NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 2063 of 2024

(Arising out of the Impugned Order dated 06.09.2024 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench-V in C.P. (IB) No. 693/MB/2021)

IN THE MATTER OF:

M/s Identity Science Company Ltd.
3106, Yokohama Landmark Tower,
2-2-1, Minatomiral, Nishi-Ku,
Yokohama, Kanagawa, Japan-2208131
Through its SPA holder, Mr. Penil Doshi **...Appellant**

Versus

M/s Sonal Plasrub Industries Private Limited
404, Rimsan Estate Premises Co-Op. Society
Chincholi Bunder Link Road,
Malad (W), Mumbai-400064 **...Respondent**

Present:

For Appellant : Mr. S.K. Sagar, Ms. Ragini Vinaik and Ms. Anjali Sharma, Advocates

For Respondent : Mr. Deepak Biswas, Mr. Mayank Rai and Mr. Masoom Syed, Advocates.

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The present appeal filed by the Appellant is against the impugned order dated 06.09.2024 passed by the Hon'ble National Company Law Tribunal Bench-V at Mumbai in C.P. (IB) No. 693/MB/2021, dismissing its petition under Section 9 of the Insolvency and Bankruptcy Code, 2016, to be read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016. The Appellant is aggrieved by the said order passed in its petition vide which it had claimed that an operational debt in the sum of ₹ 1,12,37,646/-; and its Demand Notice dated 21.02.2020 had gone unanswered, leading to the filing of the petition.

Submissions of the Appellant

2. The Appellant is a Japanese Company that had entered into contracts on 18.06.2018 and 26.03.2019 with the Respondent to purchase the chemicals 1-Bromo Butane (NBB) and Hydro Bromic Acid 48% (HBr) from it.

3. By the Sales Contract dated 18.06.2018 the Appellant placed an order for an aggregate quantity of 140,000 kgs of the chemical named 1-Bromo Butane at USD 3.22 per kg to be delivered at Shanghai-China, being the Port of Discharge, during the period between July 2018 to January 2019. The Respondent successfully delivered the 1st lot of 40,000 kgs (out of the aggregate 140,000 kgs to be delivered). However, when the next quantity was to be delivered, a small portion of the chemical, being 1622 kgs leaked from the container and there was accordingly a proportionate shortfall in the supply. For the leakage that occurred from the drum/s in which the leaked quantity of the perilous chemical was stored, the Appellant also had to pay a sum of USD 16,766 to Qingdao Seaport. The receipt evidencing the same, dated 05.03.2019, is on record. It was accordingly the contention of the Appellant before the Ld. Adjudicating Authority that the first date of default on the part of the Respondent was 05.03.2019.

4. It was agreed that the amount paid by the Appellant to the Seaport authorities, would be suitably adjusted by the Respondent in the 3rd order of

supply of the said chemical, with altered terms. Since the Respondent had agreed to adjust said amount of USD 16,766 expended by the Appellant by reducing the sale price of the next consignment; and accordingly, in fact, there was no dispute regarding the same. Therefore, the submission to the contrary on the part of the Respondent was a falsehood and an afterthought.

5. The Appellant contends that there were multiple negotiations that were between the parties with respect to the further orders/consignments of chemical 1-Bromo Butane. It was eventually settled that the amount paid by the Appellant to the Seaport referred to in the previous paragraph would be suitably adjusted by the Respondent in a 3rd order of supply of the said chemical with altered terms. Accordingly, a new purchase order vide email dated 17.06.2019 was issued by the Appellant for 40,000 kgs of 1-Bromo Butane to be delivered by July 2019 at USD 2.802 per kg, instead of USD 3.22 per kg which was the originally contracted rate. However, this supply was never made by the Respondent, and the chemical was never delivered even though 75% of the advance amount being a sum of USD 84,060 had been paid by the Appellant in advance to the Respondent. The delivery of the contracted chemical was due on or before 31.07.2019, but admittedly it did not take place. On account of its non-supply, the next day, i.e., 01.08.2019, was considered as the date of default.

