NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO.1210 OF 2023

(Arising out of Judgement and order dated 04.09.2023 passed by the National Company Law Tribunal, Allahabad Bench, Prayagraj in CP(IB)No.80/ALD/2022)

In the matter of:

Mr. Sanjay Kumar,
Designated Partner of Kapasi Infracon LLP,
3/4199 D, Brahampuri Colony
Near Bank of Baroda,
Paper Mill road,
Saharanpur, UP 247001 Appellant

Vs

1. Gannon Dunkerley & Co Ltd,
   New Excelsior Building,
   3rd Floor,
   AK Nayak Marg,
   Fort, Mumbai 400001
   Maharashtra.

   Corporate Office at 86A
   Topsia Road (South), Haute Street,
   7th floor, Kolkata 700046

2. Kapasi Infracon LLP
   3/4 199D, Brahampuri Colony,
   Near Bank of Baroda
   Peper Mill Road,
   Saharanpur, UP 247001

   Corporate Office
   527-528, 5th Floor, Tower B
   Spazedge Towers,
   Sector 47 Gurugram
   Haryana 122002
   Rep. by Interim Resolution Professional
   Mr. Anang Kumar Shandilya,
   R/o T9, 1904, Exotica Dreamville
   Sector 16C
   Greater Noida West (Noida Extension)
   Near Gaur City 2,
   Gautam Budha Nagar, UP 201318 Respondent

For Appellant:Ms Pooja Sehgal, Mr Rajesh P, Mr. Pallavi Tayal Chadda, Advocates.
For Respondent:Ms Sweta Gandhi, Advocate for R1.

JUDGEMENT
JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

This appeal is filed by the appellant against an impugned order dated 04.09.2023 passed by the National Company Law Tribunal, Allahabad Bench, in CP(IB)-80/ALD/2022 whereby the petition under Section 9 of IB Code filed by Respondent No.1 was admitted and the CIRP against the appellant was initiated.

2. Before coming to the impugned order let us examine the facts:-

i) On /9/11/2017/21.11.207, Original contract was awarded to Gannon Dunkerley & Co Ltd, (hereinafter called 'Operational Creditor'), vide a letter of acceptance by National Highway and Infrastructure Development Corporation Ltd (NHIL) for execution of four Lanning of Jhanji to Demow Section of NH37 from 491.05 Kilometre to 535.25 in the state of Assam on Engineering Procurement and Construction mode;

ii) on 20.08.2019 since Operational Creditor (OC in short) failed to complete the project, they appointed M/s Kapasi Infracon LLP the Corporate Debtor (CD in short) to complete the project as a sub-contractor under Operational Creditor vide agreement. Under this agreement, CD was entitled to get 96.5% of the net amount received from NHIDCL of from each R.A. Bill and the OC was to take the remaining 3.5% towards management fee. Agreement also contain a reciprocal clause that the CD may utilise OC's resources such as plant and machiney, equipment, manpower, engineers and other functional staff to complete the project and charges and rates for the same were also fixed.

iii) from 12.11.2019 to 27.12.2019 there existed various pre-disputes since inception amongst the CD and OC and the same is revealed from their communication;

iv) corporate debtor completed about 41.50% of the project work despite of hurdles, including cash flow issue created by OC by December, 2021;

v) on 30.01.2022 a Principal agreement between a new entity i.e. Jalan Infrastructure LLP (JIL) and OC and subsequent Tripartite Agreement by both of them with CD

was executed whereby JIL agreed to infuse funds in the project to ensure cashflow;

vi) on 08.04.2022 due to disputes amongst JIL and OC, the said Agreements were terminated and disputes between them were referred to arbitration;

vii) on 20.05.2022 CD approached OC seeking release of funds due by OC towards the works already completed by CD till December 2021. There were discussions regarding the payment towards rental charges for the equipment of OC utilised by the CD for the project construction works and a chart was prepared stating rough figures, specifically mentioning therein the same is subject to final measurements of the works. The issue of final measurements were also relevant for preparation of final bill by the CD against OC for the works completed by them;

viii) on 13.06.2022 the OC requested CD for a joint measurement of the works done by CD till 27.12.2021. CD intimated their consent vide mail;

ix) on 21.06.2022 after completion of joint measurement, OC issued final bill dated 21.06.2022 against the principal contractor i.e. NHIDC;.

