. The Adjudicating Authority has therefore correctly noted that the conditions laid down in section 9 having not been fulfilled, the application deserved to be rejected.

19. Given this backdrop, we have no reasons to disagree with the findings of the Adjudicating Authority. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the

Section 9 Application filed by the Appellant. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that 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: 11.10.2023

**PKM**