6. As against the Sales Contract dated 26.03.2019 the Appellant placed an order for 200,000 kgs of Hydro Bromic Acid 48% (HBr) which was to be delivered at Qingdao, China, being the Port of Discharge. The first shipment

for a small sample quantity of 40,000 kgs was agreed to be delivered in April 2019. Further, 100% payment in advance against it was made by the Appellant as per the Respondent's alteration of conditions in policy, i.e., 100% advance instead of 75% advance. A sum of Japanese Yen 62,40,000 was paid. This delivery was to take place on or before 30.04.2019, but it never actually happened despite receipt of the advance payment by the Respondent.

7. The Appellant submits that in this manner, despite payment of the contracted advance sums, the delivery of 40,000 kgs of the product 1-Bromo Butane (NBB) and sample quantity of 40,000 kgs of the product Hydro Bromic Acid 48% (HBr) was not made by the Respondent and has not been made even until this date. What is highly significant is that the advance amounts paid by the Appellant have not been returned by the Respondent despite its failure to perform its part of the contracts, i.e., supply the contracted chemicals.

8. Consequently, on 21.02.2020, Demand Notice in Forms 3 & 4 was sent by the Appellant to the Respondent, claiming an amount of ₹ 1,12,37,645.54 as being the sum in default. This notice was delivered on 27.02.2020 via FedEx courier service.

9. However, no reply was received from the Respondent, and therefore the Appellant filed its petition under Section 9 of the Insolvency and Bankruptcy Code, which was numbered as C.P. (IB) No. 693/MB/2021. It is noteworthy that in the reply to petition, the Respondent had admitted receipt of advance

payment for goods that it had failed to supply; and also admitted the fact that it had not returned the advance payment received by it.

10. It is pertinent that the Respondent vide its email dated 12.07.2019 issued to the Appellant, had undertaken to repay the advance payments made. This is apparent from the annexures which were filed along with the reply to petition by the Respondent on 16.04.2022. The relevant excerpts are as follows:-

> "*We will repay you the advance that you have remitted to us for NBB and HBr. I will ask the accounts for the complete advances we are holding from you and within the next week only we will give you timelines for the repayment of your advance payment.*"
> …….
> "*You will have re-payment scheduled within the next week and the payment will be refunded as per the schedule.*"

11. However, no repayment scheduled was ever provided to the Appellant and no money was ever transferred to it by the Respondent.

12. The petition under Section 9 of the IBC was filed within the prescribed period of limitation. Moreover, the Demand Notice was issued on 21.02.2020 by Federal Express courier to two locations, i.e., the registered office of the Respondent, as well as at the director's residence. The same was received by the Respondent on 27.02.2020.

13. Appellant claims that not only the Respondent fail to reply to the Demand Notice issued by the Appellant; rather they were not able to establish pre-existing disputes either vide the reply filed by them before the Adjudicating Authority or even by way of written submissions filed post

conclusion of the arguments. Moreover, they were not even able to establish repayment of outstanding sums. On the contrary, they have perhaps admitted that the advance received by them for the contracted supplies was not repaid. Curiously however, this aspect was not noticed by the Adjudicating Authority. The Reply to the Petition that was filed by the Respondent is otherwise largely based on various technical objections, and in fact they were unable to substantially rebut the contentions on the part of the Appellant. It is also apparent from the balance sheet of the Respondent filed in March, 2022, that it is facing serious liquidity constraints. The Adjudicating Authority however termed the Respondent company as 'solvent' without there being any material on record to corroborate the same. It is also significant that the Respondent has faced and is facing other insolvency petitions before the Adjudicating Authority.

14. The appellant claims that the amount claimed vide the Demand Notice which was issued on 21.02.2020 from the Appellant's office at Japan, was a sum of ₹ 1,12,37,645.54 only. This sum remains outstanding to the Appellant from the Respondent.

15. Appellant further claims that without noticing the admission on the part of the Respondent, and noticing various arguments advanced by the Appellant, the impugned order dated 06.09.2024 came to be passed by the Ld. Adjudicating Authority dismissing the petition filed by the Appellant.

