

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Comp. App. (AT) (Ins) No. 1840 of 2024

IN THE MATTER OF:

Indu Jain, (Sole Proprietor of IB Jewels) ...Appellant

Versus

Birla Jewels Ltd. ...Respondent

Present:

For Appellant : Mr. Gopal Machiraju, Ms. Krusha Maheshwari & Ms. Ruchi Wagaralkar, Advocates

For Respondent : Ms. Honey Satpal, Mr. Akash Agarwalla, Ms. Pooja Singh, Mr. Sarang Pathak, Mr. Lalit Joshi & Mr. Aman, Advocates

J U D G M E N T

Per: Justice Md. Faiz Alam Khan: J.

The instant appeal has been preferred by the Appellant (Indu Jain, sole Proprietor of M/s IB Jewels) feeling aggrieved by the impugned order dated 09.08.2024 passed by the Ld. NCLT, Mumbai Bench – VI in C.P. (IB) No. 3626/MB-VI/2019 whereby the petition filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) has been rejected.

2. Ld. Counsel for the Appellant submits that the Appellant is the Operational Creditor and is the sole proprietor firm IB Jewels which is engaged in the business of wholesale trade of diamond jewellery and the proprietor of IB Jewels, namely, Indu Jain is the proprietor of two distinct proprietary concerns, namely, IB Jewels (OC) and Brij Ratnam.

3. It is further submitted that while IB Jewels is the wholesale supplier of rough and uncut diamond jewellery, Brij Ratnam is a retail supplier of finished jewellery and both these proprietorship have separate GST registrations and Bank accounts. The IB Jewels sells rough and uncut diamond jewellery among other parties to the Birla Jewels Ltd. (Respondent/CD) and vide three invoices of date 16.06.2019 for Rs. 26,52,781/-, invoice dated 20.06.2019 for Rs. 11,81,272/- and Invoice dated 20.06.2019 for Rs. 11,47,868/-. The uncut diamond jewellery was delivered by the Appellant to the CD/Respondent.

4. It is further submitted that as submitted earlier the CD used to finish goods and sell them to its franchisees including Brij Ratnam. The Agreement between the OC/IB Jewels and CD/Birla Jewels Ltd. is for the sale of goods supply of which has been evidenced by the aforesaid invoices.

5. It is further submitted that a franchisee agreement dated 05.12.2018 was executed between the CD/Birla Jewels Ltd. and the other proprietary concern, namely, Brij Ratnam owned by the proprietor of the Appellant (Indu Jain) and that was an independent business and agreement which was not having any concern with the supply of the rough and uncut diamond jewellery by the Appellant to the Respondent / CD.

6. It is further submitted that certain disputes had arisen between the franchisee – Brij Ratnam and CD/ Birla Jewels Ltd. under the franchisee agreement dated 05.12.2018 and Birla Jewels Ltd./CD terminated the aforesaid franchisee agreement dated 05.12.2018 by giving termination notice dated 12.08.2019 and reply of which was given by the franchisee Brij Ratnam

through their attorneys Laxmikumaran and Sridharan attorneys vide reply notice dated 27.08.2019.

7. It is further submitted that the CD failed to make payments of the aforesaid three invoices pertaining to supply of rough and uncut diamond jewellery to the CD, the delivery of which was accepted by the Respondent / CD and the supply of which was never objected and there was no controversy with regard to the amount covered under these invoices and as per the terms and conditions of the aforesaid invoices, a credit period of only 45 days was available to the CD to make the payment which was subsequently increased to 60 days, however, no payment was made by the CD and thus a default with regard to these three invoices occurred on 16.08.2019 and 20.08.2019 respectively.

8. It is further submitted that a demand notice dated 26.08.2019 in Form 3 under Section 8 of the Code was issued by the appellant/OC and a reply of which was given by the CD on 05.09.2019 disputing the claim of the Appellant and denying its liability on the ground that the amount of Rs. 49,81,921/- is not payable as there was no formal agreement between the parties and the CD is having an existing dispute with Brij Ratnam and OC/Appellant is the part of the supply chain for the procurement of diamonds by its related company- Brij Ratnam and therefore, a dispute exists between the parties.

9. Ld. Counsel for the Appellant submits that the Adjudicating Authority while rejecting the application of the Appellant has not considered the fact that the Appellant/OC is not a party to the franchisee agreement which was a separate agreement between the distinct proprietorship owned by the

proprietor of the Appellant having a different bank account and GST registration and thus was a separate entity and the transaction of the sale of the uncut jewellery to the CD was a separate transaction by a separate entity owned by the proprietor Ms. Indu Jain and therefore, the dispute between the parties which was pertaining to the franchisee agreement between the CD and Brij Ratnam may not be deemed to be a dispute between the Appellant and Respondent and therefore the concept of pre-existing dispute drawn in this case is without any basis.

10. It is further submitted that supply of uncut diamond jewellery was never disputed by the Respondent in its reply to the notice of the OC given under Section 8 of the Code and this argument of non-supply of uncut diamond jewellery with the aforesaid three invoices has been carved out to set a defence to the petition filed by the Appellant subsequently and is an afterthought and thus the Adjudicating Authority has failed to appreciate this fact in right prospective.

