

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 752 of 2019**

**IN THE MATTER OF:**

**Smt. Andal Bonumalla  
W/o. Venugopal Swami Bonumalla  
R/o. H. No. 6-3-354/8/6, Flat No. 101,  
Sri Devi Apartment,  
Hindi Nagara Colongy, Dwarakapuri,  
Punjagutta, Hyderabad- 500 034.**

**...Appellant**

**Versus**

**1. Tomato Trading LLP.  
#1102, Parle Vinod Villa,  
Near Sai Baba Temple, Shraddanand Road,  
Ville Parle (East), Mumbai – 400 057.**

**2. Smart Login Solutions Pvt. Ltd.  
Flat No. 301, Jyothi Blooms,  
Union Bank of India Colony,  
Road No. 301, Banjara Hills, Hyderabad-  
500 034.**

**Represented by the Interim Resolution Professional  
Mr. Rudraju Satyanarayana Raju,  
D 402, My Home Abhra, Opposite Inorbit Mall,  
Plot No. 3, Knowledge City, Gachibowli,  
Hyderabad, Telangana- 500 032.  
[Srrudraraju50@gmail.com](mailto:Srrudraraju50@gmail.com)  
Mobile No. 8309886298**

**...Respondents**

**Present:**

**For Appellant : Mr. Bommineni Vivekananda, Advocate**

**For Respondent : Ms. Piyush Bhardwaj, Advocate for R-1.  
Mr. Ankur Khandelwal, Advocate.**

**JUDGEMENT**

**(20<sup>th</sup> August, 2020)**

**Jarat Kumar Jain. J**

The Appellant, Smt. Andal Bonumalla Promotor and Ex-executive Director of the Corporate Debtor (Respondent No. 2) filed this Appeal

under Section 61 of Insolvency and Bankruptcy Code (In Short I&B Code) against the order dated 03.06.2019 passed by Learned Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench, Hyderabad, in CP(IB)-334/09/HDB/2019. Whereby admitted the Application, filed by the Respondent No. 1 under Section 9 of I&B Code and initiated Corporate Insolvency Resolution Process (In Short 'CIRP') against the Respondent No. 2.

2. Brief facts of this case are that Respondent NO. 1 (referred as Operational Creditor) is in business of Export and Import of Commodities. The Operational Creditor has entered into Sale and Purchase Agreement dated 04.01.2017 with the Respondent No. 2 (referred as Corporate Debtor). As per the Agreement the Corporate Debtor has agreed to deliver 130 Metric Tons of Sugar to the Operational Creditor. Pursuant to the agreement, the Operational Creditor paid advance amount of Rs. 3,58,020/- on 07.01.2017 and balance amount of Rs. 31,32,160/- on 08.02.2017. For the same, the Corporate Debtor has issued proforma invoice dated 08.02.2017. The Corporate Debtor has failed to supply the Sugar. The Operational Creditor requested to the Corporate Debtor for refund of the said amount. The Corporate Debtor has refunded Rs.9 Lakhs only. The Operational Creditor has issued a demand notice on 07.03.2018 under Section 8 of I&B Code for the balance amount, even after service of notice, the Corporate Debtor failed to refund the money received in advance for the supply of Sugar. Therefore, the Respondent No. 1 (Operational Creditor) filed an Application under Section 9 of I&B Code, for initiation of 'CIRP' against the Corporate Debtor.

3. The Corporate Debtor resisted the Application mainly on the ground that there is no contractual relationship between them as Operational Creditor and Corporate Debtor. The Advance amount for supply of goods (Sugar) is not come within the definition of Operational Debt under Section 5(21) of I&B Code.

4. Learned Adjudicating Authority after considering the submissions of the parties, by the impugned order admitted the Application and directed for initiation of 'CIRP'. Being aggrieved with this order, the Promoter and Ex-executive director of Corporate Debtor has filed this Appeal.