16. The Appellant contends that a pre-existing dispute cannot be deemed

to exist between a seller and a buyer of goods, when the seller does not dispute that advance payment received by it against goods that were not supplied, was never returned by it to the buyer. The Appellant further claims that an obvious rebate offered on future supplies by a seller, to a buyer on account of leakage of contracted chemical and consequently diminished supply thereof, should not have been taken by the Adjudicating Authority as an amount in the nature of 'damages', especially since the short supply was being made good by the seller and no dispute was raised with respect to the same. Appellant further claims that mere an exchange of correspondence and discussion including acrimonious discussion too between a seller and a buyer of goods cannot qualify as pre-existing dispute as it does not engages determination, and that too when the seller does not dispute that the advance payment received by it from the buyer for goods that it failed to supply, was never returned by it to the buyer.

17. Further claims that failure on the part of the Appellant to file an affidavit in terms of Section 9(3)(b) of the Insolvency and Bankruptcy Code was a curable defect.

18. Appellant further contends that amount payable to the Appellant had to be calculated at the exchange rate prevalent on the date of default or at least on the date of Demand Notice, and not at the exchange rate prevalent on the date of actual payment of advance amounts by the Appellant to the Respondent.

Submissions of the Respondent

19. The Appellant Operational Creditor i.e., Identity Science Co. Ltd., is a Company based in Japan. The Appellant had entered into a continuous sales contracts with the Corporate Debtor i.e., the Respondent, between period of June 2018 to March 2019, for supplying of the chemicals products 1-BROMO BUTANE(NBB) AND HYDRO BROMIC ACID 48% (HBr). Accordingly, the parties entered into a continuous sales contract dated June 18, 2018. The Respondent supplied six consignments to the Appellant between October 26, 2017 and December 12, 2018 under CFR (Cost and Freight) terms, wherein marine insurance liability for shipping of goods rests solely with the buyer, i.e., the Appellant. One consignment, shipped under Bill of Lading dated December 19, 2018, sustained damage during transit. Despite being entitled to claim insurance, the Appellant, without disclosing the insurance proceeds, sought to wrongfully recover the alleged loss from the Respondent. The Respondent repeatedly requested for disclosure of the actual loss and insurance claim amount, but the Appellant failed to furnish any such details, and instead sought unilateral deductions from payments due to the Respondent. The Respondent took all necessary measures and precautions including but not limited to shipping the consignment using UN-approved HDPE drums, identical to those used in prior successful shipments. However, due to unavoidable circumstances some drums were damaged. It is pertinent to mention here that the damage admittedly occurred at the consignee's port, and since that falls outside the scope of the Respondent's liability under CFR, which limits the Respondent's liability of arranging for the carriage of the

consignment by sea to the destination port. The Respondent has successfully discharged its aforesaid obligation and hence is not liable for any damage to the consignment after it had reached the destination port. Disputes thus arose prior to issuance of the demand notice, and continued thereafter. The Appellant exerted undue pressure on the Respondent and attempted to make the Respondent absorb the losses, coercing a supply at reduced rates and withholding legitimate payments under the guise of damage adjustment. The Respondent informed the Appellant of various bona fide constraints, including rise in raw material prices and governmental restrictions in the MIDC area affecting production. Despite this, the Appellant issued threats, including to take over the Respondent's factory, and used abusive language.

20. The Respondent claims that it did not receive the statutory demand notice dated February 21, 2021, to be under Section 8 of the Code. [1]Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, that itself lays down the procedure, form, and manner in which a demand notice shall be served by an Operational Creditor to a Corporate

[1] 5. Demand notice by operational creditor. - (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-
(a) a demand notice in Form 3; or
(b) a copy of an invoice attached with a notice in Form 4.
(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,
(a) at the registered office by hand, registered post or speed post with acknowledgement due; or
(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.
(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