11. It is further submitted that a dispute with regard to a distinct and separate contract may not be brought into ambit of another contract and may not be termed as a prior dispute in order to reject the application of the Appellant.

12. It is further submitted that the Adjudicating Authority failed to appreciate that the demand notice was issued by the advocates of the Appellant and not by her proprietary concern so the question of it being defective could not have surfaced and the Appellant is the individual and proprietorship and is not a separate entity.

13. Ld. Counsel for the Appellant further submits that the pre-existing dispute in order to succeed apart from being a genuine one must relate to the same transaction and the same may not relate to a claim which has become time barred and may not be executed.

14. Ld. Counsel for the Appellant in support of his submissions has relied on following case laws:-

(i) Deepak Modi v. Shalfeyo Industries (P) Ltd., 2023 SCC OnLine NCLAT 169

(ii) Aroon Kumar Aggarwal v. ABC Consultants (P) Ltd., 2022 SCC OnLine NCLAT 1614

(iii) Nandamuri Meenalatha v. Quality Steels & Wire Products, 2023 SCC OnLine NCLAT 1757

(iv) Union of India v. Ramuan Iron Foundry, (1974) 2 SCC 231

(v) Organon (India) P. Led. v. Martin and Harris P. Ltd, 2017 SCC OnLine Cal 21500

(vi) Mobilox Innovations (P) Ltd Vs. Kirusa Software (P) Ltd. (2018) 1 SCC 353

(vii) Rajeev K. Aggarwal v Panipat Texo Fabs Pvt. Ltd and Another, 2028 SCC Online NCLAT 656

(viii) Jord Engineers India Ltd. Vs. Vatin & Co, 2018 SCC OnLine NCLAT 925

(ix) Macquarie Bank Ltd. v Shilpi Cable Technologies Ltd. (2018) 2 SCC 674

(x) Unigold System, a proprietorship concern Through its Proprietor, Rajesh Kumar Gupta vs. Fortune Spirit Limited, 2021 SCC OnLine NCLAT 5619

15. Ld. Counsel for the Respondent/CD submits that there is no illegality or to say any irregularity in the impugned order and the appeal appears to have been filed against the said judgment on two grounds i.e. the dispute

raised is a claim which has become time barred and the dispute related to one contract cannot be taken as defence in another contract.

16. It is further submitted that IB Jewel / Appellant and Brij Ratnam (Franchisee of CD) are one and the same entity and not having any separate legal existence and both are owned by the Appellant and both these proprietorship are owned by the same proprietor - Ms. Indu Jain and Ms Indu Jain introduced IB Jewels as vendor partner for sale of Mrs. Indu Jain's dead diamond and other jewellery stocks under the brand name of 'BJEWELZ' store.

17. It is further submitted that the operation of both these entities was managed, controlled and carried out by the Appellant from the same premises having common address of both entities and thus the IB Jewel (Appellant) is a part of supply chain for procurement of diamonds by its another entity Brij Ratnam making it a part of composite transactions and thus the supply of uncut diamond to the Respondent/CD by the Appellant and the supply of material by the CD to Brij Ratnam under the franchisee agreement was part of the same transactions and the same cannot be segregated.

18. Ld. Counsel for the Respondent has highlighted the emails written by the Appellant of date 20.06.2019, 02.07.2019 and also the emails dated 04.07.2019, 06.07.2019 and 16.07.2019 in order to show that both context i.e. supply of uncut diamond by the Appellant to the CD and the supply of goods by the CD to the Brij Ratnam under franchisee agreement are intertwining transactions closely integrated with each other and could not be separated and thus the dispute with regard to the supply of goods by the CD

to its franchisee Brij Ratnam owned by the Appellant has rightly been considered by the Adjudicating Authority as a pre-existing dispute between the Appellant and the CD/Respondent.

19. Ld. Counsel for the Respondent has highlighted email dated 26.07.2019 addressed by the Appellant to the CD stating and admitting clearly that Appellant's sister concern has replied to the termination letter dated 26.07.2019. Reliance has also been placed on email dated 05.08.2019 addressed by the CD to the Appellant wherein various breaches and disputes were notified by the CD pursuant to audit and inspection conducted by the CD at the store of the Appellant. Reliance has also been placed on the letter of termination dated 12.08.2019 and franchise agreement dated 05.12.2018 and it is emphasised that filing of the petition under Section 9 of the Code was only an attempt for recovery of money and is not for resolution of the CD, hiding pre-existing dispute between the parties.

20. It is further submitted that the Appellant through its reply letter dated 27.08.2019 has replied to the CD's termination letter dated 12.08.2019 acknowledging the disputes highlighted vide email dated 22.06.2019, 02.07.2019, 04.07.2019 and 05.08.2019.

21. It is also submitted that neither there was any agreement between the Appellant and Respondent for supply of uncut jewellery as claimed by the Appellant nor any supply has been made vide aforesaid three invoices and in absence of any unimpeachable proof of delivery of goods, section 9 petition is not maintainable. More so when there is no existence of any purchase order

nor any privity of contract between the parties for placing the order for supply of alleged jewellery by the CD through aforesaid invoices.