5. Learned Counsel for the Appellant submits that Section 8(1) of I&B Code provided that on occurrence of a default the Operational Creditor deliver a demand notice to the Corporate Debtor in Form No. 3 or in Form No. 4 as prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Service of such demand notice is precondition for filing an Application under Section 9 of I&B Code. The demand notice is not in a prescribed format, hence, the Application under Section 9 of I&B Code could not have been admitted. For this purpose, he placed reliance on the Judgment of this Appellate Tribunal in the case of Company Appeal (AT) (Ins) No. 31/2017 Era Infra Engineering Ltd. Vs. Prideco Commercial Projects Pvt. Ltd. decided on 03.05.2017, Company Appeal (AT) (Ins) No. 117/2017 M/s Sabari Inn Pvt. Ltd. Vs. M/s Ramesh Associates Pvt. Ltd. decided on 17.11.2017, Company Appeal (AT) (Ins) No. 155 of 2017 MSP Paper Mills Pvt. Ltd. Vs. Arjun Chemicals Pvt. Ltd. decided on 06.12.2017 and Company Appeal (AT) (Ins) No. 1354/2019

Neeraj Jain Vs. Cloudwalker Streaming Technologies Pvt. Ltd. & Anr. decided on 24.02.2020.

6. Learned Counsel for the Appellant further submits that Operational Debt is defined in Section 5(21) of the I&B Code. The advance amount for supply of goods does not come within the definition of Operational Debt. Section 5(20) of I&B Code defines the term Operational Creditor as 'a person to whom an Operational Debt is owed.' The Respondent No. 1 does not owe the Operational Debt, therefore, it cannot be termed as Operational Creditor. The Insolvency and Bankruptcy Code is code which has been enacted for finding a resolution and to aid in the revival of Company. The Code is not intended to be recovery mechanism and thus, the provisions of the I&B Code, cannot be used for the purpose of recovery of dues. Learned Counsel for the Appellant placed reliance on the Judgment of this Appellate Tribunal in the Case of Company Appeal (AT) (Ins) No. 394/2018 Daya Engineering Workers Vs. UIC Udyoge Ltd. decided on 26.07.2018, wherein it was held that advance given for supply of goods or services is not an Operational Debt. The same view is taken by this Appellate Tribunal in the case of Company Appeal (AT) (Ins) No. 545 & 546 of 2018 in Kavita Anil Taneja Vs. ISMT Ltd. decided on 24.01.2019. Company Appeal (AT) (Ins) No. 223 of 2019 Roma Infrastructure India Pvt. Ltd. Vs. A.S. Iron & Steel Pvt. Ltd. decided on 22.04.2019, Company Appeal (AT) (Ins) No.1454 of 2019 Mironda Trade & Commerce Pvt. Ltd. Vs. Sai Laxmi Tulasi Ferros Pvt. Ltd. decided on 16.12.2019.

7. On the other hand, Learned Counsel for the Respondent No. 1 (Operational Creditor) submits that the notice under Section 8(1) of I&B Code is not prescribed in format, this ground has not been taken before the Learned Adjudicating Authority and even in Memo of Appeal, therefore, at the stage of argument the Corporate Debtor should not be permitted to raise such an objection. It is incorrect to say that the Corporate Debtor has not served the notice in the prescribed format for the same, he drew our attention towards the Annexure (D) of demand notice dated 07.03.2018.

8. Learned Counsel for the Respondent No. 1 (Operational Creditor) submits that Ld. Adjudicating Authority after due consideration held that the amount due is arising out of agreement of Sale and Goods, the Operational Creditor is having every right of approaching the Adjudicating Authority under the I&B Code. Since, the Corporate Debtor failed to make the payment and the receipt of the same is not denied by the Corporate Debtor and the email correspondence produced by the Operational Creditor revolves upon the issue of supplying Sugar and refund of amount. The Corporate Debtor has committed default in repayment of the amount. Therefore, there is no force in the argument of Learned Counsel for the Appellant (Corporate Debtor). Hence, the Appeal deserves to be dismissed.

9. After hearing argument of Learned Counsel for the parties, we have gone through the record.

10. We have to consider two issues in this Appeal.

(a) Whether the Adjudicating Authority can admit the Application under Section 9 of I&B Code when the demand notice has not been served as prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016?