Debtor. The aforesaid rule mandates the Operational Creditor to deliver the demand notice either at the registered office of the Corporate Debtor by hand, registered post or speed post with acknowledgement, or by an e-mail to a whole-time director, designated partner or key managerial person. The Appellant, in complete non-compliance of the above provision, particularly has failed to comply with the Rule 5 while delivering the demand notice inasmuch as, the demand notice has neither been sent by registered post, nor by an e-mail. The demand notice that was sent by the Appellant through Fedex (a mode of service which does not fall under the recognised modes of service), the acknowledgement receipt of which reflects the names of S. Sruti Pureza and P. Patade as recipients, who are neither employees, nor in any way associated with the affairs of Respondent. It was submitted by the Appellant, in the pleadings before the Ld. Hon'ble NCLT and the present Appeal, has annexed the status update from FedEx for substantiating the delivery of the demand notice dated February 21, 2020. The Appellant now, for the first time, has filed an undated, handwritten copy of the FedEx receipt, depicting the addresses of the parties, as an afterthought. Such service, even if affected does not amount to a valid service of the demand notice as per mandate of law and hence, the Ld. NCLT was right in dismissing the Application seeking initiation of CIRP against the Respondent. It is a settle principle of law that, whenever any statute prescribes an act to be done in a specific manner, it has to be mandatorily done in that manner. The Respondent places reliance on the judgement passed by the Hon'ble Supreme

Court in ***Sharif-Ud-Din v. Abdul Gani Lone (1980) 1 SCC 403***. (Para 18-19).

21. The Respondent also contends that the alleged operational debt falls below the minimum statutory threshold of ₹1 crore. The insolvency proceedings under Part II of the Code were only applicable on a minimum default amount of ₹ 1 Lakh, which was subsequently enhanced by amendment to ₹ 1 Crore, with effect from March 04, 2020 vide the Notification No. S.O. 1205(E). The Company Petition under judicial scrutiny in Appeal has been admittedly filed in respect of the advance payment made by the Appellant to the Respondent for the delivery of goods. The payment received by the Respondent from the Appellant only amounts to ₹ 97,19,589/-, which fails to meet the minimum threshold of ₹ 1 Crore. It is argued, that the Appellant, in an attempt to increase the purported operational debt to over ₹1 Crore has deliberately attempted to add the disputed amount of US $ 16,766/- to the operational debt, which is admittedly towards the damages during transportation of goods. Even this amount has not been substantiated by any shred of evidence, even after clarification sought by the Respondent vide email dated June 06, 2019. [Annexure R-3 @Pg 55 of the reply]. The consignment in question was admittedly on CFR basis (Cost and Freight) and not on CIF basis (Cost, Insurance and Freight) and therefore the marine insurance for shipping goods was to be borne by the Appellant. Thus, the damages during transportation/shipment of the goods under the CFR based consignment is not the liability of Respondent, and any claim for such damage

is not covered under the definition of Operational Debt under Code. The total amount received by the Respondent from the Appellant on the so called date of default i.e., May 1, 2019 and August 01, 2019 is ₹ 97,19,589/-, which is below the Pecuniary Limit of the Ld. NCLT. The Appellant, deliberately, has taken the conversion rate as prevalent on February 11, 2020 to bring the claim amount within the jurisdiction of the Ld. NCLT. The Appellant's attempt had been to raise the operational debt to over ₹ 1 Crore, is an afterthought and hence the Ld. NCLT was right in dismissing the Petition under Section 9 of the Code filed by the Appellant herein.

22. The Respondent also contends, that the applying a belated exchange rate is to inflate the operational debt. The Appellant in the Petition filed before the Ld. NCLT has claimed defaults on March 05, 2019, August 01, 2019, and May 01, 2019, and has made payments to the Respondent on March 26, 2019 and June 24, 2019. However, the Appellant has deliberately applied the exchange rate of February 11, 2020, which aimed to inflate the amount of the alleged operational debt, in order to reach the minimum threshold of ₹ 1 Crore for sustaining application for initiation of CIRP. The exchange rate for USD, as on the date of payment i.e., June 24, 2019 was 69.6, whereas the exchange rate applied to the operational debt in the demand notice was 71.29. This difference in the later exchange rate was used by the Appellant for attempting to inflate the alleged operational debt amount to over ₹ 1 Crore, which was rightly rejected by the Ld. NCLT.

23. The Appellant has sought to rely upon the judgement passed by the Hon'ble Supreme Court in **DLF Limited v. Konkar Generators and Motors Limited, (2025) 1 SCC 343 (Para 19)**, to submit that the correct date for considering the exchange rate is the date of demand notice i.e., February 21, 2020. However, it is pertinent to mention here that the Hon'ble Supreme Court in the aforesaid judgement has provided for six different dates that are considered as proper for fixing the exchange rates, which are set out hereunder:

> "i. the date when the amount became due and payable;
> ii. the date of commencement of the action;
> iii. the date of the decree;
> iv. the date when the court orders execution to issue;
> v. the date when the decretal amount is paid or realised; and
> vi. in cases where a decree is passed by the court in terms of an arbitral award in foreign currency, the date of award."

