

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
NEW DELHI
Company Appeal (AT) (Insolvency) No. 56 of 2017

IN THE MATTER OF:

P.K. Ores Private Limited **Appellant**
Vs.
Tractors India Private Limited **Respondent**

Present:

For Appellant: - Mr Amit Kumar Muhuri, Advocate.

For Respondent: Mr Rishav Banerjee and Ms Ishita Chakrabarti, Advocates.

ORDER

1.6.2017 – This appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I&B Code) have been preferred by Appellant - P.K. Ores Private Limited (Corporate Debtor) against order dated 3rd April 2017 passed by Ld. Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in Company Petition No. 172 of 2017 whereby and where under the application preferred by Respondent – Tractors India Private Limited – (Operational Creditor) under Section 9 of the I&B Code for initiating the Corporate Resolution Process against the Appellant - Corporate Debtor has been admitted and the Operational Creditor has been asked to propose the name of Interim Resolution Professional along with the consent letter for taking immediate possession of the assets of Corporate Debtor, including the bank account (s).

2. Ld. Counsel appearing for the Appellant while assailed the order, submitted that the impugned order dated 3rd April, 2017 has been passed by the Adjudicating Authority in violation of rules of natural justice, without any notice and without giving any opportunity to Corporate Debtor. It is further contended that there is an ‘existence of dispute’ which the Appellant- Corporate Debtor could have brought to the notice of the Adjudicating Authority, if given an opportunity.

3. On the other hand according to Ld. Counsel for Respondent-Operational Creditor the Appellant- Corporate Debtor was served with a notice under Section 8 of the I&B Code and the copy of the

petition under Section 9 was also forwarded to the Appellant. It is further contended that the Appellant failed to reply to the notice given by the Operational Creditor under Section 8 of I&B Code.

4. We have heard Ld. Counsels for the parties and perused the record.

5. From the Order Sheets enclosed with the appeal, we find that the Adjudicating Authority initially taken up the matter on 17th March 2017 and thereafter on 30th March 2017 but the application was incomplete as the Respondent- Operational Creditor had not filed any affidavit regarding pendency of any litigation with the Corporate Debtor. The Operational Creditor had also not filed Board's resolution for initiating proceeding against the Corporate Debtor. Therefore, time was allowed for the Operational Creditor. From the aforesaid order sheets it is clear that only Ld. Counsels appearing for the Operational Creditor were present and no notice was given to the Appellant –Corporate Debtor.

6. It appears that the matter was subsequently taken up on 3rd April 2017. On the said date taking into consideration the fact that after service of notice by the Operational Creditor under Section 8 of the I&B Code, the petition had been filed and the Operational Creditor had alleged that the Corporate Debtor has failed to pay Rs. 9,76,095/- (Rupees Nine Lakh seventy-six thousand ninety-five only) in spite of notice dated 17th January 2017 and the petition was otherwise complete, the application was admitted. From the said order it is clear only Ld. Counsels for the Respondent/Operational Creditor were present and no notice was given to the Appellate – Corporate Debtor.

7. It appears that on 10th April 2017 when the matter was taken up the Ld. Counsel for the Respondent submitted that the Operational Creditor will propose the name of Insolvency Resolution Professional along with the consent letter by 12th April, 2017. On the said date for the first time, Ld. Counsel for Corporate Debtor appeared. However, there is nothing on record to suggest that the Ld. Adjudicating Authority issued any notice to the Appellant-Corporate Debtor. The Respondent - Operational Creditor has also not brought on record any order to suggest that the Ld. Adjudicating Authority issued any notice to Corporate Debtor before admitting the application.

8. Ld. Counsel appearing on behalf of Appellant submits that the Appellant requested the National Company Law Tribunal, Kolkata Bench to allow the Appellant to inspect the records. On inspection of records, the Appellant came to know that no notice was issued by Ld. Adjudicating Authority to the Appellant – Corporate Debtor prior to admission of the case.

9. As per Section 424 of the Companies Act, 2013 the Adjudicating Authority is supposed to follow the rules of natural justice before passing any order. In “*Innoventive Industries Limited vs. ICICI Bank*” Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017 this Appellate Tribunal by judgment dated 15th May, 2017, also held that a notice required to be given to the Corporate Debtor before admitting any application for initiation of corporate resolution process under Section 7 and 9 of the I&B Code.