(b) Whether an advance amount for supply of goods can be considered as an Operational Debt under Section 5(20) of the I&B Code?

11. So far as, first issue is concerned we have gone through the demand notice dated 07.03.2018. There are four Annexures with the demand notice (A) a copy of Agreement dated 04.01.2017, (B) a copy of invoice dated 08.02.2017, (C) a copy of Bank Statement, (D) a copy of particulars of claim. The Corporate Debtor has not filed the copy of Annexures to the demand notice and according to the Operational Creditor annexure (D) copy of particulars of claim is a notice in prescribed format. Therefore, we are unable to appreciate the objection raised by the Appellant (Corporate Debtor). This objection is not raised before Adjudicating Authority. Therefore, there is no finding of Adjudicating Authority on this issue.

12. Now, we have considered the arguments in regard to second issue, this is admitted fact that the Corporate Debtor has agreed to deliver 130 Metric Tons of Sugar to the Operational Creditor, for the same, the Operational Creditor paid an advance amount total Rs. 34,90,180/- to Corporate Debtor and Corporate Debtor has issued Proforma Invoice dated 08.02.2017. The Corporate Debtor refunded Rs. 9 Lakhs only, balance principal amount of Rs. 25,90,180/- and interest Rs. 4,92,634/- total as on 07.03.2018 a sum of Rs. 30,82,814/- is due from the

Corporate Debtor. We have considered whether this amount is come within the definition of Operational Debt under Section 5 (21) of I&B Code. The Respondent No. 1 has not supplied any goods or provided any services to Respondent No. 2, but paid an advance amount to Respondent No. 2 for supplying Sugar. However, the Respondent No. 2 failed to supply the Sugar to Respondent No. 1. Thus, the advance amount in the hand of Respondent No. 2 cannot termed as Operational Debt. Consequently, the Respondent No. 1 does not come within the definition under Section 5(20) of I&B Code, the Operational Creditor.

13. This Appellate Tribunal in the case of Kavita Anil Taneja (Supra) held that :-

“Section 5(20) defines ‘Operational Creditor’ which is r/w Section 5(21) which defines ‘Operational Debt’. In the present case, it is clear from the work order that the amount of Rs. 2,60,000,00/- was advanced by the Respondent ‘M/s. ISMT Ltd. to the ‘Corporate Debtor’ for supply of 10,000 Metric Tons of Indonesian Thermal Coal. From the aforesaid fact, we find that the Respondent had not supplied any goods nor provided any services and, therefore, it does not come within the meaning of Operational Creditor”

We have taken the same view in the case of Roma Infrastructure India Pvt. Ltd. (Supra) and held that Roma Infrastructure India Pvt. Ltd. has not supplied the goods nor provided any services to the Respondent A.S. Iron and Steel (I) Pvt. Ltd. It advanced payment to Respondent (Operational Creditor) for supply of goods cannot be treated to be an Operational Debt and the Application under Section 9 of I&B Code, was not maintainable.

14. As aforesaid, we are of the considered view that the advance

amount paid by the Respondent No. 1 to Respondent No. 2 for supply of Sugar is not an Operational Debt. Learned Adjudicating Authority erroneously admitted the Application. Thus, the Appeal is allowed and the impugned order dated 03.06.2019 is set aside.

15. In the result, the Respondent No. 2 (Corporate Debtor) is released from the rigour of 'CIRP' and the action taken by IRP/RP and Committee of Creditors, if any, in view of the impugned order is set aside. IRP/RP will hand back the records and management of the Corporate Debtor to the Promoters/Directors of the Corporate Debtor.

16. The matter remitted back to the Ld. Adjudicating Authority to decide fees and costs of 'CIRP' payable to IRP/RP, which shall be borne by the Respondent No. 1 Tomato Trading LLP.

The Appeal is allowed. No Costs.

**[Justice Jarat Kumar Jain]**  
**Member (Judicial)**

**[Dr. Ashok Kumar Mishra]**  
**Member (Technical)**

**[ Shreesha Merla ]**  
**Member (Technical)**

**New Delhi**  
SC