24. It is also pertinent to mention that aforesaid dates were considered by the court in a case that was arising out of arbitral proceedings, which is altogether procedurally different in nature and the purpose of the insolvency and bankruptcy proceedings under the Code. Therefore, considering the legislative object of the proceedings under the Code, which is not meant for recovery of debt, the aforesaid judgment cannot be applied to the present case with non-application of judicious mind. Thus, the Ld. NCLT was right in dismissing the Petition under Section 9 of the Code filed by the Appellant herein.

25. The Respondent further contends, that the Insolvency and Bankruptcy Code is not a recovery mechanism. The alleged debt, of which the Appellant has sought the payment vide the alleged demand notice is an operational debt and not a financial debt. The Code is intended for corporate entities facing financial distress seeking its revival through restructuring, and is not meant for debt recovery. The procedure under the Code is significantly different from a civil recovery suit. The Respondent places reliance on the judgement passed in ***Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17*** (Para 12), wherein the Hon'ble Supreme Court observed that the IBC is not akin to a recovery legislation for creditors, but is a legislation beneficial for the Corporate Debtor.

26. The Ld. NCLT has rightly dismissed the Petition while relying upon the judgment passed in ***M/s SS Engineers v. Hindustan Petroleum Corporation Ltd. (HPCL)*** [***Company Appeal (AT) (Ins) No. 138 of 2017***] (Para 18), wherein it was cleared that IBC is not a tool for recovering disputed debts and intention behind IBC law is to resolve insolvency, not to penalize solvent companies.

27. Although the Appellant has claimed the date of default to be on March 05, 2019, August 01, 2019, and May 01, 2019, but it has neither raised this issue to the Respondent before the issuance of the alleged demand notice dated February 21, 2020 nor has terminated the contract/agreement entered between the parties. The Respondent has been carrying on its business as a going concern since 1987, with yearly turnover of more than 26 Crore. It is a

registered MSME and a profit-making company with an employee base of 300, and is paying salaries to the tune of ₹ 3 Crores. The Ld. NCLT has rightly observed that the Respondent is a solvent company and a company, which is solvent and has the ability to pay its debt and should not be dragged into CIRP.

28. With respect to the claim towards damage of goods during transportation/ shipping, there exists several disputes between the Appellant and the Respondent. The said disputes existed between the parties much prior to the alleged issuance of the demand notice under Section 8 of the Code. Therefore, the Petition under Section 9 of the Code has been rightfully dismissed by the Ld. NCLT.

29. Thus the present Appeal is nothing but a gross abuse of the process of law, filed with the intent to exert undue pressure on a solvent and profit-making MSME unit. The Petition under Section 9 of the Insolvency and Bankruptcy Code was rightly dismissed by the Ld. NCLT on sound legal and factual grounds, including the existence of pre-existing disputes, lack of valid service of demand notice as per Rule 5, failure to meet the statutory threshold of ₹ 1 crore, and wrongful application of a belated exchange rate to inflate the alleged operational debt.

30. It is evident that the Appellant has misused the IBC framework, which is not a recovery mechanism, to resolve what is essentially a disputed commercial transaction. The Respondent, being a going concern with a

consistent track record, solvent financials, and substantial employment base, cannot be subjected to CIRP in such circumstances. In the facts and circumstances as set out hereinabove, the Respondent most respectfully prays that the instant Appeal may be dismissed with exemplary costs, as the same is devoid of merit, predicated upon a patently disputed claim, and constitutes a misuse of the remedy available under the Insolvency and Bankruptcy Code, 2016.

31. The alleged delivery of the Demand Notice affected by the Appellant was done via private courier partner and the tracking report bear the name of S. Sruti Pureza and P. Patade, i.e. upon the individuals who are neither known to nor employed by the Respondent's. The Appellant also failed to provide or place on record, any proof of service via registered post or postal acknowledgement.

