

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 958 of 2020

IN THE MATTER OF:

M/s. Brand Realty Services Ltd.

...Appellant

Versus

M/s. Sir John Bakeries India Pvt. Ltd.

...Respondent

Present:

For Appellant: Mr. Pankaj Agarwal, Advocate.

For Respondent: Mr. Nishant Awana, Mr. Devansh Malhotra,
Advocates.

ORDER
(Virtual Mode)

10.03.2022: Heard Learned Counsel for the Appellant and Respondent.

2. This Appeal has been filed against the Order dated 22nd July, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-V) in IB 1677(ND)/2019. By which Order, the Adjudicating Authority has rejected the Application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC in short).

3. Section 9 Application claims that debt is due on the Corporate Debtor on the basis of Agreement dated 28th November, 2014 and 15th June, 2018. It is submitted that the part payments were made by the Corporate Debtor to the Operational Creditor but when the Corporate Debtor failed to clear the debt outstanding dues, Demand Notice under Section 8 of IBC dated 30th April, 2019 was served. The Corporate Debtor sent Reply dated 25th May, 2019 to Section 8 Demand Notice thereafter Section 9 Application came to be filed on 03rd June, 2019 claiming operational debt to the tune of Rs. 54,94,874/-.

4. In the Section 9 Application, Notice was issued to the Corporate Debtor and Corporate Debtor also filed a Reply to Section 9 Application. The Adjudicating Authority by the Impugned Order rejected the Section 9 Application.

5. In the Impugned Order, two aspects need to be noticed; firstly, that the Adjudicating Authority after noticing the Reply given to Section 8 Demand Notice has observed that since the Demand Notice was received on 4th May, 2019 and not on 17th May, 2019, Reply to Notice having not been sent within the time prescribed under Section 8(2) of the IBC. The Corporate Debtor failed to raise the disputes; secondly, the Adjudicating Authority took the view that default of instalment of settlement agreement does not come within the definition of “Operational Debt”. In paragraph 14 of the Impugned Order, following has been stated:

“14. In the light of that decisions and provisions which we have referred in the aforementioned para, when we shall consider the case in hand then we are of the considered view that the case of the applicant is covered with the aforesaid decisions, therefore, we are of the considered view that default of instalment of settlement agreement does not come within the definition of operational debt, hence, we are not inclined to admit the application rather we are of the view the present application is liable to be dismissed.”

6. Learned Counsel for the Appellant challenging the Order of the Adjudicating Authority contends that Adjudicating Authority committed error in rejecting the Section 9 Application holding that default of instalment of settlement agreement does not come within the definition of Operational Debt. He submits that under the Agreement dated 28th November, 2014 and 15th

June, 2018, the Appellant was entitled to receive payment hence it cannot be said that no debt was due from the Appellant. He submits that the claim of the Appellant flow from the aforesaid Agreements and the Agreement cannot be discarded by observing that it was default of instalment of settlement agreement.

7. Learned Counsel for the Respondent refuting the submissions of the Learned Counsel for the Appellant submits that Corporate Debtor immediately replied to the Demand Notice dated 25th May, 2019 which has been filed at Page 214 of the Appeal Paper Book where claim of the Appellant was disputed. It is submitted that Reply to Section 9 Application, a detail Reply was filed by the Corporate Debtor raising various issues and which Reply has also been brought on record as Annexure A-15 of the Appeal Paper Book at page 250. Learned Counsel for the Respondent further in the Reply has raised question regarding execution of Agreement dated 15th June, 2018 and has made serious allegations against the Appellant. Allegations of stealing cheques have also been made and certain Police Complaints have also been filed which all have been referred to in the Reply.

8. We have considered the submissions of Learned Counsel for the parties and perused the record.

9. Coming to the reasons given by the Adjudicating Authority for rejecting the Section 9 Application as noticed above. The only reason given by the Adjudicating Authority is that no operational debt has been proved by the Appellant as quoted above in Paragraph 14. The Adjudicating Authority observed that “default of instalment of settlement agreement” does not come

within the definition of Operational Debt. The present is the case which cannot be said to be case of default of any instalment of agreement, present is the case where Appellant claims certain payments to be made to the Appellant by the Corporate Debtor by virtue of Agreement dated 28th November, 2014. The said Agreement has been projected as Annexure A-5(Colly). The subsequent Agreement dated 15th June, 2018 has also been relied on by the Appellant with regard to which Respondent has raised objection regarding execution.

