

National Company Law Appellate Tribunal,
Principal Bench, NEW DELHI
Company Appeal (AT) (Ins) No. 968 of 2020

Arising out of the order dated 29.09.2020 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, Court-2 in C.P. (I.B) No. 824/NCLT/AHM/2019.

IN THE MATTER OF:

M/s Agarwal Veneers
 14, Chandrama Society,
 Market Yard Road,
 Gultekdi, Pune- 411037
 Maharashtra State

...Appellant

Versus

1. Fundtonic Service Pvt. Ltd.

2nd Floor, Shoppers Plaza -3,
 Opp. Municipal Market,
 C.G. Road,
 Ahmedabad – 380009
 Gujarat State

...Respondent

Present:

For Appellant: Ms. Shweta Busar, Advocate.

For Respondents: Mr. Shivam C.S. Ganeshan, Advocate.

J U D G M E N T

[Per: Ms. Shreesha Merla, Member (T)]

This Appeal challenges the order dated 29.09.2020, passed by Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad) Court-2 in C.P. (I.B) No. 824/NCLT/AHM/2019, whereby the Application under Section 9 of the Insolvency and Bankruptcy Code,

2016(herein after referred to 'the Code') was rejected. By the impugned order, Ld. Adjudicating Authority has observed as follows:

"9. On perusal of the records it is found that the Respondent has issued two demand notices (page 28-55), the first one dated 24.06.2019 and second one dated 20.07.2019. Demand notice which is a pre-requisite under Section 8 of the Insolvency & Bankruptcy Code, 2016 for filing the petition under Section 9, is signed and issued by an advocate on behalf of M/s. Nehru & Co. (Advocates and Legal Consultants), whereas, the petition is signed by Mr. Rohit Agarwal, Partner of the applicant firm on the basis of authority letter dated 20.08.2019 issued by the other partner of the partnership firm. On perusal of the records it is found that no authority is given to the advocate to issue demand notice or for filing an application u/s 9 of the IB Code. Similarly, no document is produced by the applicant showing that the advocate who has signed the application is associated with the company for a long period and can take such steps on behalf of the company. Therefore, the demand notice which is a pre-requisite for filing an application under Section 9 of the itself is bad in the eye of law.

10. On perusal of the records it is found that the Respondent Company is a going concern and at present giving employment to 20 employees. Hence, it would defeat the very purpose of the Code, if a going concern generating revenue, the employees and stakeholders are subject to the rigors of the CIRP. It appears that the operational creditor has filed the instant petition as a tool of recovery mechanism which is not the objective of the IBC. It is a settled law that the Code is not intended to be a substitute to a recovery forum. More so, when the corporate debtor company falls within the category of Micro, Small and Medium Enterprise (MSME), CIRP proceedings against a going concern Jeopardising livelihood of several families is against the objectives of IB Code and cannot be used to jeopardise the financial health of a solvent company by pushing it into insolvency Initiating.

11. *Notwithstanding above, it is found that the petitioner has not produced on record documents like copy of the purchase order and delivery challan to substantiate its claim. Moreover, the applicant has not produced on record a copy of bank statement showing that no payment is received from the corporate debtor towards the invoices against which the claim has been raised.*

12. *Under the facts and circumstances discussed above, the Adjudicating Authority has no other option but to dismiss the petition as it is bad in the eye of law and not maintainable on the very reason that the demand notice is issued without any authority.*

13. *In the result, company Petition No. CP (IB) 824 of 2019 stands dismissed and disposed of. However, this will not stand in the way of the Petitioner approaching the appropriate forum seeking to enforce its claim against the Respondent, as this petition has been dismissed on the issue of maintainability taking into consideration the provisions of IB Code, 2016”.*

2. **Submissions of the Ld. Counsel appearing on behalf of the Appellant.**

- Ld. Counsel appearing for the Appellant strenuously submitted that the Adjudicating Authority has overlooked the Principle laid down by the Hon’ble Supreme Court in “*Macquarie Bank Ltd. vs. Shilpi Cable Technologies Ltd.*, (2018) 2 SCC 674 , wherein the Hon’ble Apex Court has observed that an advocate can issue the demand notice on behalf of its client. It is submitted that an advocate from Nehru & Co. (Advocates and Legal Consultants) issued the demand notice under Section 8 of the Code upon instructions from the Appellant/Operational Creditor. It is further submitted that the Adjudicating Authority has erroneously observed that the Corporate Debtor is an MSME and a going concern having twenty employees and that initiating CIRP proceedings

would defeat the purpose of the Code. This cannot be a ground for dismissal of the Application under Section 9 of the Code. It is argued that a perusal of the Section 20 of the Code would make it amply clear that the objective of the Code is not to put the Operational Creditor through rigours of the CIRP Process, but to instead maximize the value of assets of such persons, to promote entrepreneurship and balance the interest of all stakeholders.