Analysis and Findings

32. We have heard the learned counsel for the parties and have perused the material placed on record. The issue before us is whether the dismissal of the application under Section 9 of the Insolvency and Bankruptcy Code, 2016, was justified on the grounds of alleged pre-existing dispute, inconsistency in the claim, non-compliance with the procedural requirements, and failure to meet the statutory threshold.

33. The Adjudicating Authority, while dismissing the application, recorded the following findings:

> "Disputes arose over missing quantities, non-deliveries, and damages"

> "The disagreements between the operational creditor and the corporate debtor were already happening before the demand notice was issued. These disputes included missing quantities, non-deliveries, and who was responsible for damages, establishing pre-existing disputes between the parties."
>
> "…Dates of default mentioned by operational creditor are inconsistent with their payment dates…"
>
> "Outstanding summary mentions damages for a sum of USD 16,766 without any supporting documents for the alleged claim by way of damages due to any reason of breach of terms and conditions of PO by the corporate debtor. The operational creditor has not filed any documents regarding the breach committed by the corporate debtor, due to which the alleged damages occurred. Insurance was not received even after mentioning the same in the email exchange that took place between the parties before the issuance of the demand notice by the operational creditor."
>
> "The present petition is not maintainable as the claim amount is below the threshold limit of ₹1 crore and the claim amounts are the damages which the operational creditor has failed to justify. Therefore the petition is liable to be dismissed."
>
> "The petition is dismissed due to the presence of pre-existing disputes, inconsistencies in the claims, lack of necessary documentation, and failure to meet the procedural requirements under the IBC."

Issue of Demand Notice

34. The Respondent has contended that the application is not maintainable because the Demand Notice was not served in accordance with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. According to the Respondent, the Demand Notice was sent through FedEx, which is not one of the recognised modes of service. It is also

contended that the persons who acknowledged the delivery were neither employees nor representatives of the Respondent.

35. We are unable to accept this objection. The material on record shows proof of dispatch, proof of delivery and a tracking number. The Demand Notice was issued to the registered office address of the Respondent and was delivered on 27.02.2020. The Respondent has not disputed the correctness of its registered office address.

36. The fact that the Appellant, being a company based in Japan, used a private courier service cannot by itself defeat the proceedings when effective delivery of the Demand Notice is established. The object of Section 8 and Rule 5 is to ensure that the Corporate Debtor is put to notice of the claim and is given an opportunity to make payment or raise a genuine dispute. The object of notice under law is to make aware of the proposed actions likely to be taken; here, the said purpose was served, as the Respondent did get knowledge of the notice because of the admitted service of notice effected upon them. Since the procedures are only enabling law, which does not affect the substantive proceedings on merits, the mode of service taken in the instant case has served its object. The procedures are handmaid of justice, and has to be rationally construed in the context of its object.

37. The Appellant has also relied upon the judgment of this Hon'ble Appellate Tribunal in **G. Shivramkrishna Vs. Isgec Covema Ltd. & Anr., 2020 SCC OnLine NCLAT 909**, particularly paragraphs 10, 14 and 16, where

service through courier and courier receipts were considered. The Appellant has further relied upon **Piya Puri Vs Mr. Debashish Nanda RP of Venta Realtech Pvt. Ltd. 2022 SCC OnLine NCLAT 4006**, at para 15 thereof, which states: *"......while it is important to maintain the sanctity and credibility of CIRP proceedings, it is equally important to ensure that hyper technicality is not allowed to occupy centre-stage and besiege the proceedings as it would end up frustrating and defeating the very object and purpose of IBC. ......"*

38. The above judgments support the Appellant. Hyper-technical objections cannot be permitted to defeat a proceeding when from the circumstantial evidence it is inferred that the Corporate Debtor has, in substance, received the Demand Notice and had knowledge of the claim. We therefore hold that the Demand Notice was duly served and met the purpose of law of service of notice and the objection based on the mode of service is not sustainable. Moreover, such hyper-technical grounds cannot be the grounds to decide on the admission of a Section 9 petition, the petition should be seen with respect to its merit regarding the operational debt and default and whether any pre-existing dispute exists or not.

