

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 194 of 2019

[Arising out of order dated 23rd January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in C.P. No.223/16 (T.P. No. 83/17)

IN THE MATTER OF:

M/s Krystal Integrated Services Pvt. Ltd.,

Krystal House,
15 A 17, Shivaji Fort,
CHS Duncans Causeway Road,
Mumbai - 400022.

....Appellant

Vs

M/s Indiaontime Express Private Limited,

81, SS Commercial Estate,
Nagavarapalya, CV Raman Nagar,
Bangalore – 560 093.

....Respondent

Present:

For Appellant: Mr. Mritunjay Kr. Tiwari, Advocate.

For Respondent: None.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant, in the year 2016, filed a petition under Section 433 r/w Section 434 and 439 of the Companies Act, 1956 for winding up of the Respondent Company – ‘M/s Indiaontime Express Private Limited’ (hereinafter referred to as ‘Corporate Debtor’) before the Hon’ble High Court of Karnataka. Subsequently, the petition came to be transferred to National Company Law Tribunal, Bengaluru Bench in terms of Gazette Notification No. GSR119(E) dated 7th December, 2016. It was renumbered as TP No.

83/2017 and directed to be treated as application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') only after complying with the relevant provisions of the I&B Code. Appellant was directed to serve notice on the Respondent and upon its failure to deliver the same to Respondent, the National Company Law Tribunal, Bengaluru Bench (hereinafter referred to as the 'Adjudicating Authority') issued notice to Respondent – Corporate Debtor, which was returned with endorsement "Left". Substituted service through publication in English and Kannada Newspapers directed by the Adjudicating Authority does not appear to have been carried out by the Appellant on the score that notice sent through Registered Address of Respondent was deemed to have been served. Consequently, the matter was heard in ex-parte. On consideration of the material on record, the Adjudicating Authority passed the impugned order dated 23rd January, 2019 by virtue whereof the application came to be rejected on the ground that the Appellant had failed to prove the claim which was also prima facie barred by limitation. Aggrieved thereof the Appellant has filed the instant appeal assailing the impugned order as being legally infirm and unsustainable.

2. In these appeal proceedings also service could not be effected on the Respondent through ordinary mode as the postal article containing the notice was received back with postal endorsement "Left". Even the track consignment report in respect of service through electronic mode revealed non-delivery of notice as "Addressee left without instructions". According to

learned counsel for Appellant, particulars of Respondent were in accordance with the Registered Office Address as per record of Registrar of Companies. Mode of substituted service was resorted to and the notice was published in English newspaper - Indian Express and Kannada Newspaper – ‘Vijayavani’ (Bengaluru Edition) issues dated 16th April, 2019 and 12th May, 2019, respectively. However, none appeared on behalf of the Respondent and the appeal was heard in ex-parte.

3. The case setup by the Appellant is that the Appellant is a Private Limited Company engaged inter-alia in the business of providing facility management, security, portfolio management and aviation services. The Respondent - Corporate Debtor dealing in transport, storage and communications business, being in continuous requirement of manpower for its works contacted the Appellant for supply of manpower culminating in a letter of intent dated 24th August, 2012 for supply of manpower styled as “facility services” which, according to Appellant, constituted a contract between the parties. According to Appellant, the Appellant supplied manpower on regular basis to Respondent – Corporate Debtor between September, 2012 to December, 2013 but against the invoices raised for Rs.1,89,25,381/- only Rs.1,06,53,549/- was paid. According to Appellant, Respondent was liable to pay the sums within 15 days of each invoice and in default the outstanding payment was liable to be paid with interest at 14% per annum. According to Appellant, invoices raised from July, 2013 to December, 2013 for total outstanding amount of Rs.81,49,542/- alongwith

interest @ 14% per annum calculated till 31st July, 2017 at Rs.43,62,224/- being total dues of Rs.1,25,56,766/- is the amount of default, which the Respondent – Corporate Debtor, despite admission and acknowledgment of debt, failed to repay even after issuance of demand notice in the prescribed form.

4. The findings in the impugned order culminating in rejection of the application under Section 9 of I&B Code, which have been assailed in this appeal, may briefly be summarized as under:-

- (i) That the operational debt was time barred.
- (ii) That there was no proof of purchase order/ contract between the parties to substantiate the services provided.
- (iii) That service of Respondent was not effected through substituted service as directed by the Adjudicating Authority.

5. We have gone through the record and heard learned counsel for Appellant in ex-parte. From perusal of record it comes to fore that the petition for winding up filed by the Appellant bearing CP No.223/16 before Hon'ble High Court of Karnataka sought a direction to wind up the Respondent Company in terms of provisions of Companies Act, 1956 which came to be transferred to the National Company Law Tribunal, Bengaluru Bench which registered and renumbered the petition as TP No.83/2017 and directed the Appellant to comply with the provisions of law under I&B Code

applicable to initiation of Corporate Insolvency Resolution Process at the instance of an Operational Creditor. It appears that the Appellant was directed to issue notice to the Respondent after collecting the same from the Registry which could not be delivered even when the Adjudicating Authority sent a fresh notice which came to be returned with the endorsement "Left". From the impugned order it further emerges that neither the statutory notice under the relevant Companies Act nor the Demand Notice as contemplated under Section 8(1) of I&B Code has been served upon the Respondent – Corporate Debtor. In this regard it would be apposite to reproduce Para 9 of the impugned order, which reads as under:-

“9. There are two problems basically involved in the petition one so far the Petitioner has not been in a position to serve the ‘Statutory Notice’ even under the old act i.e., Companies Act 1956 nor they have been able to serve the ‘Demand Notice’ under Insolvency and Bankruptcy Code to the Respondent. They are unable even to locate the address and serve it to the Directors. Even if we assume while CIRP process initiated, Interim professional will not in position to find the location where the company is situated and where is the office of the firm. Hence no purpose will be served. No proof has been submitted that the manpower has been supplied to the Respondent Company and to what extent they have accepted their

supply of manpower. All these suggest that the case is not right to initiate Corporate Insolvency Resolution Process. Hence we are of the view that the contract was not based on any Joint agreement between the parties nor through purchase order or through supply manpower contract, the contract is simply based on some form of understanding. Supply has been made long back in the year 2013, hence also barred by law of limitation.”