10. In the present case as the Adjudicating Authority has not given any notice to the Corporate Debtor, prior to admitting the application under Section 9 of the I&B Code, the impugned order is fit to be set aside having been passed in violation of rules of natural justice.

11. Ld. Counsel appearing on behalf of the Appellant – Corporate Debtor brought to our notice, letters communicated between the Corporate Debtor and the Operational Creditor, which are not in dispute.

12. From the record we find that in reply to the letter dated 4th November 2016, written by Operational Creditor, the Appellant-Corporate Debtor by reply dated 16th November, 2016 brought the notice of the Operational Creditor that one of the ‘Caterpillar Engine’ (CAT 6.6) which was repaired and installed by Operational Creditor was not functioning properly from the date of installation. It was further informed that since last 8 months several times without rectifying the defects of existing engine it was not possible for the Corporate Debtor to lift the Engine which was lying idle in the work shop of Operational Creditor. It was also alleged that the Operational Creditor failed to supply the spare parts as per agreement due to negligence of the Operational Creditor for that the Appellant - Corporate Debtor had to incur loss to the tune of Rs. 2 crores. The relevant portion of the letter dated 16th November, 2016 reads as follows: -

“This has reference to your letter dated November 4 2016 and the content has been noted by us. In this regard, we feel it necessary to bring to your notice the following facts for taking necessary action at your end to avoid legal complications. That one of the Caterpillar Engine (CAT 6.6) which was repaired and installed is not functioning

property from the date of installation. This was brought to your notice several times and the same was verified by your Engineers on this spot and assured for its rectification without any fruitful results. You were also informed for taking necessary measures to overcome our huge revenue loss.

In this regard, we informed you since last 8 months several times that without rectifying the existing Engine it is not possible on our part to lift the captioned Engine, which is lying repaired at your workshop.

Needless to mention here that you have also failed to supply the spares, which were committed by you and due to your negligence we have incurred a loss in the tune of Rs.2 crores and you shall be held responsible for the same.

In nutshell, to maintain in long lasting business relation with your organization we request your good self for taking necessary action for a smooth function of the existing CAT6.6 Engine to proceed further in the matter or else, we will be forced to take shelter under the law and social media to solve the issue which is obviously not desirable.

Looking forward to your views for an amicable solution of the same.”

13. In reply to the said letter, the Respondent - Operational Creditor by letter dated 15th December 2016 while shown surprise and shock, intimated the Corporate Debtor that the allegations are baseless. With regard to faulty, non-functional machine it was intimated that the Engine was earlier repaired. The Operational Creditor threatened to initiate legal proceeding, including civil and criminal proceedings against the Corporate Debtor, as apparent from the letter aforesaid, relevant portion of which (letter dated 15th December, 2016) reads as under: -

“At the outset, we are surprised and shocked to having received your reply letter dated 16th November, 2016 and the contents therein.

We would like to state in this regard that such a baseless allegation with respect to some faulty, non-functional machine which was earlier repaired by us on receipt of our legal notice for legitimate outstanding dues is purely after thought, sham and baseless, only to avoid paying our due debts.

You will appreciate that Tractors India is a trusted brand in the industry for last 7 decades and such baseless and false allegation written with malicious intent is only to damage the reputation of our organization and only delay the legitimate dues of ours.

In this regard, we would like to further state that such baseless allegations which leave us with no option but to instigate legal proceedings against your organization, both civil and criminal, including but not limited to proceedings for offences committed

under Section 193, 195, 196, 199, 200 and Section 420 of the Code of Criminal Procedure, which you are requested to note hereby.

We are hereby calling upon you as a final reminder for forthwith payment of our dues to the tune of Rs.9,76,095/-

In case we don't hear from you within 2 weeks from the date of receipt of this letter, we initiate legal proceedings, both civil and criminal and will also dispose off the said machine in parts or as a whole as scrap lying in unclaimed and abandoned state at your cost and consequence."