22. Ld. Counsel for the Respondent has drawn our attention towards various infirmities emerging in invoice no. 17 and 18 in order to show that these invoices are forged invoices and these invoices have been raised subsequently and no material has been supplied through these invoices.

23. Ld. Counsel for the Respondent has also submitted that the petition as such was not maintainable and has rightly been dismissed by the Adjudicating Authority.

24. Ld. Counsel for the Respondent in support of his submissions has also relied on following case laws:-

(i) Standard Refinery And Distillery Ltd. Vs. Commissioner of Income Tax (Central) Calcutta 1970 2 SCC 777

(ii) Dogiparthi Venkata Satish v. Pilla Durga Prasad & Ors 2025 SCC OnLine SC 1825

(iii) Impex Services India vs. DBA Enterprises 2018 SCC OnLine NCLAT 337

(iv) Greymatter Entertainment Pvt. Ltd. Vs. Pro Sportify Pvt. Ltd. 2023 SCC OnLine NCLAT 82

(v) Brand Realty Services Ltd. Vs. Sir John Bakeries India Pvt. Ltd. 2022 SCC OnLine NCLAT 290

(vi) Rajratan Babulal Agarwal Vs. Solartex India Private Limited and Ors, 2022 SCC Online SC 1395

(vii) Beacon Cosurier & Cargo India Pvt. Ltd. Vs. Trim India Pvt. Ltd. 2019 SCC OnLine NCLAT 321

(viii) Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353

(ix) Mascot Petrochem Pvt. Ltd. vs Midaas Constructions Co. Pvt. Ltd. 2022 SCC OnLine NCLAT 2164

25. We have heard Ld. Counsel for the parties and perused the record.
26. The Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353** , which has been relied on by both the parties held as under:

"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 non-payment 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. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the

other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [Section 9(5)(i)(b)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [Section 9(5)(i)(c)], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [Section 9(5)(i)(d)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [Section 9(5)(i)(e)], it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso [Section 9(5)(ii)(a)]. It may also reject the application where there has been repayment of the operational debt [Section 9(5)(ii)(b)], or the creditor has not delivered the invoice or notice for payment to the corporate debtor [Section 9(5)(ii)(c)]. It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [Section 9(5)(ii)(d)]. Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected [Section 9(5)(ii)(e)].

34. *Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of

Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

27. A perusal of the impugned order would show that the Adjudicating Authority has rejected the application of the Appellant moved under Section 9 of the Code on the following grounds:- (i) It is not established that the goods (diamonds) under the invoices were in fact supplied by OC to CD through courier Jewel Goldi who stated to courier it through sequel global critical logistics (ii) as both the firms i.e. IB Jewels and Brij Ratnam owned by Indu Jain, having the same address and both the businesses were managed by Indu Jain and were interwind and thus the dispute existing between IB Jewels and Brij Ratnam cannot be regarded as separate. It is also stated that pre-existing dispute with the CD in relation to the franchisee agreement by Indu Jain in her capacity as sole proprietor of Brij Ratnam has nexus with the business concern IB Jewels also run by Indu Jain (iii) Section 8 demand notice was issued by IB Jewels as proprietary concern while section 8 contemplates issuance of demand notice by the operational creditor, section 5(20) defines operational creditor to be a person to whom operational debt is owned. Section 3(23) of the Code does not list out sole proprietorship as legally recognisable person. Hence, sole proprietorship is not competent to issue demand notice under Section 8.

28. The claim of the Appellant is that the Appellant proprietorship concern, namely, IB Jewels and another proprietor firm, namely Brij Ratnam is owned by the one and same person, namely, Ms. Indu Jain. The OC is stated to be dealing in supply of uncut and rough diamond jewellery to 3rd parties

including the CD – Birla Jewels Ltd. and it is claimed that vide aforesaid three invoices of date 16.06.2019 for Rs. 26,52,781/-, invoice dated 20.06.2019 for Rs. 11,81,272/- and Invoice dated 20.06.2019 for Rs. 11,47,868/- the uncut rough diamond jewellery was supplied to CD and despite demand the amount of these invoices were not paid and on account of occurrence of default a notice on 26.08.2019 in form 3 was given to the CD under Section 8 of the Code. A reply of which was given by the CD on 05.09.2019 disputing the claim of the OC and denying its liability. It is also reflected that the CD while denying its liability to pay the amount of these invoices through its reply dated 05.09.2019 has stated that the CD has never agreed to pay any amount as there was no formal agreement between the CD and Appellant. Thus, it is evident that the defence of non-supply of uncut diamond jewellery or rough jewellery has not been taken as defence by the CD in its reply to the notice of the Appellant.

