

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 30 of 2018**

[Arising out of Order dated 29<sup>th</sup> November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai in CP/611/(IB)/CB/2017]

**IN THE MATTER OF:**

**Mr. V. V. Nagarajan**

Director,  
M/s Sri Nagananthana Mills Ltd.,  
No.16, Sathya Sai Nagar,  
Opp. To Sai Baba Temple,  
Madurai – 625 003,  
Tamil Nadu.

**...Appellant**

**Vs**

**1. M/s Vishnusudha Textiles**

Sole Proprietor Smt. T. Sudha,  
Rep. by Its Power of Attorney Mr. V. Rajagopalan,  
No.32, K. R. P.A.D. Road,  
Pallipalayam,  
Erode – 638 006,  
Tamil Nadu.

**2. M/s Sri Nagananthana Mills Ltd.,  
Through Insolvency Resolution Professional**

No.16, Sathya Sai Nagar,  
Opp. To Sai Baba Temple,  
Madurai – 625 003,  
Tamil Nadu

**....Respondents**

**Present:**

**For Appellant:** Mr. G. Sivabalamurugan and Mr. A. Vasantha Kumar,  
Advocates.

**For Respondents:** Mr. A. K. Mysamy, Ms. Shalini Kaul and Mr. Chaman  
Lal Choudhary, Advocates for Respondent.

Mr. Partha Sil and Mr. Tavish S. Prasad, Advocates for  
Intervener (UCO Bank).

## **J U D G M E N T**

### **BANSI LAL BHAT, J.**

This appeal has been preferred by Appellant – Mr. V. V. Nagarajan, Director of M/s Sri Nagananthana Mills Ltd. (Corporate Debtor) against impugned order dated 29<sup>th</sup> November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, in CP/611/(IB)/CB/2017.

2. By the impugned order, the Adjudicating Authority admitted the application for triggering the Corporate Insolvency Resolution Process filed by the Respondent – M/s Vishnusudha Textiles (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code'), slapped Moratorium prohibiting certain activities in terms of provisions of Section 14 of the I&B Code and appointed the Interim Resolution Professional to take charge of the Corporate Debtor's management.

3. The issue raised in this appeal is that the Adjudicating Authority failed to notice the existence of a pre-existing dispute inter-se the parties warranting rejection of application under Section 9 of the I&B Code.

4. The factual matrix may briefly be adverted to as follows:-

- (i) The Respondent/Operational Creditor claimed to have supplied Polyester Staple Fibre products to the Appellant/Corporate Debtor between 15.02.2016 to 07.05.2016, in respect whereof she claimed an amount of Rs.1,18,86,658/- from the Appellant/Corporate Debtor in terms of demand notice dated 28<sup>th</sup> August, 2017.
- (ii) Appellant/Corporate Debtor contested the claim on the ground that the amount owed to the Respondent/ Operational Creditor was settled. Appellant/Corporate Debtor further maintained that the Respondent/Operational Creditor had willfully suppressed material facts in regard to the bus permits, promissory notes alongwith blank cheques for a value of Rs.1.50/- crore held by it as security. It was further stated in the counter that the Appellant/Corporate Debtor had paid an amount of Rs.1,93,60,000/- towards outstanding amount.
- (iii) The Adjudicating Authority overruled the objections raised by the Appellant/Corporate Debtor in his counter observing that the Appellant/ Corporate Debtor failed to produce certificate from his bank to show the details of payments made to the Respondent/Operational Creditor and passed the impugned order assailed through the medium of instant appeal.

5. The stand taken by the Appellant is that in terms of agreement dated 28<sup>th</sup> June, 2012, Respondent had agreed to supply Polyester Staple Fibre to Appellant and Appellant had agreed for name transfer of the bus permit route from Madurai to Kamuthi in favour of the Respondent. However, the Respondent had agreed to retransfer the said route permit in favour of the Appellant once the liability was settled. Appellant also claimed to have issued six cheques of the value of Rs.25/- Lakh each together with promissory note for Rs.1.50/- Crore alongwith interest @15% per annum from the date of demand till the date of payment to the Respondent. According to the Appellant, the Stage Carriage Permit in respect of Vehicle No. TN 58 H 7921 was transferred in the name of Respondent in terms of the aforestated agreement which was subsequently renewed in the name of Respondent by Regional Transport Authority, Madurai South for a period of 5 years w.e.f. 26.01.2015. Subsequently, Respondent falsely claimed to have delivered the original registration certificate of the aforesaid vehicle to Appellant's staff. Respondent and one Mr. Thiyagarajan filed a joint application dated 18.01.2016 before Regional Transport Authority for transfer of the bus permit. It happened on 18.01.2016. Respondent stated that she had no objection to such transfer. According to the Appellant this was a Modus Operandi adopted by Respondent to get over the agreement dated 22.06.2012 though the bus permit had been given to Respondent only as the security. Appellant claimed to have paid the amount of Rs.50/- lakhs to the Respondent against receipt dated 21.03.2016. The Appellant further claimed that in response to the