Issue of Threshold, Damages and Pre-existing Dispute

39. The next issue is whether the operational debt satisfies the statutory threshold of ₹1 crore and whether the alleged dispute regarding USD 16,766 constitutes a genuine pre-existing dispute. The Respondent contends that the amount received by it was only ₹ 97,19,589/- and that the amount relating to damages cannot be included in the operational debt.

40. It is not necessary for us to decide the claim for USD 16,766 as a crystallised operational debt for the purpose of determining the threshold. The Adjudicating Authority did not examine the outstanding amount in this manner. We will delve into this issue that even after excluding the disputed amount, is it still the case that the operational debt exceeds ₹1 crore?

41. The relevant exchange rate also requires consideration because the payments were made in Japanese Yen and US Dollars. The Appellant relies upon the judgment of the Hon'ble Supreme Court in **Forasol versus ONGC, 1984 (SUPP) (SC) 263, delivered on 25th October 1983.** The relevant extract at para 70 is as follows:

> "In such a suit the plaintiff, who has not received the amount due to him in a foreign currency and therefore desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him"

42. The Respondent has relied upon **DLF Limited and Another v. Koncar Generators and Motors Limited (2025) 3 SCC 343** and placed reliance on para 19. The relevant extract is:

> “19. For the remaining amount that still requires conversion to Indian rupee, for which no exchange rate was provided in the contract or the arbitral award, the court in Forasol case considered six possible dates as the proper date for fixing the rate of exchange: i. The date when the amount became due and payable; ii. The date of the commencement of the action; iii. The date of the decree; iv. The date when the court orders execution to issue; v. The date when the decretal amount is paid or realized; and vi. In cases where a decree is passed by the court in terms of an arbitral award in foreign currency, the date of the award”

43. The above judgment in DLF Limited (supra) arose in the context of an arbitral award and the Arbitration Act. The present proceedings arise under the Insolvency and Bankruptcy Code. The principle in Forasol even though in the context of Arbitration proceeding, however, provides guidance regarding the appropriate date for conversion where the amount is claimed in foreign currency. In the facts of the present case, the exchange rate on the date of the Demand Notice is relevant for determining the amount claimed in Indian currency.

44. On the exchange rate applicable on the date of the Demand Notice, the amount claimed by the Appellant exceeds ₹1 crore even after excluding the amount of USD 16,766 relating to the alleged damages. The appellant has claimed the outstanding dues as follows:

Summary of Outstanding dues claimed Annexure II

Sr. No.	Date of remittance of money	Product	Amount of Rupees paid for which products were not received						
			Quantity	Unit Price	Total amount due in foreign currency	Exchange rate as on the day of remittance of money	Total amount due in Rupees as on the day of remittance of money	Exchange rate as on the day of demand application i.e 11/02/2020	Total amount due in rupees as on the day of demand application i.e 11/02/2020
1	03/04/2019	(HBr)	40,000 kg	¥ 156	¥ 6,240,000	0.614	3,831,360.00	0.649	4,049,760.00
2	24/06/2019	1- BROMO BUTANE (NBB)	40,000 kg	2.802	$ 84,060	69.6	5,850,576.00	71.29	5,992,637.40
3	05/03/2019	Product Damages of NBB			$ 16,766	70.77	1,186,529.82	71.29	1,195,248.14
						TOTAL	10,868,465.82	TOTAL	11,237,645.54

Even if the damages claim of about USD 16,766 is excluded, still the threshold of ₹1 crore as required in a Section 9 petition is met as the total amount due as on 11.2.2022 (for which the calculations have been given by the appellant) and also on the date of the demand application, which is 20.2.2022[2] exceeds ₹ 1 crore. The statutory threshold is therefore satisfied, even after deducting disputed amount.

Admissions by the Respondent

45. There is a significant admission by the Respondent which cannot be overlooked. The Respondent admitted that it had received the advance amounts and had agreed to return them. In its email dated 12.07.2019, the Respondent stated:

> "We will repay you the advance that you have remitted to us for NBB and HBr. I will ask the accounts for the complete advances we are holding from you and within the next week only we will give you timelines for the repayment of your advance payment. We will repay you the advance that

[2] **Exchange rate on 20th February 2020**:
Japanese Yen (JPY) and the Indian Rupee (INR) **was approx.** 1 JPY = 0.6395 INR
US Dollar (USD) and the Indian Rupee (INR) **was approx.** 1 USD = 72.11 INR

you have remitted to us for NBB and HBr. I will ask the accounts for the complete advances we are holding from you and within the next week only we will give you timelines for the repayment of your advance payment."