It would also be appropriate to extract opening lines of Para 11 summing up the observations and findings recorded by the Adjudicating Authority, which read as under:-

“11. The above facts and circumstances show that the Petitioner failed to substantiate the impugned amount with proper evidence. The efforts made by the Petitioner to serve the notice failed, even though the Tribunal ordered to serve notice to the Respondent. Moreover the claim itself is not proved and the prima facie barred by the law of limitation.”

From the aforesaid, it is manifestly clear that the initiation of Corporate Insolvency Resolution Process was declined by the Adjudicating Authority not only for failure on the part of Appellant - Operational Creditor to serve Demand Notice in terms of Section 8(1) of the I&B Code upon the

Respondent - Corporate Debtor but also for failure on its part to substantiate the claim which was also held to be prima facia barred by the law of limitation. It is queer that the Adjudicating Authority proceeded to pronounce upon the merits of the claim and its enforceability at the very threshold stage when no notice of dispute was received from the Corporate Debtor in response to the Demand Notice within the prescribed time. Admittedly, notice of demand was not served upon the Respondent and in such situation demand notice of claim of Appellant filed in Form 5 forming Annexure A/10 at page 91 of the paper book was not responded to by the Respondent. Thus, dispute regarding the claim of Appellant being payable or not payable in law or in fact as also factum of a pre-existing dispute was not raised before the Adjudicating Authority. It was therefore not prudent on the part of the Adjudicating Authority to pronounce upon the merits of the claim. If the notice of demand under Section 8(1) of the I&B Code was not served upon the Corporate Debtor or any of its Directors and existence of Corporate Debtor itself was in the region of doubt as emerges from record, the only course open to the Adjudicating Authority was to have recourse to the provision engrafted in Section 9(5)(ii)(c) of the I&B Code. It would be appropriate to profitably refer to the dictum of Hon'ble Apex Court in **"Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.,** (2018) 1 SCC 353, Para 33", which reads as under:-

"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 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)].” **[emphasis added]**

In the light of the authoritative pronouncement of law, the application of Appellant was required to be rejected merely on the ground of non-delivery of notice of demand upon the Corporate Debtor and the Adjudicating Authority had no jurisdiction to record finding with regard to merits of the claim.

6. This leaves us to consider the issue of limitation. We may at the very outset make it clear that limitation for purposes of triggering of Corporate Insolvency Resolution Process would not be identical with the limitation for purposes of claim. We take judicial notice of the fact that vide S.O.3594(E) dated 30th November, 2016 published in the Gazette of India, inter-alia,

Sections 8 & 9 of the I&B Code came into force on 1st December, 2016. Remedy provided to an Operational Creditor, therefore, was not available before the date of enforcement of the aforesaid provisions and Corporate Insolvency Resolution Process in the instant case could be triggered only after 1st December, 2016. Viewed in that context the application for triggering of Corporate Insolvency Resolution Process under Section 9 of I&B Code could not be held to be hit by law of limitation notwithstanding the fact that the instant case seeking winding up as one of the reliefs before the Hon'ble High Court stood transferred to the Adjudicating Authority which directed the Appellant to comply with the legal provisions under I&B Code for triggering of Corporate Insolvency Resolution Process. We are therefore of the considered view that the application filed in Form 5 in compliance to the order of Adjudicating Authority seeking initiation of Corporate Insolvency Resolution Process under Section 9 of I&B Code was not hit by limitation but the application was premature as the demand notice stated to have been sent on 11.10.2017 could not be served upon the Respondent and was received back with endorsement "Addressee Left". Even the notice sent on alternate address was returned with endorsement "No Such Firm". In absence of service of demand notice upon the Respondent – Corporate Debtor whose existence at the given address itself was doubtful, the Appellant – Operational Creditor was not entitled to seek triggering of Corporate Insolvency Resolution Process. Once application in prescribed form was filed by the Appellant, the Adjudicating Authority was empowered

to reject the same for failure on the part of Operational Creditor to deliver demand notice to the Corporate Debtor.

7. In view of the foregoing discussion, we find ourselves left with no course but to dismiss the appeal though only for reasons of non-compliance with the procedural requirements as laid down under Section 8(1) r/w Section 9(5)(ii)(c) of I&B Code. The impugned order as regards findings on admissibility, sustainability and proof of claim besides observations as regards limitation cannot be supported and is set aside. The Appellant shall be at liberty to seek triggering of Corporate Insolvency Resolution Process under Section 9 of I&B Code afresh after complying with the mandatory requirement of Section 8(1) of I&B Code within thirty days from the date certified copy of this judgment is provided to it. The period for which the Appellant has been prosecuting his claim before the Adjudicating Authority and before this Appellate Tribunal shall be excluded from computation of limitation.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Judicial)

NEW DELHI

12th July, 2019

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