29. Perusal of the reply of the notice given by the CD to the Appellant on 05.09.2019 would further reveal that the other defence taken by the CD in this reply is pertaining to the dispute existing between the CD and Brij Ratnam another proprietorship of the proprietor Ms. Indu Jain under a franchisee agreement dated 05.12.2018. Thus, it is evident that in reply given by the CD to the Appellant of its demand notice the claim of the Appellant has been contested only on the ground that there is no formal agreement between the parties and the CD has never agreed to pay the Appellant any amount and also that the Appellant- IB Jewel and Brij Ratnam are owned by the same proprietor and the franchisee agreement between the CD and Brij Ratnam has

also been terminated on account of alleged wrong doings of Brij Ratnam and both these entities are having hands in glove and since both the transactions namely, supply of uncut rough diamond jewellery by the Appellant to the CD and supply of finished goods by the CD to the sister proprietorship of appellant (Brij Ratnam) are part of a one integrated contract and a loss with regard to business damage has occurred to the CD to the tune of Rs. 7,50,00,000/-, the payment of three invoices have been denied. Thus, the reply given by the CD to the demand notice sent by the Appellant would clearly reveal that there is no mention of non-supply of any goods by the Appellant to the CD and also with regard to the alleged forged invoices and in our considered opinion these defences have been carved out subsequently at the stage of filing of reply to the petition filed by the Appellant under Section 9 of the Code before the Adjudicating Authority and thus was a clear after thought.

30. We notice that various submissions have been raised by Ld. Counsel for the Respondent pertaining to various discrepancies allegedly occurring in the invoices, in order to show that the same are forged and have been made subsequently, but we are not impressed by these submissions. It is evident that the goods under invoice Nos. 17 and 19 were stated to be couriered by the appellant through one Jewel Goldi, stated to be a renowned diamond manufacturer, who couriered the same through sequel Global Critical Logistics Courier service which was dealing in precious stones. The orders were placed by the OC to Jewel Goldi under Bill to ship model and it was jewel Goldi who was required to furnish the goods to CD. The aforesaid Jewel Goldi has issued invoice to the OC who in turn invoiced the CD. This is the normal

practice in Bill to Ship supply. It is noted by Adjudicating Authority in para No.5.2 of the impugned judgment that Tax invoice of date 15.06.2019 has been produced by the OC wherein the goods as detailed are shown to have been dispatched through Sequel Log. Pvt Ltd. and it is endorsed thereon 'payment in favour of Jewel Goldi', which means that for the goods delivered by the Goldi India through Sequel Log Pvt Ltd. the amount was to be paid by the CD to Jewel Goldi and in turn, jewel Goldi had to make payment to the OC. It is stated by Ld. Adjudicating Authority that such arrangement is not uncommon in business parlance. But thereafter Ld. Adjudicating Authority stated that OC needs to prove that the Invoice issued by the Jewel Goldi was genuine and after delivery of goods it did not receive any payment either from the CD or from the Jewel Goldi. We are unable to understand as to why the OC will receive any payment from Jewel Goldi as the payment was required to be made by the CD either to the Jewel Goldi or to the OC. Thereafter Ld. Adjudicating Authority on superficial grounds has doubted the invoices. We are not in agreement with the conclusions drawn by the Adjudicating Authority in this regard as when the opportunity was available to the CD, it can very well show if the payment has been made by it. We are of the considered view that when the notice given by the OC under Section 8 of the Code was replied by the CD and as per the case developed later on the goods were not supplied by the OC, the natural corollary would be to deny supply of goods by the OC. At the cost of repetition we are stating that when the delivery of goods has not been denied by the CD in its reply to the notice sent under section 8 of the Code and only payment has been denied on account of absence of any agreement and prior dispute with regard to other franchisee

agreement, the invoiced filed by the OC may not be doubted only on the basis of superficial grounds.

31. Ld. Counsel for the Respondent has relied on ***Mascot Petrochem Pvt. Ltd. vs. Midaas Construction Company Pvt. Ltd. 2022 SCC OnLine NCLAT 2164*** wherein it is held as under:

*"11. Therefore, we feel that appellant had to submit unimpeachable proof of delivery of goods to establish his case under section 9 of the IBC. Such evidence was also necessary since the **respondent had disputed delivery of goods in his reply to the demand notice.**"*
(Emphasis Ours)

32. It may be noted that in the case relied on by the Respondent the delivery of goods was denied in the reply to the demand notice, which is not a case in the case at hand. Thus the Respondent may not get any benefit of this case due to factual difference. Thus, we do not find any merit in the claim of the CD that no goods as claimed by the Appellant/OC has been supplied to it under aforesaid three invoices.

33. Now we come to the crucial issue as to whether there was a pre-existing dispute existing between the parties with regard to the payment of amount as claimed by the Appellant.

34. Ld. Counsel for the Appellant has relied on a case decided by this Appellate Tribunal in ***Deepak Modi v. Shalfeyo Industries (P) Ltd., 2023 SCC OnLine NCLAT 169*** wherein it is opined as under:

"13. It is true that under the provisions of Code if Adjudicating Authority is satisfied with pre existing dispute at the time of entertaining an application filed under Section 9 of the Code there is no reason to initiate the same or admit the application. However, law is settled on the point that there must be pure pre-existing dispute. Meaning thereby that genuine pre-existing dispute

must exist in rejecting an application Section 9 of the code..... This fact is itself enough to draw an inference that the Corporate Debtor had accepted the delivery of granite slabs made by the Operational Creditor without raising any dispute or objection..... There may be plausible reasons for SGB Infra Ltd. to ask the Corporate Debtor to remove the flooring but fact remains that the Corporate Debtor had accepted the granite slabs supplied by the Operational Creditor without raising any dispute or objection. On this score itself we are of the opinion that such plea of the Corporate Debtor regarding dispute can be termed as moon shine defence. On this plea there is no reason to accept as if there was pre-existing dispute in between the Operational Creditor and Corporate Debtor. "