demand notice dated 02.08.2017, he had sent a reply notice dated 19.08.2017 to the Respondent disputing the amount claimed by the Respondent. Respondent is said to have sent 2<sup>nd</sup> demand notice dated 28.08.2017 reducing the claim amount from Rs.95,21,232 to 94,61,148 alongwith interest @15% per annum. Appellant sent a short reply dated 07.09.2017 to the Respondent intimating the Respondent that he is collecting documents from Accounts Department and Bank and the detailed reply would follow. Appellant claims to have issued legal notice dated 27.09.2017 to Respondent highlighting transfer of Stage Carriage Permit and other issues. It is admitted that the Respondent had by then filed application under Section 9 of the I&B Code before the Adjudicating Authority (National Company Law Tribunal), Chennai on 16.09.2017.

6. In the counter affidavit filed by the Respondent, it is stated that the Respondent had issued demand notice dated 02.09.2016 claiming the sum of Rs.98,10,525/- from the Appellant in respect of the invoices raised in regard to supply of Polyester Staple Fibre. **The Appellant replied the notice claiming temporary setback in his business and sought time to repay the outstanding amount after verifying the accounts.** Respondent further claimed to have issued another notice dated 02.08.2017 calling upon the Appellant to pay in respect of another set of invoices raised for outstanding amounts. To this the Appellant replied that he had already paid the amount. Respondent had issued another notice dated 28.08.2017 calling upon the Appellant to make payment in respect of another set of invoices raised

between 15.02.2016 to 07.05.2016 for the Polyester Staple Fibre supplied by Respondent. **This demand notice was replied by the Appellant on 07.09.2017 wherein he sought time to respond after collecting relevant documents. However, no reply was sent by the Appellant within 10 days in terms of Section 8 of the I&B Code prompting the Respondent/Operational Creditor to file petition under Section 9 of I&B Code before Adjudicating Authority (National Company Law Tribunal) Chennai on 16.09.2017 to trigger Corporate Insolvency Resolution Process.**

7. Learned counsel for the Appellant submits that the Respondent adopted unique *modus operandi* to cheat the Appellant and grab his valuable bus route permit on the basis of forged letters. It is contended that the value of the bus route permit has not been adjusted by the Respondent and material facts have been willfully suppressed. Learned counsel for the Appellant submits that the Respondent has triggered Corporate Insolvency Resolution Process to compel the Appellant to cough up the money at the same time retaining the bus permit given to her as security for the transaction. Per contra it is argued on behalf of Respondent that only documents of the buses were endorsed by Appellant as a security in favour of Respondent. The buses were being operated by the Appellant. Respondent could not have sold the said buses as the same were only hypothecated in her favour. It is submitted that the bus plying on Madurai to Kamuthi route was sold by one Mr. Veeraswamy – Father of the Appellant to one Mr. Thiyagarajan and the Respondent had only made

the necessary endorsements in the documents of the bus. It is submitted that the sale consideration of the bus was received by Mr. Veeraswamy and only an amount of Rs.50 lakhs was paid to Respondent for which credit was given and Rs.1,18,86,658/- remained outstanding.

8. Heard learned counsel for the parties' and perused the record. The requisite conditions necessary to trigger the Corporate Insolvency Resolution Process under Section 9 of the I&B Code by an Operational Creditor are:

- (i) occurrence of a default;
- (ii) delivery of a demand notice of an unpaid operational debt;
- (iii) non-receipt of payment by the Operational Creditor from the Corporate Debtor within the period of 10 days of receipt of the demand notice or receipt of reply from the Corporate Debtor not indicating existence of a pre-existing dispute or repayment of the unpaid operational debt.

