NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 720 of 2018

[Arising out of Order dated 5th October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru in C.P. (IB) No. 35/BB/2018**]**

IN THE MATTER OF:

Pedersen Consultants India Pvt. Ltd. ...Appellant

Vs.

Nitesh Estates Limited ...Respondent

Present: For Appellant: - Mr. Abhishek Dutta, Ms. Akanksha Jain and Ms. Syali Petiwale, Advocates.

For Respondent: - Ms. Haripriya Padmanabhan, Mr. Abir Phukan and Ms. Vaishali Goyal, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- 'Pedersen Consultants India Pvt. Ltd.'- ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against 'M/s. Nitesh Estates Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru, discussing the claim and counter claim of the parties, rejected the

application by impugned order dated 5th October, 2018 with following observations:

> *"7. The above narration of facts discloses that there are various disputed question of fact with regard to the alleged debt and default raised in the petition. The contention of the respondent that the defense raised by the respondent is moonshine cannot be accepted. On the other hand, the Petitioner Company itself could not prove that the debt and default in question is beyond doubt. The Tribunal, cannot enter into enquiry with regard to the disputed questions, in a case filed under the IBC, 2016, which is summary in nature, and the issues to be primarily decided basing on the principles of natural justice. As stated supra, there are several clauses in the agreement in question, and the respondent, on the contrary made claim against the petitioner. Ultimately, the parties in the first instance have to reconcile their own statement of accounts before approaching the Tribunal to invoke provisions of IBC, 2016. The Petitioner, instead of finalising the*

disputed amounts, has filed the instant Company Petition on untenable grounds. The question of excess payment, and set-off as claimed by the respondent has to be examined in an appropriate proceeding in a case filed in accordance with the law, and the issue cannot be adjudicated in the instant Company Petition. Therefore, we are of considered opinion that there is a dispute with regard to debt in question, and thus it is not a fit case to admit."

2. The Respondent- 'M/s. Nitesh Estates Limited'- ('Corporate Debtor') has taken plea that it has informed the Appellant by e-mail dated 27th February, 2017 that there are serious issues with respect to the engagement with the Appellant, but such e-mail does not relate to any pre-existing dispute. Whatever the stand taken by the 'Corporate Debtor' before the Adjudicating Authority, are afterthought which is after receipt of Demand Notice under Section 8(1) of the 'I&B Code' issued on 14th July, 2017.

3. The Adjudicating Authority has not rejected Section 9 application on the ground of pre-existing dispute, but rejected it on the ground that it, cannot enter into enquiry with regard to the disputed claim.

4. The aforesaid finding has been given by the Adjudicating Authority on the basis of statement made by the 'Corporate Debtor' as apparent from the impugned order, relevant of which is quoted below:

> *"5. The Learned Counsels for the Petitioner, while pointing out various averments made in the Company Petition and the documents filed in support of the petition, has also filed written arguments dated 18.09.2018, by inter alia, contending as follows:*
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> *a. The details of invoices raised, the corresponding amount paid by the respondent and the outstanding amounts remaining have been tabulated below:*

S. No.	Date of issuance of Invoice	Invoice No.	Service Code	Amount			Page No. in the petition
				Raised	Paid	Outstanding	
1.	08.04.2016	1021/16	2000478281 (VP- Retail and Commercial)	2,74,800	2,40,000	34,800	86
2.	27.06.2016	1038/16		4,14,000	0	4,14,000	87
3.	01.12.2016	1104/16		6,90,000	0	6,90,000	88
4.	14.04.2016	1022/16	2000178281 (Chief Operating Officer- COO)	3,43,000	3,00,000	43,500	83
5.	June 27, 2016	1037/16		5,17,500	0	5,17,500	84
6.	17.08.2016	1056/16	2000278281 (Head of Project Finance- HOPF)	3,22,000	0	3,22,000	85
	TOTAL			**25,61,300**	**5,40,000**	**20,21,800**	

That from the above, it is amply clear that an amount of Rs.20,21,800/-still remains outstanding from the Respondent. Based on the request made by the respondent, the Petitioner put a replacement for the position held by Mr. Rajit Mehta. The Petitioner was offered a settlement of Rs.6,00,000/- by the Respondent. However, that was not accepted.

b. It is contended that the Petitioner cannot adjust in his books to adjust the amount paid in relation to the employment of Mr. Rajit Mehta. There is no provision for set-off under the IBC, 2016. The respondent issued reply with a delay of 12 days. The additional documents filed by the respondent should not be taken into consideration with a defense raised by the respondent is moonshine defense.

6. The Learned Counsel for the Respondent has disputed the contention of the Petitioner and the debt in question is a disputed and has pointed the averments stated in additional Statement of

Objections as briefly stated above. The case is covered by the Apex Court judgement rendered in the Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited case. Therefore, this C.P.(IB) No.35/BB/2018 is liable to be dismissed."

5. In an application under Section 9, it is always open to the 'Corporate Debtor' to point out existence of dispute, if any. Such existence of dispute should be that of a period prior to the issuance of the demand notice under Section 8(1) of the 'I&B Code'.

6. In ***"Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353"***, the Hon'ble Supreme Court held 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. The Hon'ble Supreme Court further observed:

"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 66 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))"

7. In the said case, the Hon'ble Supreme Court held as to what are the relevant facts to be examined by the Adjudicating Authority while examining an application under Section 9:

"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?*
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> *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."*

8. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist prior to issuance of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of 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', the

application under Section 9 cannot be rejected and is required to be admitted.

9. In ***"Innoventive Industries Ltd. v. ICICI Bank and Anr.– (2018) 1 SCC 407"***, the Hon'ble Supreme Court while explaining the provisions of Section 9 observed and held:

> *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered*

by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy

(Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, ***that the corporate debtor is entitled to point out***

that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect *within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.*

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can,

within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing- i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

10. From the aforesaid findings, it is clear that the claim means a right to payment even if it is disputed. Therefore, merely because the 'Corporate Debtor' has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute.

11. In the present case, as we have observed that there is no record to suggest pre-existence of dispute with regard to the services rendered by the Appellant, we hold that the application under Section 9 should not have been rejected by the Adjudicating Authority on the ground that the dispute about the quantum of payment cannot be determined.

12. The Respondent disputed that the alleged debt is not the amount as shown in the Form. However, on mere dispute of amount, the application under Section 9 cannot be rejected, as in terms of Section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The Hon'ble

Supreme Court in ***"Innoventive Industries Ltd. v. ICICI Bank and Anr."*** (Supra) noticed the definition of 'claim' and held that even if the right of payment is disputed, the Code gets triggered the moment default is of rupees one lakh or more (Section 4). In the circumstances, in absence of any pre-existing dispute, it was not open for the Adjudicating Authority to reject the application under Section 9.

13. For the reasons aforesaid, we set aside the impugned order dated 5th October, 2018 and remit the case to the Adjudicating Authority to admit the application under Section 9 after notice to the Respondent, so that the Respondent may get an opportunity to settle the matter prior to the admission of the application.

The appeal is allowed with aforesaid observations and directions. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

NEW DELHI
24th July, 2019
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