35. Another case which has been relied on by the Appellant is **Aroon Kumar Aggarwal v. ABC Consultants (P) Ltd., 2022 SCC OnLine NCLAT 1614**

wherein this Appellate Tribunal Observed as under:

"12.Careful reading of section 8(2)(a) of the Code provides that the existence of dispute has to be in respect of the amount so claimed and it is not referable to any kind of dispute such as the one which is highlighted in the present controversy..... there was no suggestion that the corporate debtor had raised any dispute about the supply or quality of goods prior to issuance of demand notice, the Adjudicating Authority had rightly held that there was no pre-existing dispute and admitted the application.....Further it was held that the pendency of the case amounts to admission and not an existence of dispute. In the case of Shapoorji Pallonji and Co. P. Ltd. [Shapoorji Pallonji and Co. P. Ltd. v. Shore Dwellings P. Ltd., (2022) 17 Comp Cas-OL 144 (NCLAT).] it has been held that no dispute has been raised prior to the issuance of demand notice whereas in the present case no reply has been filed to the demand notice.

13. Thus, from the resume of the aforesaid facts and circumstances, one thing is clear that the plea of pre-existing dispute has to co-relate with the amount claimed by the operational creditor or if a suit or arbitration proceedings is pending then the same should also be related to such dispute."

36. Ld Counsel for the Appellant has also referred **Jord Engineers India Ltd. v. Valia & Co., 2018 SCC OnLine NCLAT 925** wherein this Appellate Tribunal Opined as under:

"7. There was another issue raised by the Corporate Debtor that the goods supplied was of inferior quality, but no such dispute was raised by the Appellant prior to issuance of notice under Section 8(1). The question of quality was raised by the Appellant only when reply under Section 8(2) was filed by the Corporate Debtor. Therefore, that cannot be taken into consideration to annul the initiation of Corporate Insolvency Resolution Process."

37. Ld Counsel for the Appellant has also highlighted **Nandamuri Meenalatha v. Quality Steels & Wire Products, 2023 SCC OnLine NCLAT 1757** wherein it is held that the 'Proceedings', under the I & B Code, 2016, are 'Summary in Character', and that an 'Adjudicating Authority', not being a 'Recovery Fora' or 'Court' is not obliged to conduct an elaborate enquiry is like that of a 'Regular Trial' of a 'Civil' case, and also, it does not determine, a 'Money Claim' or 'Civil Suit', Paragraph No.79 Of this report was relied to emphasise that the 'Dispute', relating to 'Violation of Agreement'/'Contract', between the 'Inter se Parties', does not constitute a 'Pre-existing Dispute', qua the 'Sum', payable in 'Law'. This Appellate Tribunal further held as under :

"82. In 'Law', once the 'Debt', shown as 'Due', it is for the 'Corporate Debtor', to establish that, there are 'no Outstanding Dues', to be paid to an Operational Creditor'.

83. In this connection, it is not out of place, for this 'Tribunal', to make a significant mention that the 'Corporate Debtor', had not filed any 'Suit' or any 'Legal Proceeding', before the 'Competent Court', against the '1st Respondent/Operational Creditor/Petitioner', claiming 'Damages', seeking redressal of its grievances.

86. Going by the last Invoice date, being 24.10.2017, the final 'Violation', would be on 24.10.2017, and at this distant point of time, if the 'Appellant' initiates any 'Legal' action, it will be clearly barred by time, in the considered opinion of this 'Tribunal'. That apart, even, in respect of the 'Test Certificates', and the 'Quality of Steel', supplied was not proper, and there is alleged 'Deficiency', admittedly, 'no steps were taken', by the 'Corporate Debtor', to get

it 'decided', by the 'Appropriate Forum'. In the absence of the same, the 'Dispute', at best, if it exists, then, at the maximum, it only pertains to a 'Out-of-date Claim', and as such, it is only an 'Otiose' one, as opined by this 'Tribunal'."

38. The Law laid down by this Appellate Tribunal in **Rajeev K. Aggarwal v. Panipat Texo Fabs (P) Ltd., 2018 SCC OnLine NCLAT 656** has been referred wherein this Tribunal observed as under:

"3. The appellant did not question the factum of the "operational debt" being payable in law. In so far as "default" is concerned, the only ground urged in this appeal is that the Adjudicating Authority failed to consider that the goods corresponding to the invoice/bill forming basis of the purported debt were defective and of inferior quality. It is contended that the factum of quality of goods supplied being defective and substandard was communicated to the operational creditor. However, the appellant could not lay hands upon any communication to substantiate its contention that the operational creditor was apprised of the goods supplied being sub standard and defective."

39. He also relied **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231** wherein Hon'ble Supreme Court Opined as under:

"11..... A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. "

40. The law propounded by The Hon'ble High Court of Calcutta again in **Organon (India) (P) Ltd. v. Martin and Harris (P) Ltd., 2017 SCC OnLine Cal 21500** has also been relied wherein it is stated that a claim in damages cannot be elevated to the status of an immediately enforceable claim to be adjusted or set off against an admitted debt.