- Ld. Counsel further contended that the Adjudicating Authority has failed to appreciate the evidence of acknowledgment in the Ledger Statement and ought to have given a reasonable opportunity to the Appellant to file other documents. The Corporate Debtor did not raise any dispute regarding the products supplied or the invoices raised by the Appellant either before issuing the demand notice, or after receiving the same. In fact, the Respondent has also made part payments towards the invoices raised by the Appellant. It is strenuously argued that a copy of the certificate from the ‘financial institutions’ maintaining the accounts of the operational creditor and conforming that there is no payment of an unpaid operational debt by the corporate debtor is not a condition precedent for triggering the CIRP. The Adjudicating Authority has failed to take into consideration that Section 9(3) (c) of the Code was amended and the words ‘by the Corporate Debtor, if available’ was substituted.

3. The Ld. Counsel relied on the following judgments in support of his case:

- *Macquarie Bank Ltd. vs. Shilpi Cable Technologies Ltd., 2018 SCC Online SC 264 [Pg. Nos. 159-201, Appeal].*

- *M/s Bannari Amman Spinning Mills Ltd. vs. M/s. My Choice Knit & Apparels Pvt. Ltd., 2019 SCC NCLAT 1121 (Para.3, Pg. No. 220, Appeal).*
- *International Road Dynamics vs. Reliance Infrastructure, CA (AT) (Ins) No. 72 of 2017)*
- *Sagufa Ahmed & Ors vs. Upper Assam Plywood Products Pvt. Ltd. & Ors. Civil Appeal Nos. 3007-3008 of 2020.*

4. **Submissions of the Ld. Counsel appearing on behalf of the Respondent:**

- The Ld. Counsel for the Respondent/Corporate Debtor vehemently argued that the present Appeal is not maintainable, as the Appellant has not placed on record any purchase order/ delivery challan/bank statements in support of their Application before the Adjudicating Authority. There can be no sale or supply of goods without a purchase order. The operational creditor is only attempting to recover their claims through these CIRP proceedings.
- It is submitted that the demand notices issued by the Operational Creditor were never served on the Corporate Debtor and the same was pointed out by the Corporate Debtor in their 'Affidavit in Reply' filed before the Adjudicating Authority. The Corporate Debtor is a 'going concern' and an MSME with a sales turnover of Rs. 1,61,74,968/- and the present Application preferred by the Appellant is only an attempt to recover the dues.

5. The Ld. Counsel for the Respondents placed reliance on the following judgments to buttress his arguments:

- *Mr. V Nagarajan Resolution Professional vs. SKS Ispat & Power Ltd. (CA (AT) (Ins) No. 561 of 2020, dated 13.07.2020.*
- *Neeraj Jain Director of M/s Flipkart India Pvt. Ltd. vs. Cloud walker Streaming Technologies Pvt. Ltd. & Ors. in CA (AT) (Ins) No. 1354 of 2019, dated 24.02.2020.*
- *Anand Natvarlal Khant vs. Kush Structure Pvt. Ltd. in CA (AT) (Ins) No. 502 of 2021, dated 23.07.2021.*
- *Pankaj Aggarwal vs. Union of India & Ors. , W.P. (C) 3685 of 2020 & CM Appls. 13194/2020,13195/2020,13196/2020.*

Assessment:

6. The brief point for consideration which arises in this Appeal is whether the Adjudicating Authority was justified in rejecting the Section 9 Application preferred by the Appellant herein.

7. It is the main case of the Appellant/Operational Creditor that the Adjudicating Authority has wrongly observed that the demand notice under Section 8 of the Code was issued by an advocate and is therefore not valid.

8. The Adjudicating Authority in para 9 of the impugned order has observed that the demand notice which is a prerequisite for filing of the Application under Section 9 is bad as no document was produced by the Applicant/Appellant showing that the advocate who has signed the Application is associated with the Company for a long period and can take such steps on behalf of the Company.