x) on 15.07.2022 at 11.46 AM, CD issued a final bill alongwith an email against OC demanding an amount of Rs.19,05,41,478/- towards the works completed by them till 27.12.2021;

xi) on 15.07.2022 at 9.24 PM to counterblast the final bill of CD; OC issued a Section 8 IBC Demand Notice against CD claiming the rental charges under the contract;

xii) on 20.07.2022 CD invoked arbitration clause of sub-contracting Agreement dated 20.08.2019 and arbitration clause in Tripartite Agreement dated 30.01.2022;

xiii) on 21.07.2022 notice of dispute was also issued by CD to the Section 8 IBC demand notice;

xiv) on 30.07.2022/03.08.2022 raising disputes OC issued reply to the notice of dispute and against the same CD issued response;

xv) in July, 2022 CD filed Section 9 Arbitration petition before the High Court of Kolkata;

xvi) on 05.08.2022 OC filed Section 9 IBC petition against CD before the Adjudicating Authority;

xvii) on 22.09.2022 Hon'ble High Court of Kolkata referred the disputes between CD and OC to arbitration;

xviii) on 04.09.2023 the Adjudicating Authority admitted the Section 9 IBC petition; and.

xix) on 08.09.2023 Ld. Arbitral Tribunal Kolkata rejected the Section 16 arbitration application filed by CD and observed there exist arbitrable disputes amongst the parties.

3. The impugned order dated 04.09.2023 was passed wherein the Ld. NCLT had held there was no *pre existing dispute* between the parties as the Operational Creditor on 15.07.2022 had served a demand notice under Section 8 of IBC to Corporate Debtor and it was replied on 21.07.2022 raising a dispute and before serving a reply to the demand notice, CD had also served a notice to the Respondent on 20.07.2022 through its Advocate under Section *21* of the *Arbitration and Conciliation Act, 1996*. In this notice *the CD had demanded losses suffered due to JIL not allowing to remove the plant and equipment and GDCL had also collected hire charges for machinery during the periods where no work could be carried out due to hindrances such as CAA protests, covid induced lockdowns and it was noticed that prior to sending* of demand notice dated 15.7.2022 various letters dated 11.5.2021, 20.11.2021 and 22.12.2021 regarding payment of statutory tax, rental charges on plant and machinery equipment etc. were sent. The Ld. NCLT noted as per the clauses of agreement between the parties it was appellant who had to bear the expenses/charges of all the statutory taxes and fee, local and government authorities. The Ld. NCLT then proceeded to decide the issue of expenditure incurred on maintenance to say the amount of Rs.1,10,73,672/- as claimed by the Corporate Debtor vide letter dated 11.05.2021 was not sustainable considering the clarification given by the operational creditor in its letter dated 20.03.2020. Further reference was made to a note dated 20.05.2022 wherein Respondent claimed all disputes were sorted out between operational creditor as well as corporate debtor and an amount of Rs. 7,55,76,839/- was *agreed* upon by the Corporate Debtor to be paid to the respondent. The Ld. NCLT

rather concluded by virtue of Clause *13* of the Contract, entire work was to be executed by VSD Infracon LLP (later named as Kapasi Infracon LLP)VIL as per specification and terms and conditions of the original contract agreement between NHIDCL and GDCL on back to back basis and hence it went on to admit the petition under Section *9* stating interalia since arbitration notice was given after the demand notice it would not constitute a pre-existing dispute and since in a Meeting dated 20.05.2022 the CD had agreed to pay outstanding amount of Rs.7,55,76,839/- hence all disputes between them were sorted out and as the debt was not paid after service of demand notice under Section 8 of the IBC there was no reason why Section *9* application should not be admitted and thus admitted it.

4. The issue of a *pre-existing dispute* is no longer res integra and has been elucidated and reiterated by the Hon'ble Supreme Court of India in ***Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd (2018) 1 SCC 3531.*** The concept of pre-existing dispute has been elaborated in detail and the Hon'ble Supreme Court had observed as under:-

> *56. 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.*
>
> *57. Learned counsel for the respondent, however, argued that the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to*

> *the respondent under the NDA till the matter is resolved. Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.*

5. The above quoted observations of the Hon'ble Supreme Court with regards to a pre-existing dispute qualifies a pre-existing dispute to be a defence which is not spurious, mere bluster, plainly frivolous or vexatious. Thus it enjoins an obligation upon the Adjudicating Authority to arrive at a prima facie satisfaction that a dispute indeed exists with regards to quality or price, which in common parlance and in matters of civil jurisdiction, would be regarded as a triable issue of fact. However, it does not call upon the Adjudicating Authority to venture into the appreciation of the merit of pre-existing dispute and embank upon the adjudication of rival contentions of parties. If the dispute is raised by the CD and if the CD shows the disputed issues of facts which require adjudication by a competent court of law, then Section *9* of IBC would not empower the Adjudicating Authority to take upon itself the task of sifting through the rival contentions raised and to gave a judgement upon it. However, it has to determine whether there truly exist a dispute which may or may not ultimately succeed, but at the stage of consideration of an application under Section *9* IBC the *jurisdiction is limited to consideration of existence of a dispute.*