10. Be that as it may, a perusal of the Agreement dated 28th November, 2014 indicates that the said Agreement entitled the Appellant to receive certain payment from the Corporate Debtor. The present cannot be said to be case of default in payment of instalment. The Agreement was not a kind of Settlement Agreement rather the Agreement gave rights and obligations to the parties hence the very basis of rejecting the Application by the Adjudicating Authority is erroneous. We thus are of the view that the Impugned Order deserved to be set aside on this ground alone.

11. The disputes were raised by the Respondent by replying to the Notice under Section 8 of the IBC as well as the details given in the Reply to Section 9 Application. The Adjudicating Authority has not adverted to these pleas and has discarded the Reply to Section 8 Notice only on the ground that the reply to the Demand Notice was not submitted within time as per Section 8(2) of the IBC. The Demand Notice was issued on 30th April, 2019 and the same was replied on 25.05.2019 by the Respondent. Present is the case where there is no dispute with regard to the submission of Reply to Demand Notice by the Corporate Debtor before filing Section 9 Application.

12. One of the questions to be considered in the present case is as to; when Reply submitted by Corporate Debtor was not within 10 days from the receipt of the notice under Section 8, whether the Corporate Debtor is precluded to raise the issue of Pre-Existing Dispute before the Adjudicating Authority. We need to notice the provisions of Section 8, 9(1) and 9(5) which are to the following effect:

“Section 8: Insolvency resolution by operational creditor.

8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment] of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

...

9. (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.

....

9(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 ³[payment] 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 pending⁴ 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 ³[payment] 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 pending⁴ 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.”

Section 8(2) of the Code provides that the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor- (a) existence of a dispute. Section 9(1) of the Code provides that 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. Section 8(2) when read with Section 9(1), it is clear that Section 9(1) enables the Operational Creditor to file Section 9 application if no payment has been received by the Operational Creditor from Corporate Debtor or no notice of the dispute under sub-section (2) of section 8 has been received. The statutory scheme under Section 8 and 9 does not indicate that in an event Reply to Notice is not filed within 10 days by

Corporate Debtor or no Reply to Notice under Section 8(1) have been given, the Corporate Debtor is precluded from raising the question of dispute.

13. Our above conclusion is further fortified then we look into the scheme of Section 9(5)(ii) which provides that the Adjudicating Authority can reject the Application if-“notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility”. The above provision indicates that even if no notice of dispute has been received, and there is record of dispute in the Information Utility the Application under Section 9 is to be rejected by the Adjudicating Authority. The above provision clearly indicates that even in absence of notice of dispute, Adjudicating Authority can reject the Application if there is record of dispute in the Information Utility. It goes without saying that record of dispute in the Information Utility can very well be pointed out by the Corporate Debtor before the Adjudicating Authority when notice is issued under Section 9. Further in Reply to Section 9 Corporate Debtor can bring the material to indicate that there are pre-existing disputes in existence prior to issuance of demand notice under Section 8. We thus are of the considered opinion that mere fact that Reply to notice under Section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application. In the above context, we may refer to Judgement of this Tribunal in “Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited” (Company Appeal (AT) Ins. No. 1354 of 2019) decided on 24th February, 2020 in paragraph 50 following observations have been made by this Tribunal:

“...Even otherwise, mere failure to reply to the demand notice does not extinguish the rights of the Operational Creditor to show the existence of a pre-existing dispute...”

We thus set aside the Impugned Order and remit the matter back to the Adjudicating Authority to consider the Application afresh. We are not expressing any view on the merits of the case and it is for the Adjudicating Authority to consider the submission of the parties and after hearing the parties pass appropriate order. In view of the setting aside of the Impugned Order, Application under Section 9 of the IBC is revived before the Adjudicating Authority and be considered afresh in accordance with law after hearing the parties. The Appeal is allowed to the above extent.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

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