

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insol.) No. 79 of 2017

(arising out of Order dated 01.06.2017 passed by the National Company Law Tribunal, Chennai Bench, Chennai in CP/506 (IB)/CB/2017 (IND/1616/(IB)/CB/2017))

IN THE MATTER OF:

M/s. Bhash Software Labs Pvt. Ltd. ...Appellant

Vs.

M/s. Mobme Wireless Solutions Ltd. ... Respondent

Present: For Appellant:- Shri Shishira Amarnath, Shri Shoumendu Mukherji and Mr. Vishwanath Venkatesh, Advocates.

For Respondent:- Ms. Haripriya Padmanabhan and Ms. Pooja Dhar, Advocates

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Respondent-M/s. Mobme Wireless Solutions Ltd-"Operational Creditor" preferred an application under section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code") for initiation of Corporate Insolvency Resolution Process against Appellant-M/s. Bhash Software Labs Pvt. Ltd.-"Corporate Debtor". The Adjudicating Authority, (National Company Law Tribunal), Chennai Bench, Chennai, by impugned order dated 1st June, 2017 admitted the application, initiated Insolvency Resolution Process and passed prohibitory orders in terms of I & B Code.

2. The Appellant has challenged the impugned order mainly on following grounds: -

(i) The impugned order has been passed in violation of Rules of natural justice without notice to the appellant.

(ii) No notice under section 8 of I & B Code or under Rule 5(3) of the I & B (Application to Adjudicating Authority) Rules, 2016 has been served on the appellant.

(iii) There is an existence of dispute and therefore application under section 9 was not maintainable.

3. On notice Respondent- "Operational Creditor" has appeared. Ld. Counsel for the Respondent submitted that the appellant changed its address but had not informed the same to the "Operational Creditor". It was further contended that the e-mail notice was served on appellant on 7th March, 2017. A copy of notice under Section 8 of the I & B Code, 2016 for unpaid debts was attached. However, Ld. Counsel for the Respondent accepts that the Adjudicating Authority had not issued any notice to the Appellant before admission of the application under section 9 of the I & B Code.

4. From impugned order dated 5th June, 2017, it is clear that the notice sent by Respondent was not served on the appellant and was returned with the endorsement "left without information". Though, the same was noticed by the Adjudicating Authority, instead of directing the respondents to issue fresh notice on correct and present address, the Adjudicating Authority observed "However, the petition was sent to proper address".

5. From the record, we find that the Registered Office of the “Corporate Debtor” is at #267-A, Kilipauck Garden Road, Chennai-600 010. However, the notice was sent to the Appellant on different address at ‘Dharmaraja Koil Street, Kilpauk Garden, Chennai-600 010’.

6. It is not in dispute that the address of the appellant was changed and recorded in the register with the Registrar of Companies. It was not the duty of the appellant to inform the “Operational Creditor” the change of the address for the purpose of filing a case/application under section 9 of the I & B Code. If the notice under section 8 issued by respondent-“Operational Creditor” was returned due to incorrect address, it was the duty of the “Operational Creditor” to provide the correct and present address of the ‘Corporate Debtor’ before preferring any application under section 9 of the I & B Code.

7. In any case, it is accepted that no notice was issued by the Adjudicating Authority before admission of the application.

8. In **“M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr – Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017”**, this Appellate Tribunal held:

“53. In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the financial creditor and to find out whether the application is complete and or there is any other defect

required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the Corporate debtor before passing its order.”

9. In view of the such decision, we hold that the impugned order dated 1st June, 2017 cannot be upheld having passed in violation of Rules of natural justice.

10. There is an existing dispute with regard to the debt amount as is apparent from the record.

11. The respondent-“Operational Creditor” issued a notice dated 25th August, 2016 under section 433(e) of the Companies Act, 1956 to the Appellant-“Corporate Debtor” for payment of debt amount. Notice was issued through Mr. Robi Isaac, Ninan and Mathem, Advocates. Pursuant to the said notice, the “Corporate Debtor” sent reply through Advocate Mr. Vishwanath Venkatesh on 23rd September, 2016, raising the dispute about the service rendered by respondent-“Operational Creditor” and pointed out the poor quality of the service. The relevant portion of the reply dated 23rd September, 2016 on behalf of the appellant reads as follows:

“2. In pursuance of the Service, Our Client was in need of persons with the infrastructure and technical proficiency to send such bulk SMSes to the public (“Service”). Your Client is one such entity that does so as its primary occupation and approached Our Client with an offer its expertise to Our Client. Thereafter, Our Client entered into

a Service Level Agreed dated 3 January 2015 (**"Agreement"**) to engage Your Client for the above. As per the Agreement, Our Client would provide the content of the SMSes and the phone numbers to which such SMS would be sent and response to any subsequent interest that the SMS may evoke and Your Client would perform the Service. As per Annexure III of the Agreement, Our Client was to pay Your Client INR.085/- plus taxes per SMS sent by Your Client in pursuance of the Agreement.