6. On perusal of the impugned order the Adjudicating Authority had taken out whether the defence raised by the appellant was general or will he succeed. Thus what was required to be observed was as to if from the material

on record if there exist claims or counter claims in respect of amount to be paid and if the defence is not spurious or mere bluster. Even if no reply to the demand notice was given, it would have not precluded the corporate debtor to bring immediately before the Adjudicating Authority to establish a pre-existing dispute which would lead to rejection of Section 9 petition. Thus the underline rational with regard to a petition of pre existing dispute is clearly that as long as there are trivial issues of facts which requires consideration and adjudication, the same shall be recorded a pre-existing dispute to reject the petition filed under Section 9 of the IBC.

7. In *Raj Ratan Babulal Agarwal Vs Solar Tech's India Pvt Ltd (2023) 1 SCC 115* the Hon'ble Supreme Court has sounded a word of caution the Court must not be oblivious to the limited nature of examination of the case of Corporation Debtor projecting a pre existing dispute. Overlooking the boundaries of jurisdiction can cause a serious miscarriage of justice besides frustrating the object of IBC. Thus where there is an indication of an existence of dispute prior to receipt of demand notice under section *8* of IBC then the correctness of its truthfulness is only a matter of evidence.

8. The impugned order would rather show the Learned Adjudicating Authority *took upon itself to appreciate rival contentions based upon documents produced to arrive at a finding whether the defence of CD was correct or not. In this regard we may say that the Ld. Adjudicating Authority has erred in exercising jurisdiction* to evaluate whether the defence set up by the Corporate Debtor was correct or not.

9. On perusal of the impugned order we find the Ld. Adjudicating Authority has split the entire transaction into two independent contracts

between the parties to obligation. The Ld. Adjudicating Authority failed to note the final bill dated 21.06.2022 raised by the Corporate Debtor for the work performed was rather emailed to the Respondent/Operational Creditor on 15.7.2022 at 11.46 A.M i.e. prior to the issue of demand notice. It was only after receipt of the same, a Section 8 demand notice was issued in late night at *9.24 PM*. Even a reply raising dispute against the final bill issued by the Corporate Debtor/Appellant was issued by the Respondent on the same day. The final bill dated 15.07.2022 issued by the Corporate Debtor/Appellant has not been noticed and considered by the Ld. Adjudicating Authority in its impugned order. The Learned Adjudicating Authority has raised the events beginning from the issuance of demand notice. Right from November, 2019, there were issues *qua* sight hinderances, attachment orders passed in respect to the equipments being made available by operational creditor, road taxes outstanding. All these are placed on record by Corporate Debtor alongwith reply to the company petition. The Corporate Debtor also places reliance on series of correspondence *indicating* the dispute *vide* letter dated 20.07.2022 invoking the Arbitration clause in the sub-contract agreements dated 20.08.2019 and 30.01.2022.

10. Admittedly CD also filed a petition under Section *9* of Arbitration and Conciliation Act before High Court being Arbitration Petition No.532/2022 which was prior in time to filing of petition under Section 9 and *vide* order dated 22.09.2022 the High Court of Calcutta with consent of all parties, including the operational creditor appointed an arbitrator to adjudicate upon all disputes between the parties. *The consent accorded by the OC is sufficient evidence of existence of a dispute which ought to have resulted in a dismissal*

of petition under Section 9 of IBC. Further the Respondent had failed to inform the Adjudicating Authority that the Operational Creditor had raised a final bill dated 21.06.2022 on the principal employer NHIDCL which is merely identical to the bill raised by the Corporate Debtor upon the Operational Creditor *vide* its communication dated 15.07.2022. The fact the Operational Creditor had raised final bill of Rs.17,01,26,320/- upon the principal employer would show the joint measurements had taken place and it could establish an amount of Rs.*17* crores approximately was due and payable for the work done by the Corporate Debtor under the sub-contract, which was admittedly awarded by the Operational Creditor to the Corporate Debtor.

11. Thus considering above we are of the considered view that there was a *pre-existing dispute* and hence such disputes cannot be decided in a summary procedure and thus petition under section 9 so filed by the Operational Creditor needs to be dismissed and is accordingly so directed.

12. The appeal is allowed. Pending applications are also disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated: 30.05.2024