

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No.308 of 2018

IN THE MATTER OF:

Jaya Patel

...Appellant

Vs

Gas Jeans Pvt. Ltd. & Ors.

....Respondents

Present:

For Appellant: Mr. Krishnendu Dutta, Mr. Priyadarshi Chitanyashil and Ms. Diptimaan Kumar, Advocate

For Respondents: Mr. R. Chandrachud and Mr. Karan Sharma, Advocates for R-1.

ORDER

08.10.2018: The Respondent 'Gas Jeans Pvt. Ltd.' preferred an application under Section 433-434 of the Companies Act, 1956 before Hon'ble Bombay High Court for winding up of 'Vama Apparels India Pvt. Ltd.' pertaining to a debt of Rs.21,63,359/-. The case was transferred pursuant to Rule 5 of the Companies (Transfer of pending proceedings) Rule, 2016 before the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench. The Respondent therein filed Form-5 r/w Rule 6 to treat the same as application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code) for initiation of Corporate Insolvency Resolution Process against 'Vama Apparels India Pvt. Ltd.'. By impugned order dated 17th May, 2018, the Adjudicating Authority admitted the application, passed order of moratorium and appointed Interim Resolution Professional. The Appellant – Director of the Corporate Debtor has challenged the aforesaid order dated 17th May, 2018 on the ground that notice under Section 8(1) was issued on the same date when Form-5 under Rule 9 was filed. This apart there is an existence of dispute.

2. Mr. R. Chandrachud, learned counsel appearing on behalf of the 'Gas Jeans Pvt. Ltd.' (Operational Creditor) accepts that the notice under Section 8(1) was issued on the same date when Form-5 under Rule 9 was filed. He submitted that the Corporate Debtor has already replied to the said notice, in which they have admitted the liability of Rs.6 Lakhs approximately.

3. Section 9 of the I&B Code reads as follows:

“9. Application for initiation of corporate insolvency resolution process by operational creditor.-(1) *After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

4. From the aforesaid provision it is clear that only after completion of ten days and if the matter has not been settled, an application under Section 9 in Form-5 can be filed. Any application under Section 9 preferred before the completion of 10 days cannot be entertained and admitted by the Adjudicating Authority. Application under Section 9, therefore, being not maintainable on the

date the application under Section 9 was filed, the impugned order dated 17th May, 2018 cannot be sustained. We accordingly set aside the impugned order dated 17th May, 2018 and make it clear that the transfer of petition be abated in terms of Rule 5.

5. In the result, 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 Respondent is dismissed as abated. Learned Adjudicating Authority will close the proceeding. The 'Corporate Debtor' company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

6. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the 'Corporate Debtor' will pay the fees of the Interim Resolution Professional, for the period he has functioned.

7. However, order passed by the Adjudicating Authority dated 17th May, 2018 which has been set aside and order passed by this Appellate Tribunal will not come in the way of the Respondent to file application under Section 9 after issuing notice to the Corporate Debtor under Section 8(1). It will be also open to the Appellant Corporate Debtor to negotiate with the Respondent to settle the claim.

8. The appeal stands disposed of with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

am/gc