41. Ld Counsel for the Respondent on the other hand has relied on **Standard Refinery And Distillery Ltd. Vs. Commissioner of Income Tax (Central) Calcutta 1970 2 SCC 777** wherein Honble Supreme Court held as follows :

"4. As pointed out by this Court in CIT v. Prithvi Insurance Company Ltd.1. in determining whether two lines of business constitute the "same business" within the meaning of Section 24(2) of the Income Tax Act, the Income Tax Authorities must consider the inter-connection, interlacing, inter-dependence and unity furnished by the existence of common management, common business organisation, common administration, common fund and a common place of business."

42. We with utmost respect are of the view that the aforesaid Law with regard to the Income Tax Act wherein for the purpose of Computation of income the two distinct entities may be clubbed together. Thus due to factual difference this law appears to be not applicable to the facts of this case.

43. The next law which has been relied on by the respondent is **Greymatter Entertainment Pvt. Ltd. Vs. Pro Sportify Pvt. Ltd. 2023 SCC OnLine NCLAT 82** wherein this Appellate Tribunal opined as under:

"11. The main point for consideration in this appeal is whether if section 8 notice is not replied to, does any provision under the Code prevent the corporate debtor from pleading issues of "pre-existing dispute" or that the "debt" has been paid, in their reply to the petition filed under section 9 of the Code and whether the Adjudicating Authority was justified in dismissing the section 9 application filed by the appellant herein.

13. It is observed from the aforementioned sections that neither section 8 nor section 9 of the Code indicate that in event reply to notice was not filed within 10 days, the corporate debtor is precluded from raising the question of dispute or pleading that there or no amount "due and payable", the corporate debtor is not prevented from establishing by way of a reply and relevant documents, any "pre-existing dispute" or paid "operational debt"."

44. The same principle has been followed by this Appellate Tribunal in **Brand Realty Services Ltd. Vs. Sir John Bakeries India Pvt. Ltd. 2022 SCC OnLine NCLAT 290**. Reliance is also placed on **Impex Services India vs. DBA Enterprises 2018 SCC OnLine NCLAT 337** decided by this Appellate Tribunal in order to show that when the business of the two entities is closely integrated the dispute with either of it may be treated as dispute with other.

45. The Law propounded by Hon'ble Supreme Court again in **Dogiparthi Venkata Satish v. Pilla Durga Prasad & Ors 2025 SCC OnLine SC 1825** has also been referred by the Respondent :

" 4.1 A proprietorship concern is nothing, but a trade name given by an individual for carrying on his business. A proprietorship concern is not a juristic person. It cannot sue, however, in view of Order XXX Rule 10 CPC, it can be sued....."

4.3 It is well settled by series of judgments that proprietorship concern cannot be equated either with a company or with a partnership firm. Order XXX deals with partnership basically, however, Rule 10 thereof refers to proprietorship. It makes very clear that proprietorship concern cannot sue but it can be sued. "

46. Another case i.e. **Beacon Courier & Cargo India Pvt. Ltd. Vs. Trim India Pvt. Ltd., 2019 SCC OnLine NCLAT 321** relied on by Ld Counsel for the Respondent in our considered opinion is not having any relevance due to factual difference.

47. Paragraph 51 of the Law propounded by Hon'ble Supreme Court again in **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, (2018) 1 SCC 353** has also been highlighted, which is placed below:

"51. 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)(i)(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."

48. We notice that there is no dispute with regard to the fact that both IB Jewels (Appellant)/OC and Brij Ratnam are two independent and distinct proprietorship concerns owned by the proprietor Ms. Indu Jain and it has not been disputed before the Adjudicating Authority or before us that both these entities having distinct bank accounts and GST number. The only defence has been taken by the CD / Respondent is with regard to the fact that both these proprietorship were doing their business from the same premises. Which in our considered opinion is not having any adverse affect so far as the claim of the Appellant is concerned.

49. As stated earlier in the reply to the notice of the Appellant given under Section 8 of the Code, the only objection with regard to the pre-existing dispute has been taken which is shown to have arisen between the CD – Birla Jewels Ltd. and another proprietor firm of the proprietor Ms. Indu Jain i.e. M/s Brij Ratnam pertaining to which a termination notice of the franchisee

agreement dated 05.12.2018 is stated to have been given by the CD to Brij Ratnam and the franchisee agreement was cancelled.

50. At this stage, it is important to have a glance on the franchisee agreement executed between Birla Jewels Ltd. and Brij Ratnam. A perusal of this franchisee agreement would reveal that various clauses have been provided in this agreement with regard to the smooth execution of the agreement between the parties, however, no where in this agreement any mention of the Appellant, namely, IB Jewels has been made and this contract/agreement appears to be purely between the CD and Brij Ratnam.