9. We are of the considered view that as far as this issued is concerned, an advocate can, on behalf of the Company issue a demand notice under Section 8 and no such document is required to establish his 'period of association' with the said Company. At this juncture, we place reliance on the observations of the Hon'ble Supreme Court in '*Macquarie Bank Ltd. vs. Shilpi Cable Technologies Ltd., 2018 2 SCC 674*', in which the Hon'ble Apex Court in para - 49 has observed as follows:

"49. Since there is no clear disharmony between the two parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1) (g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicating Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order".

Therefore, we are of the earnest view that the observation by the Adjudicating Authority in para -9 be set aside.

10. However, the Application was not dismissed on this ground alone. A perusal of the impugned order shows that the Adjudicating Authority has dismissed the Application even on merits, the grounds being that the Corporate Debtor is an 'MSME' and a 'going concern' and a 'viable entity'.

11. It is also observed by the Adjudicating Authority that the Operational Creditor had filed the Petition as a tool of recovery and that the Code is not intended to be a substitute to a Recovery Forum. Further, the Adjudicating

Authority has also noted that the Appellant/Applicant has not produced on record any bank statements to show that payments were received from the Corporate Debtor against the invoices based on which the claims have been raised.

12. The Contention of the Ld. Counsel for the Appellant submitted that a reasonable opportunity ought to have been given to the Appellant to file further documents namely the Purchase orders and the corresponding delivery challans and that the Adjudicating Authority had erroneously dismissed the Application, on this ground too, is untenable, as the record shows that the Appellant herein, had sought time before the Adjudicating Authority and has failed to produce the relevant documents. Part –V of Form 5 mandates that relevant document(s) under which the debt has become due must be annexed in compliance of this requirement, the Appellant ought to have filed the relevant Purchase Orders based on which its claim was raised. Part-V, Column 7 of form 5 also mandates that a statement of the bank account where deposit or credit is received, ought to be attached.

13. It is relevant at this juncture, we reproduce the relevant provisions of the Code along with the concerned Regulations which establish that the Application should be *complete* and only then the Adjudicating Authority may decide to admit the Application.

Sec 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 or 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 subsection (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, prior to rejecting an application under sub-clause (a) of clause (ii) of this sub-section, shall give a notice to the applicant to rectify the defect in his application within three 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).”

Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is also relevant and reads as under: —

7. Claims by operational creditors.—

(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit proof of claim to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule: Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the operational creditor under this Regulation may be proved on the basis of—

(a) the records available with an information utility, if any; or

(b) other relevant documents, including—

(i) a contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;

(iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or

(iv) financial account.

FORM B

PROOF OF CLAIM BY OPERATIONAL CREDITORS EXCEPT WORKMEN AND EMPLOYEES

[Under Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

1. [Date]

To,

The Interim Resolution Professional/Resolution Professional

[Name of the Insolvency Resolution Professional/Resolution Professional]

[Address as set out in public announcement]

From,

[Name and address of the operational creditor]

Subject.—Submission of proof of claim.

Madam/Sir,

[Name of the operational creditor], hereby submits this proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the same are set out below:

PARTICULARS

1. Name of operational creditor
2. Identification number of operational creditor (if an incorporated body provide identification number and proof of incorporation. If a partnership or individual provide identification records [PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India] of all the partners or the individual)
3. Address and email address of operational creditor for correspondence
4. Total amount of claim (including any interest as at the insolvency commencement date)
5. Details of documents by reference to which the debt can be substantiated

6. Details of any dispute as well as the record of pendency or order of suit or arbitration proceedings

7. Details of how and when debt incurred

8. Details of any mutual credit, mutual debts, or other mutual between the corporate debtor and the creditor which may be set-off against the claim

9. Details of any retention of title arrangements in respect of goods or properties to which the claim refers

10. Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan

11. List of documents attached to this proof of claim in order to prove the existence and non-payment of claim due to the operational creditor.

Signature of operational creditor or person authorised to act on his behalf

[Please enclose the authority if this is being submitted on behalf of an operational creditor]

Name in BLOCK LETTERS

Position with or in relation to creditor

Address of person signing”

Section 8(1), the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, speaks of demand notices by the

operational creditor and applications by the operational creditor in the following terms: —

5. Demand notice by operational creditor.—(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely—

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of Section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgment due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

6. Application by operational creditor.—

(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under Section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.