If the aforesaid conditions exist, the Operational Creditor may file an application under Section 9(2) of the I&B Code in the prescribed manner alongwith the requisite fee. A copy of the invoice demanding payment or demand notice delivered by the Operational Creditor to the Corporate Debtor has to be furnished with the application. This is clearly borne out by conjoint reading of Section 8 and 9 (1) of the I&B Code. The Hon'ble Apex Court while dealing with this aspect in **“Macquarie Bank Limited Vs Shilpi Cable Technologies Ltd.” in Civil Appeals No. 15135, 15481 and 15447 of**

**2017 decided on 15<sup>th</sup> December, 2017** held that the requirement of an application filed under Section 9(2) of the I&B Code being accompanied by an invoice/ demand notice is a mandatory condition precedent to the filing of the application.

9. While dealing with triggering of Corporate Insolvency Resolution Process at the instance of an Operational Creditor in **“Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited”, Civil Appeal No.9405 of 2017 decided on 21.09.2017**, the Hon’ble Apex Court held:-

*“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)(2)(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 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 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.”*

10. Adverting to the facts of the instant case, be it seen that the respondent/Operational Creditor claims to have issued three demand notices to the Appellant in respect of the amounts claimed to be due and payable for invoices raised by the Respondent in respect of Polyester Staple Fibre supplied by her. It is significant to note that to the first notice dated 02.09.2016 emanating from the Respondent **reply was furnished by the Appellant claiming “temporary setback” in its business and seeking time to repay the outstanding amount after verification of accounts.** In response to second notice dated 02.08.2017 from Respondent, the Appellant replied that the invoices for which demand notice had been sent had already been paid to the Respondent as the same were discounted invoices against letter of credit opened by the Appellant in favour of the Respondent. The Respondent claims to have issued demand notice dated 28.08.2017 in respect of invoices raised between 15.02.2016 to 07.05.2016 for the Polyester Staple Fibre supplied to Appellant. This was replied to by the Appellant stating that he was in the process of collecting relevant documents including the bank statement.

However, the Appellant does not appear to have either repaid the Operational Debt claimed by the Respondent or brought to his notice the existence of a dispute. In the given circumstances Respondent was within his rights to file application before the Adjudicating Authority for initiating Corporate Insolvency Resolution Process.

11. As regards Appellant's contention that the Respondent did not disclose the factum of buses being provided as security, be it seen that the transfer of buses was effected prior to the demand notice issued by the Respondent to the Appellant as has been claimed by the Respondent. Therefore, it cannot be said that this fact had been willfully suppressed and non-disclosure thereof justified rejection of the application.

12. In so far as the "Debt" and "Default" is concerned, it emerges from record that the parties continued to engage in business even after confirmation of outstanding balance by the Appellant on 31.12.2015. 27 invoices have been raised by the Respondent/ Operational Creditor in respect of supplies of Polyester Staple Fibre made to Appellant. Details of LC's from Catholic Syrian Bank relied upon by the Respondent/ Operational Creditor reflects outstanding balance of Rs.1,18,86,658/- in respect whereof the Appellant committed default. The Appellant has failed to demonstrate that he had within the period of 10 days of the receipt of the demand notice brought to the notice of the Respondent/ Operational Creditor existence of dispute or repaid the outstanding operational debt. His plea that the Respondent had suppressed from the Adjudicating Authority the factum of

two buses of Appellant being provided as security does not materially affect the Respondent's claim qua the debt in respect whereof default was committed by the Appellant. Admittedly the buses given as security merely stood hypothecated with the Respondent. Such securities can, by no stretch of imagination, be counted towards payment of outstanding debt. If the Respondent has manipulated transfer of the vehicles on the basis of endorsements made in regard to hypothecation of these buses, it is for the Appellant to seek appropriate legal remedy. However, triggering of Corporate Insolvency Resolution Professional cannot be declined once there is default of a debt.

13. For the foregoing reasons we are of the view that the impugned order admitting respondent's application under Section 9 of I&B Code does not suffer from any legal infirmity. The appeal being devoid of merit is accordingly dismissed. There shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**NEW DELHI**

**10<sup>th</sup> May, 2018**

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