

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 167 of 2018

(Arising out of Order dated 17th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-II in C.P. No. IB-55(ND)/2018)

IN THE MATTER OF:

Anil Nanda

...Appellant

Vs

Hari Kishan Sharma & Ors.

...Respondents

Present:

For Appellant: Mr. Arjun Syal and Mr. Shreyan Das, Advocates.

For Respondents: Mr. Apoorv Gupta, Mr. Amit Prasad and Mr. Kunal Seth, Advocates for R-3.

Mr. Ashwini Mata, Senior Advocate assisted by Mr. Yugank Goel, Advocates for Phoenix ARC. Mr. Achal Gupta and Mr. Suresh Dobhal, Advocates.

Mr. Sunil Kumar, Advocate.

Mr. Sudhir Sud, one of the employees of the 'Corporate Debtor'

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- 'Mr. Anil Nanda', Shareholder of 'M/s. AKME Projects Limited'- ('Corporate Debtor') has challenged the order dated 17th April, 2018 passed by the Adjudicating Authority (National Company Law

Tribunal), Court-II, New Delhi, whereby and whereunder, the application preferred by the Respondent- 'Mr. Hari Kishan Sharma'- ('Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) has been admitted, order of 'Moratorium' has been passed and 'Interim Resolution Professional' has been appointed.

2. Learned counsel appearing on behalf of the Appellant submitted that there is an existence of dispute. Apart from that the 'Operational Creditor' wrongly claimed interest @ 18% per annum from the due date i.e. 1st June, 2015, which has not been appreciated by the Adjudicating Authority.

3. Learned counsel for the Appellant also submitted that the application under Section 9 filed by the Respondents for an amount of default of Rs. 12,22,146/- (Rupees Twelve Lakhs Twenty-Two Thousand One Hundred Forty-Six Only) along with 18% interest is nor based on record. According to the Appellant, there was no admission made by the 'Corporate Debtor' with regards to the differential amount of Rs. 6,11,937/- (Rupees Six Lakhs Eleven Thousand Nine Hundred Thirty-Seven Only) and the interest as sought for.

4. We have heard the parties and perused the records.

5. The 'Corporate Debtor' had taken following plea before the Adjudicating Authority:

- a) That the Company underwent a serious financial crisis because of fraud played by ex-employees i.e. Mr. Arun Anand, Mr. Sonal

Anand etc. it resulted in filing an FIR. It was pleaded that the 'Operational Creditor' was employed at the behest of Mr. Sonal Anand. It was also pleaded that "it is believed that several employees such as the Applicant, one Mr. Sudhir Sood and Mr. Jitendra Pandey have been hand in glove with the aforesaid accused ex-employees".

- b) The notice issued under Section 8 of the 'I&B Code' does not bear the signature or sign on receipt by any person or employee at the registered office of the Respondent Company.
- c) The full and final settlement is fabricated and false and there is bonafide dispute over the final settlement between the parties.

6. There is nothing on the record to suggest that there is a pre-existence (bonafide) dispute raised by the 'Corporate Debtor'.

7. In ***"Innoventive Industries Limited Vs. ICICI Bank and Another- (2018) 1 SCC 407"***, the Hon'ble Supreme Court explaining Sections 7 & 9 of the 'I&B Code' observed and held 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.”

8. From the aforesaid decision, it is clear that even part of the dues, once becomes payable comes within the meaning of ‘debt’ and if not paid it will amount to default.

9. In the present case, the ‘Corporate Debtor’ has not disputed the existence of ‘debt’, nor there is anything on record of the pendency of a suit

or arbitration proceedings, or any pre-existing dispute raised prior to issuance of demand notice under Section 8(1). Therefore, no relief can be granted on the plea of so-called existence of dispute.

10. In absence of any merit, the appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

29th November, 2018

AR