

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 307 of 2018

IN THE MATTER OF:

Nayan Shah

...Appellant

Vs

Viral Rajarashi Mehta & Anr.

....Respondents

Present:

For Appellant: **Mr. Pallav Sisodia, Sr. Advocate with Mr. Pramod B. Agarwala, Mr. Aayush Agarwala, Mr. Anuj Agarwala, Mr. Mayur Thorat and Mr. Shashank Khurana, Advocates for Appellants.**

For Respondents: **Mr. Aditya Dewan, Advocate for R-1.**
Ms. Udita Singh, Advocate for RP.

O R D E R

29.06.2018. This appeal has been preferred by 'Mr. Nayan Shah' one of the Shareholder and Director of the Corporate Debtor (M/s Neptune Ventures and Developers Private Limited) against order dated 24th May, 2018 passed by Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in CP No.1640/IBC/NCLT/MB/MAH/2017, whereby and whereunder the application preferred by the 1st Respondent – 'Mr. Viral Rajarashi Mehta' (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code'), has been admitted and order of moratorium has been passed and pursuant to this the Interim Resolution Professional (Respondent No.2) has been appointed.

2. Learned senior counsel appearing on behalf of the Appellant submitted that though there was existence of dispute inspite of the same application under Section 9 was admitted by the Adjudicating Authority. It is accepted that pursuant to the demand notice under Section 8(1), the Corporate Debtor filed reply on 06.11.2017.

3. Learned counsel for the Appellant while referred to the emails exchanged between the parties submitted that there was an existence of dispute prior to demand notice issued under Section 8(1) issued on 16.09.2017. It is further submitted that the dispute about the quantum of payment having settled, the agreed amount of Rs.75 Lakh plus GST has already been paid in favour of the 1st Respondent. Infact part payment has been made and cheque for rest of the amount has been handed over to the 1st Respondent.

4. Learned counsel appearing on behalf of the 1st Respondent submitted that it cannot be alleged that there was an existence of dispute. The Corporate Debtor earlier agreed to pay total fee of Rs.1 Crore as brokerage towards the TATA-Neptune deal but it was not settled. However, he accepts that the matter has been settled for Rs.75 Lakh plus GST and part amount has paid and for the rest of the amount a cheque has been received by the 1st Respondent.

5. Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank and Ors.*" – 2017 SCC online SC 1025 while considered the provisions of Section 7 and 9 of I&B Code observed and held as follows:

“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 in sub-section (1), bring to the notice of the operational creditor the existence 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.”*

6. From the decision of Hon'ble Supreme Court it is clear that in a petition under Section 9 the Corporate Debtor has right not only right to show that there is an existence of dispute about quality of goods or services provide but also he has right to dispute the 'debt' including the quantum of payment. If the 'debt' has been disputed, the question of default does not arise.

7. From the email exchanged between the parties, as enclosed at page 62 to 69, we find that a negotiation has on going between the parties since 7.10.2015 relating to the quantum of payment. The email dated 07.10.2015 sent by the 'Corporate Debtor' to the 1st Respondent shows that the 'Corporate Debtor' confirmed and agreed to pay the brokerage of Rs.1 Crore. The 1st Respondent made request to pay a sum of Rs.25 Lakhs however a sum of Rs.11 Lakh was paid. The fact that the Corporate Debtor agreed to pay tentative amount of Rs.1 crore, but finally settled for Rs.75 Lakhs plus GST show that there some discussion was going on with regard to amount actually payable to the 1st Respondent, therefore, it can be accepted that there was an existence of dispute about the payment of debt.

8. For the reasons aforesaid, and the fact that parties have settled the claim and part payment has been made and cheque for rest of the amount has been handed over to the Counsel for the 1st Respondent, we set aside the order dated

24th May, 2018 passed by Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, in CP No.1640/IBC/NCLT/ MB/MAH/2017 and pass following directions:-

9. In effect, order(s) passed by Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. The application preferred by 1st Respondent under Section 9 is dismissed. Learned Adjudicating Authority will 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 with immediate effect.

10. The Corporate Debtor will pay Rs.1.5 Lakh towards fee and cost of resolution expenses in favour of the 'Interim Resolution Professional' (2nd Respondent) within a fortnight.

11. In case, the cheque for rest of the amount handed over by the Appellant to the Counsel for the 1st Respondent (Operational Creditor) is bounced and amount is not paid by the Appellant, it will be open to the 1st Respondent to move before this Court for appropriate order.

12. The appeal is allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S. J. Mukhopadhyaya]
Chairperson

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

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