NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency)No. 493 of 2019

IN THE MATTER OF:

Mr. Bhaaskaran Rangarajan .....Appellant

Vs.

M/s. Info Drive Software Ltd. ......Respondent

Present :

For Appellant: **Mr. Jayant Mehta, Ms. Sanjana Saddy, Mr. Sanyat Lodha, Advocates**

For Respondents: **None**

O R D E R

26.08.2019 - This appeal has been preferred by 'Mr. Bhaaskaran Rangarajan' ('Operational Creditor') against order dated 14th March, 2019 passed by the Adjudicating Authority ('National Company Law Tribunal') Divisional Bench, Chennai rejecting the application u/s 9 of the Insolvency & Bankruptcy Code, 2016 ('I&B' Code, for short).

2. The claim of the Appellant is that the Appellant was engaged for consultancy services and Respondent defaulted in paying Rs. 50 lacs against the service provided by the Appellant ('Operational Creditor') to 'M/s. Info Drive Software Ltd.' ('Corporate Debtor'). The Adjudicating Authority noticed that the Appellant raised invoices on 19th August, 2018 for Rs. 50 lacs

against the 'Corporate Debtor' observed that the Appellant has not mentioned TDS deduction therein thereafter the Adjudicating Authority had some observation as mentioned in para 8 of the impugned order dated 14th March, 2019 as recorded below.

> *"8. On perusal of these documents and references made by this Creditor counsel, it is clear that the documents this counsel referring to are not compatible to each other, offer letter dated 26.11.2014, MoU in the year 2018, no sooner raised invoices, section 8 notice, then section 9 petition before this Bench. As to the letter dated 26.11.2014, even if it is assumed as a Letter of Engagement, since it is the service to the provided to the Department of Corporation, Government of Tamil Nadu, it could not be blindly assumed as Government would remain silent for more than three years until this Operational*

Creditor engaged somebody to provide such services basing on MoU dated 22.01.2018 alleged to have been entered into with the Debtor. And for there being no definite agreement between these parties, we are unable to believe that this case is made out u/s 9 of the Code. This kind of circuitous approach for proving a case is not contemplated under the Code."

From the aforesaid position, we find that merely on the basis of presumption and in the absence of definite agreement, the application u/s 9 was not entertained.

The Hon'ble Supreme Court in "Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407]" while dealing with section 7 and 9 of the 'I&B' Code observed as follows:-

"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.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by

some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

From the aforesaid decision, it is clear that it is not necessary that there should be an agreement between the parties and there being invoices, a person can claim on the basis of such invoices as Form- 5 which is an application, u/s 9 empowers the claimant 'Operational Creditor' to file any evidence of debt and default.

In the Form – 5 filed by the Appellant in part-IV clause 6 Appellants relied on 8 documents to show how operational debt became due and in clause (8) the Appellant has given details of the records – 11 enclosures to show existence of debt and record shows default. The Adjudicating Authority has failed to consider the same though even when 'Corporate Debtor' has claim when notice u/s 8(1) was issued.

Inspite of service of notice, the 'Corporate Debtor' has not appeared nor disputed the aforesaid facts and records, in Appeal.

Learned counsel for the Appellant has brought to our notice that the 'Corporate Debtor' on the other hand accepted the amount and sought for some time to pay the amount and failed to pay the amount.

In the facts and circumstances, it was not open to the Adjudicating Authority to reject the application preferred by the Appellant u/s 9 of the 'I&B' Code. We, accordingly set aside the impugned order and remit the case to the Adjudicating Authority ('National Company Law Tribunal'), Divisional Bench, Chennai and direct it to admit the application u/s 9 preferred by the Appellant after notice to the Respondent (so as to enable the Respondent to pay the amount before the order of admission).

The appeal is allowed with aforesaid observation. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

ss/gc