51. The termination notice pertaining to the termination of this franchisee agreement given by the Birla Jewels Ltd. on 12.08.2019 would also reveal that it was addressed to Brij Ratnam and the fact of continuous default in fulfilling the alleged obligations of Brij Ratnam has been stated therein with regard to various terms and conditions and clauses of the franchisee agreement dated 05.12.2018 and the other grounds which has been given in the notice for termination of this franchisee agreement are deficiency of fund infusion against agreed opening stock value of gold jewellery and of Rs. 77 lakhs against diamond jewellery stock, which has been allegedly brought to BJEWELZ's notice all of a sudden which has effected profitability of BJEWELZ, delivery failures at last moment by Brij Ratnam, non-delivery of stock to the franchisee within 7 – 28 days of the receipt of the payment, activities to the prejudiceness or damage to the goodwill of the franchisor's/CD, activities involving outside product sale by the Brij Ratnam from within the store premises using the brand name of CD and many other

shortcomings and non-compliances of the franchisee agreement have been mentioned therein. However, there is no mention of any of the transaction undertaken by the Appellant with the Respondent / CD. Therefore, what is evident in this notice dated 12.08.2019 whereby the franchisee agreement dated 05.12.2018 was terminated is that the franchisee agreement between the CD and Brij Ratnam was terminated on account of certain disputes which had arisen between the parties only with regard to the conduct of the business by the Brij Ratnam with the CD under the franchisee agreement and the Appellant was not at all involved therein.

52. We have also perused the reply to this franchisee agreement termination notice given by the attorneys of Brij Ratnam to the CD and in this reply also it would be evident that the reply is also been confined to the compliances made by the Brij Ratnam of the franchisee agreement dated 05.12.2018 and the denial of the allegations of the CD and a counter claim has also been made. It also appears to be an admitted fact that on 26.09.2019 a notice was given on behalf of the CD to Brij Ratnam invoking arbitration clause of the franchisee agreement dated 05.12.2018 and nomination of Rajiv Nayak, Adv. as the Arbitrator in the dispute and differences that has been arisen between the parties. This notice of invoking arbitration which was given on behalf of the CD would also reveal that the dispute has been confined only to the non-compliance of various terms and conditions of clauses of the franchisee agreement dated 05.12.2018 and there is no mention of the supply or non-supply of uncut diamond jewellery by the Appellant to the Respondent under the aforesaid three invoices. Thus up to 26.09.2019 where on this

notice for invoking arbitration clause has been given by the CD to Brij Ratnam there was no mention of any dispute between the Appellant the Respondent/CD with regard to the transactions in question through aforesaid three invoices. Likewise, the reply of this notice dated 20.11.2019 given by the Brij Ratnam to the CD is also confined to the franchisee agreement dated 05.12.2019.

53. Therefore, what is evident from the above is that it is on account of dispute which has arisen between the CD and Brij Ratnam the franchisee agreement dated 05.12.2018 was terminated by the CD and the arbitration clause has also been invoked and the termination of franchisee agreement dated 05.12.2018 was solely on account of alleged non-compliances by the Brij Ratnam and the same was not having concern with the supply of material by the Appellant through aforesaid three invoices.

54. Now coming to the issue which has been highlighted by the Ld. Counsel for the Respondent that in various emails written by the parties to each other there is reference of dispute existing between the CD and Brij Ratnam.

55. We have perused the various emails highlighted by Ld. Counsel for the Respondent i.e of date 20.06.2019, 02.07.2019, 04.07.2019, 06.07.2019, 16.07.2019, 26.07.2019 and 05.08.2019.

56. Much emphasis has been given by the Ld. Counsel for the Appellant on the email dated 22.06.2023 which has been written by the Appellant to the CD and it has been stated therein that there has been a confusion between them regarding payment and that they are single person and being viewed as two different entities franchiser and vendor which is the major cause of

confusion and the payment at the last moment cannot be changed to this great extent.

57. Another email of date 21.06.2019 has been highlighted which has been sent by the Appellant to the CD wherein it is stated that as a part of earning for IB Jewels as a vendor, you will provide 3% commission to I.B Jewels on total invoice value of diamond jewellery and then Brij Ratnam will not ask for any credit from BJEWELZ in future.

58. Another email which has been sent on 02.07.2019 by the CD to Brij Ratnam has been relied wherein in clause 6 it has been mentioned that for fresh procurement of diamond stocks from SRK by IB meant for sale to BJEWELZ which shall further sell to Brij Ratnam, the quality check to be done at SRK premises.

59. The email sent by the CD to the Appellant on 26.07.2019 has also been highlighted whereby the franchisee agreement dated 05.12.2018 has been cancelled.

60. We have very carefully perused the aforesaid emails relied on by Ld. Counsel for the Respondent in order to show that all the businesses of the Appellant, CD and Brij Ratnam were closely integrated and were dependent on each other and was a supply of chain and therefore a dispute pertaining to franchisee agreement is bound to be considered as a prior existing dispute with regard to any transaction which has taken place between the Appellant and the CD.

61. A close scrutiny of these emails would reveal that though some reference, though remotely, has been made to the business between the Appellant and the CD but the same in our considered opinion is not sufficient to term the same as a pre-existing dispute between the parties, with regard to the transaction in question and payment with regard to the three invoices. It is to be recalled that when two distinct legal entities are owned by a single proprietor, namely, Indu Jain and they are doing business separately with the CD, some reference of the business which was being done by the Brij Ratnam with CD under the franchisee agreement dated 05.12.2018 is bound to come/appear in the communications made either between the Appellant and CD or between Brij Ratnam and CD and simply by some stray mentioning of some facts pertaining to the business of Appellant with the CD in the communications of the CD with Brij Ratnam, the same may not be sufficient to consider the dispute arisen between the CD and Brij Ratnam as a dispute between the Appellant and the CD.