14. In "*Kirusa Software Private Ltd. Vs Mobilox Innovations Private Ltd*" Company Appeal (AT) (Insolvency) No. 6 of 2017, the Appellate Tribunal by judgment dated 24th May 2017 decided the question as to what does a '*dispute*' and '*existence of dispute*' means for the purpose of determination of petition under Section 9 of the I&B Code. In the said case, the Appellate Tribunal held: -

"25. The true meaning of sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' clearly brings out the intent of the Code, namely the Corporate Debtor must raise a dispute with sufficient particulars. And in case a dispute is being raised by simply showing a record of dispute in a pending arbitration or suit, the dispute must also be relatable to the three conditions provided under sub-section (6) of Section 5 (a)-(c) only. The words 'and record of the pendency of the suit or arbitration proceedings' under sub-section (2)(a) of 16 Section 8 also make the intent of the Legislature clear that disputes in a pending suit or arbitration proceeding are such disputes which satisfy the test of subsection (6) of Section 5 of the 'I & B Code' and that such disputes are within the ambit of the expression, 'dispute, if any'. The record of suit or arbitration proceeding is required to demonstrate the same, being pending prior to the notice of demand under sub-section 8 of the 'I & B Code'.

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' are confined to a dispute in a pending suit and arbitration in relation to the three classes under subsection (6) of Section 5 of the 'I & B Code', it would violate the definition of operational debt under sub-section (21) of Section 3 of the 'I & B Code' and would become inconsistent thereto, and would bar Operational Creditor from invoking Sections 8 and 9 of the Code.

27. Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc. as long there are disputes as to existence of debt or default etc., it would satisfy subsection (2) of Section 8 of the 'I & B Code'.

28. Therefore, as per sub-section (2) of the 'I & B Code', there are two ways in which a demand of an Operational Creditor can be disputed: 17 i. By bringing to the notice of an operational creditor, 'existence of a dispute'. In this case, the notice of dispute will bring to the notice of the creditor, an 'existence of a dispute' under the Code. This would mean disputes as to existence of debt or default etc. or ii. By simply bringing to the notice of an operational creditor, record of the pendency of a suit or arbitral proceedings in relation to a dispute. In this case, the dispute in the suit/arbitral proceeding should relate to matters (a)-(c) in sub-section (6) of Section 5 and in this case, showing a record of pendency of a suit or arbitral proceedings on a dispute is enough and to intent of the Legislature is clear, i.e. once the dispute (on matters relating to 3 classes in sub-section (6) of Section 5 of the 'I & B Code') is pending adjudication, that in itself would bring it within the ambit of sub-section (6) of Section 5 of the 'I & B Code'.

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 debit 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 19 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 goods, 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.”

15. In the present case we find that the Corporate Debtor raised dispute about the quality of goods and brought the same to the notice of the Operational Creditor. The Corporate Debtor also claimed damage for inferior quality of goods and its loss much prior to receipt of notice under sub-section (1) of Section 8 of the I&B Code. In this background and in view of decision in “*Kirusa Software Private Ltd. Vs Mobilox Innovations Private Ltd*”, we hold that a dispute is existing about the quality of goods which is one of the clause of sub-section (6) of Section 5 of I&B Code.

16. In this appeal as admittedly the Adjudicating Authority has passed the impugned order dated 3rd April 2017 without notice to the Appellant, in violation of rules of natural justice and there exists a dispute between the parties, we hold that the as impugned order dated 3rd April 2017 passed by Adjudicating Authority is not only in violation of rules of natural justice, the application under Section 9 was also not maintainable. For the reasons aforesaid, we set aside impugned order dated 3rd April 2017.

17. In effect the order appointing an Interim Resolution Professional, order declaring moratorium, freezing of account and all other order passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the Interim Resolution Professional, including the advertisement published in the newspaper calling for applications are declared illegal. The Adjudicating Authority is directed to close the proceeding. The appellant company is released from the rigour of law. The appellant

company is allowed to function independently through its Board of Directors from immediate effect.

18. The Adjudicating Authority will fix the fee of Interim Resolution Professional and the Financial Creditor will pay the fees to the Interim Resolution Professional, for the period he has worked.

19. The appeal is allowed with aforesaid observation and direction. However, there shall be no order as to cost.

Sd/-
(Justice S.J. Mukhopadhaya)
Chairperson

Sd/-
(Mr. Balvinder Singh)
Member (Technical)

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