3. The Agreement was performed by both parties to satisfaction up till November 2015. In November 2015, Your Client requested Our Client to opt for a higher category of the Service offered by Your Client, promising Our Client that this would provide Our Client with access to better network resources that would enable Our Client to send more SMSes at superior speeds compared to the category of Service currently by Our Client (**"New Service"**). If Our Client was to avail the New Services, the rate for each SMS would be higher than that stipulated in the Agreement. Your Client assured Our Client that the New Service would be optimal for Our Client's requirements and would greatly benefit Our Client's business. Agreeable to the above, Our Client opted for the higher category of services offered by Your Client.

4. However, despite availing the New Service, there was no change in the speed or quality from that of the Service itself. Our Client brought this to Your Client's attention on numerous occasions and requested that they address the same considering that Your Client had commenced invoicing Our Client as per the rates for the New Service. Despite further, it was brought to Your Client's notice that the New Service's failure to live up to Your Client's promises are "Priority Level Problems" as provided for in Annexure IV of the Agreement.

5. The above situation persisted for a few months upon availing the New Service. Thereafter, in February 2016, rather than address the problems highlighted above, Your Client abruptly terminated the Agreement, leaving Our Client in the lurch and scrambling for alternatives to continue the Service. Your Client made a demand for payment of the outstanding invoices for the period commencing November 2015 and ending February 2016 for a total amount of INR. 75,76,380/- ("**Invoice Amount**"). Our Client once again brought to Your Client's attention the poor quality of the New Service was a breach of the terms of the Agreement. However, Our Client, agreed to commence payments towards the undisputed part of the Invoice Amount while the parties renegotiated the invoices to factor in the failures of the New Service. Accordingly,

Our Client paid INR. 29,00,000/- till date towards the Invoice Amount.

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8. Further, we bring to your attention that, the above circumstances is a bona fide dispute between the parties over the terms of the Agreement. There is no question of invoking Sec.433(e) of the Companies Act, 1956 against a solvent entity such as Our Client, and the same would be frivolous, extortionist and a misuse of judicial process. Our Client shall not be cowed into submission by threats of malicious prosecution made to preclude Your Client's obligations under the Agreement and the dispute resolution mechanism provided therein.

9. Therefore, if Your Client elects to pursue such a legally unsound course of action, it would be at Your Client's risk, cost and embarrassment. Further, in such an event, Our Client shall be constrained to initiate legal action against Your Client, both civil and criminal, against Your Client to protect itself against any adverse consequences to Our Client's reputation and business due to Your Client's malicious petition."

12. In **"Kirusa Software Private Ltd. v. Mobilox Innovations Private Ltd.- Company Appeal (AT) (Insol.) No. 6 of 2017"** this Appellate Tribunal by judgment dated 24th May, 2017 while interpreting the meaning of "dispute" and "existence of dispute, if any", observed:

“31. The dispute under I&B Code, 2016 must relate to specified nature in clause (a), (b) or (c) i.e. existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the ‘operational creditor’ has issued notice under Code of Civil Procedure Code, 1908 prior to initiation of the suit against the operational creditor which is disputed by ‘corporate debtor. Similarly notice under Section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operation creditor for the purpose of Section 9 of I&B Code, 2016 may have raised the dispute with the State Government concerning the subject matter i.e. existence of amount of debt and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector undertaking). There may be cases where one of the party has moved before the High Court under Section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of foods, if the ‘corporate debtor’ has raised a dispute, and brought to the

notice of the 'operational creditor' to take appropriate step, prior to receipt of notice under sub-section (1) of Section 8 of the 'I & B Code', one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of Sub-section (6) of Section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a 'dispute' raised by the corporate debtor. The scope of existence of 'dispute', if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to Section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of Section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or malafide dispute just to stall the insolvency resolution process."

13. The case of appellant is covered by decision in **"Kirusa Software Private Ltd. v. Mobilox Innovations Private Ltd."** There being "existence of dispute", we hold that the petition under section 9 preferred by respondent- "Operational Creditor" was not maintainable.

14. For the reasons aforesaid, we set aside the impugned order dated 1st June, 2017 passed by the Ld. Adjudicating Authority, Chennai Bench in Company Petition No. 506(IB)/CB/2017.

15. In effect, order (s), if any, passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional' or declaring moratorium, freezing of account, if any, and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

16. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the Respondents will pay the fees of the Interim Resolution Professional, for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
29th August, 2017

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