62. We are in complete agreement with the submissions made by the Ld. Counsel for the Appellant that a dispute which has occurred between the same parties with regard to a totally different transaction not having any connection with transaction in question may not be sufficient to term as prior existing dispute in the instant case.

63. In this regard, reference may be taken of the law laid down by the Hon'ble Supreme Court in **Deepak Modi (Supra)** wherein the Hon'ble Supreme Court has held that genuine pre-existing dispute must exist for

rejection of an application Section 9 of the code. Thus the dispute must have substance and must not be a moon shine defence.

64. The Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd (Supra)** has also held that within a period of 10 days of the receipt of the 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 and 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.

65. Therefore, having regard to the ratio laid down by the Hon'ble Supreme Court as well as by this Appellate Tribunal in the aforesaid cases it is evident that prior existing dispute should not be a moon wash and must have some substance therein which in our considered opinion is completely lacking in this case. At the cost of repetition, it is to be emphasised that neither in the reply of the demand notice nor in the franchisee agreement termination notice there is any mention of any of the dispute pertaining to the transactions in question and what has been mentioned is only dispute between CD and Brij Ratnam which in our considered opinion may not be sufficient to reject the contention of the Appellant.

66. Now we come to the last leg of submissions which is also taken a ground for rejection of the application by the Adjudicating Authority i.e. with regard to the maintainability of the application under Section 9 of the Code on the

ground that Section 8 contemplates issuance of demand notice by operational creditor while section 5 (20) of the code defines operational creditor to be a person to whom an operational debt is owed and also that Section 3(23) of the Code does not list out sole proprietorship as legally recognisable person and thus as per the Ld. Adjudicating Authority demand notice has been issued by IB Jewels as the operational creditor and the application has been filed by Ms. Indu Jain in her capacity as a sole proprietor of IB Jewels and therefore, is not maintainable.

67. Ld. Counsel for the Appellant has drawn our attention towards the para no. 49 of Macquarie Bank Ltd. (Supra) wherein it has been opined that having regard to section 30 of the Advocates Act and Section 8 and 9 of the Code a notice sent on behalf of the OC by a lawyer would be in order.

68. Thus, if a notice has been sent by a lawyer/attorney or by a legal firm on behalf of the OC the same would be sufficient having regard for initiation of proceeding under Section 9 of the Code.

69. It has also been further clarified by the Hon'ble Supreme Court in para 51 of the same report that a demand notice as mentioned under Section 8 of the code must be read as including an operational creditors authorised agents and lawyer as has been highlighted in form 3 and 5 appended to the Adjudicating Authority rules.

70. In the background of aforesaid law, it is evident that the notice under Section 8 of the Code may very well be given by an advocate/attorney or legal firm on behalf of the OC.

71. Ld. Counsel for the Appellant has relied on para 5 of **Unigold System (Supra)** wherein this Appellate Tribunal has held as under:-

" At the outset we address to the contention raised by the Learned Counsel for the Respondent that the Appellant herein is a propriety concern and therefore does not have a locus standi to initiate CIRP. Section 2(f) of the Code reads as hereunder:—

"2. Application.—*The provisions of this Code shall apply to—*

(a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;

(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;

(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e)"

(Emphasis Supplied)

It is evident from Section 2(f) that proprietorship firms also can initiate CIRP Proceedings."

72. We notice that this Appellate Tribunal in the aforesaid case has quoted with authority section 2(f) of the Code in order to emphasise that the provisions of the Code shall apply also to partnership firm and proprietorship firm and therefore, an application under Section 9 of the code may very well be maintained by the proprietor firm.

73. Thus, the conclusion drawn by the Adjudicating Authority in this regard also does not appear to be substantiated by any law or statutory provision.

74. We have considered all the facts and circumstances of the case and are of the considered view that the supply of goods by the Appellant to the CD was not denied by the CD in reply to the notice given by the Appellant under Section 8 of the Code and the defence of non-supply of goods has been taken afterwards at the stage of filing reply to the petition before the Adjudicating Authority and in our considered opinion the same could not be given much weight as the same appears to be after thought.

75. We are further of the view that the Appellant and the CD were engaged in separate business of supply of Raw uncut Diamond and the CD and another proprietorship of the Indu Jain namely Brij Ratnam were involved in another business of being a franchisee of the CD of the finished goods under a distinct trade name and brand that too under a franchisee agreement and they were transacting business independently and any dispute which has arisen between the CD and Brij Ratnam under the franchisee agreement, in the facts and circumstances of the case, may not be treated to be a dispute between the Appellant and the CD and therefore, the Adjudicating Authority appears to have committed a manifest mistake in rejecting the application moved by the Appellant under Section 9 of the Code.

76. Thus, for the reasons given herein before, the impugned order may not with stand the test of law and the same is hereby set aside. The matter is remanded back to the Adjudicating Authority to pass an order afresh in accordance with the observations made in this judgment. C.P. (IB) No.

3626/MB-VI/2019 is revived on the board of the Adjudicating Authority. The parties shall appear before the Adjudicating Authority on 13th April, 2026.

[Justice Md. Faiz Alam Khan]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi
19th March, 2026
Sheetal