46. There is also no denial of receipt of USD 84,060 and Japanese Yen 62,40,000. The material on record shows that the Respondent did not supply the contracted goods against these advances and did not return the advance amounts.

47. We are conscious that there was correspondence between the parties regarding damage to one consignment and the amount of USD 16,766 has been claimed as damages by the Appellant. The Respondent has relied upon the Cost and freight (CFR) terms and has contended that the Appellant was responsible for insurance. Material placed on record indicates that the appellant was trying to negotiate lesser rates for future supplies to take care of the damages.

48. Such correspondence regarding the disputed damages does not, in the facts of the present case, constitute a genuine pre-existing dispute in relation to the principal amount of the advances which the Respondent admittedly agreed to repay. The dispute regarding damages is separate from the admitted liability to return the advance received for goods which were never supplied.

49. The Respondent raised the alleged pre-existing dispute in its reply to the Section 9 application. The Respondent had earlier stated in writing that it would repay the advance and had undertaken to provide a repayment

schedule. No repayment schedule was provided and no payment was made. In these circumstances, the alleged dispute regarding damages cannot be treated as a genuine pre-existing dispute sufficient to defeat the Section 9 application.

50. The Supreme Court has repeatedly held that the existence of a dispute must be genuine and not a mere assertion raised without substance to avoid the consequences of insolvency proceedings. In the present case, the material placed on record does not disclose a genuine dispute regarding the admitted advance amounts. The dispute relied upon by the Respondent is, therefore, in substance, a moonshine or spurious dispute and appears to be an afterthought.

Whether the Section 9 Application is Maintainable

51. The Respondent has also relied upon **M/s. S.S. Engineers vs. Hindustan Petroleum Corporation Limited (HPCL) [Company Appeal (AT) (Ins.) No. 138 of 2017]** and submitted that the IBC is not a tool for recovery of disputed debts and that the object of the Code is resolution of insolvency. That principle is not in dispute. However, the present case is not one where the operational debt is genuinely disputed. The Respondent received substantial advance amounts, failed to supply the contracted goods, agreed to repay the advances, and thereafter failed to make payment.

52. The fact that the Respondent claims to be a solvent and profit-making company also cannot, by itself, be a ground to reject a Section 9 application when the statutory requirements are otherwise satisfied. The question under

Section 9 is whether an operational debt exceeding the prescribed threshold is due and whether a default has occurred, subject to the existence of a genuine pre-existing dispute.

Conclusions

53. On a consideration of the entire material, we are satisfied that the Appellant has established the existence of an operational debt and default. The Demand Notice was duly served. The operational debt exceeds the statutory threshold even after excluding the disputed amount of USD 16,766. The Respondent has not established a genuine pre-existing dispute in respect of the admitted advance amounts. The requirements for initiation of proceedings under Section 9 of the Code are therefore satisfied.

Order

54. For the reasons stated above, the appeal is allowed. The impugned order dated 06.09.2024 passed by the National Company Law Tribunal, Mumbai Bench-V in C.P. (IB) No. 693/MB/2021 is set aside.

55. The Adjudicating Authority is directed to pass the necessary order for initiation of the Corporate Insolvency Resolution Process against the Respondent under Section 9 of the Insolvency and Bankruptcy Code, 2016, within fifteen days from the date on which a copy of this order is placed before it.

56. The Respondent shall, however, remain at liberty to deposit/pay the amount due to the Appellant within the aforesaid period and before the order under Section 9 is issued. In the event the entire amount payable is

deposited/paid before issuance of the order initiating insolvency proceedings, the Adjudicating Authority shall take the same into consideration and the order under Section 9 need not be issued.

57. The appeal is accordingly disposed of in the above terms. There shall be no order as to costs.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Arun Baroka]
Member (Technical)

[Indevar Pandey]
Member (Technical)

New Delhi.
September 17, 2026.

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