

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 371 of 2018

IN THE MATTER OF:

Anil Kumar Saha

...Appellant

Vs

Rakesh Mehra & Anr.

....Respondents

Present:

For Appellant: Mr. Sudipto Sarkar, Sr. Advocate with Mr. Abhijeet Sinha, Mr. Arijit Mazumdar, Mr. Shambo Nandy, Mr. Akshay Chandna and Mr. Saikat Sarkar, Advocates.

For Respondents: Mr. Shreyas Mehrotra, Advocate.

ORDER

13.07.2018: This appeal has been preferred by Mr. Anil Kumar Saha alias Aniel Kuumar Saha, Promoter of 'M/s. Saha Infratech Private Limited' (Corporate Debtor) against order dated 9th July, 2018 passed by Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Petition No. IB-540(ND)/2018. By the impugned order, the Adjudicating Authority admitted the application preferred by the 1st Respondent under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code'), ordered moratorium and appointed Interim Resolution Professional with certain directions.

2. Learned senior counsel for the Appellant submits that the Respondent Mr. Rakesh Mehra do not come within the meaning of 'Operational Creditor' as defined under Section 9(5)(i), 20 and 21 of the I&B Code. It is submitted that the Respondent was engaged as Retainer pursuant to agreement dated 28.12.2015, whereby the Corporate Debtor undertook to pay retainer fee of Rs.2.5 lakh per month to him. He submitted that Retainer could not be treated to be an 'Operational Creditor', as he had not supplied any goods nor provided any services to the 'Corporate Debtor'. The Respondent is a Broker, who used to

bring clients for sale of flat for which retainer fee used to be paid. From his retainer fee no service tax was charged nor paid by the 1st Respondent.

3. It is further submitted that though the 1st Respondent has not given any specific service to the Corporate Debtor but being Retainer, the Promoter of Corporate Debtor i.e. Appellant has agreed to pay the dues to the 1st Respondent, arrears of which comes to Rs.12,50,000/- for which an account payee cheque in name of 'Mr. Rakesh Mehra' dated 12th July, 2018 bearing cheque no.097083 issued on Dena Bank, Noida Sector-18, Noida has been prepared and handed over to Mr. Shreyas Mehrotra, learned counsel for the 1st Respondent for onward transmission to the 1st Respondent.

4. Learned counsel for appearing on behalf of the 1st Respondent accepts that the service tax was never deducted and he used to bring customers for purchase of flats. He further states that 1st Respondent is satisfied with the payment made through cheque. It is informed that he has been instructed by the 1st Respondent not to dispute the facts, he having received the amount.

5. Taking into consideration the fact that the Adjudicating Authority has not decided the main issue as to whether 1st Respondent comes within the meaning of 'Operational Creditor' or not and as a prima facie case has been made by the Appellant that the relationship pursuant to the agreement dated 28.12.2015 cannot be treated to be an agreement for the purpose of giving services by the 1st Respondent to the Corporate Debtor, we have no other option but to set aside the impugned order dated 9th July, 2018, which is accordingly set aside.

6. However, if the cheque is bounced, it will be open to the 1st Respondent to move before this Appellate Tribunal may bring the development to the notice of

this Appellate Tribunal to decide whether it will initiate a contempt proceeding or not.

7. In effect, order(s) passed by Ld. Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account, and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by 1st Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

8. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', and the 'Corporate Debtor' will pay the fees of the Interim Resolution Professional, and other cost incurred by him. The appeal is allowed with aforesaid observation and direction. No Cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansilal Bhat]
Member (Judicial)

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