FORM 3

[See clause (a) of sub-rule (1) of Rule 5]

FORM OF DEMAND NOTICE/INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

[Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

2. [Date]

To,

[Name and address of the registered office of the corporate debtor]

From,

[Name and address of the registered office of the operational creditor]

Subject.—Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code.

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [name of corporate debtor].

2. Please find particulars of the unpaid operational debt below:

PARTICULARS OF OPERATIONAL DEBT

1. Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due

2. Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of default in tabular form)

3. Particulars of security held, if any, the date of its creation, its estimated value as per the creditor. Attach a copy of a certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company)

4. Details of retention of title arrangements (if any) in respect of goods to which the operational debt refers

5. Record of default with the information utility (if any)

6. Provision of law, contract or other document under which debt has become due

7. List of documents attached to this application in order to prove the existence of operational debt and the amount in default

3. If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.

4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:

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

(b) an attested copy of any record that [name of the operational creditor] has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility (if applicable)

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

Instructions

1. Please serve a copy of this form on the corporate debtor, ten days in advance of filing an application under Section 9 of the Code.

2. Please append a copy of such served notice to the application made by the operational creditor to the adjudicating authority.

FORM 4

[clause (b) of sub-rule (1) of Rule 5]

FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED [Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

[Date]

To,

[Name and address of registered office of the corporate debtor]

From,

[Name and address of the operational creditor]

Subject.—Notice attached to invoice demanding payment

Madam/Sir,

[Name of operational creditor], **hereby provides notice for repayment of the unpaid amount of INR [insert amount] that is in default as reflected in the invoice attached to this notice.**

In the event you do not repay the debt due to us within ten days of receipt of this notice, we may file an application before the adjudicating authority for initiating a corporate insolvency resolution process under Section 9 of the Code.

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

FORM 5

[sub-rule (1) of Rule 6]

**APPLICATION BY OPERATIONAL CREDITOR TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE
CODE.**

**[Under Rule 6 of the Insolvency and Bankruptcy (Application
to Adjudicating Authority) Rules, 2016]**

[Date]

To,

The National Company Law Tribunal

[Address]

From,

[Name and address for correspondence of the operational creditor]

In the matter of [name of the corporate debtor]

Subject.—Application to initiate corporate insolvency resolution process in respect of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

[Name of the operational creditor], hereby submits this application to initiate a corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the purpose of this application are set out below:

Part I

PARTICULARS OF APPLICANT

1. Name of operational creditor
2. Identification number of operational creditor (if any)
3. Address for correspondence of the operational creditor

Part II

PARTICULARS OF CORPORATE DEBTOR

1. Name of the corporate debtor
2. Identification number of corporate debtor
3. Date of Incorporation of corporate debtor
4. Nominal share capital and the paid-up share capital of the corporate debtor and/or details of guarantee clause as per memorandum of association (as applicable)
5. Address of the registered office of the corporate debtor
6. Name, address and authority of person submitting application on behalf of operational creditor (enclose authorisation)
7. Name and address of person resident in India authorised to accept the service of process on its behalf (enclose authorisation)

Part III**PARTICULARS OF THE PROPOSED INTERIM RESOLUTION
PROFESSIONAL [IF PROPOSED]**

1. Name, address, email address and the registration number of the proposed insolvency professional

Part IV**PARTICULARS OF OPERATIONAL DEBT**

1. Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell
2. Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and dates of default in tabular form)

Part V**PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS,
RECORDS AND EVIDENCE OF DEFAULT]**

1. Particulars of security held, if any, the date of its creation, its estimated value as per the creditor. Attach a copy of a certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company)

2. Details of reservation/retention of title arrangements (if any) in respect of goods to which the operational debt refers
3. Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order)
4. Record of default with the information utility, if any (attach a copy of such record)
5. Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925 (10 of 1925) (attach a copy)
6. Provision of law, contract or other document under which operational debt has become due
7. A statement of bank account where deposits are made or credits received normally by the operational creditor in respect of the debt of the corporate debtor (attach a copy)
8. List of other documents attached to this application in order to prove the existence of operational debt and the amount in default

I, [Name of the operational creditor/person authorised to act on behalf of the operational creditor] hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully qualified and permitted to act as an insolvency professional in

accordance with the Code and the rules and regulations made thereunder. [WHERE APPLICABLE]

[Name of the operational creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

Instructions

Please attach the following to this application—

Annex I

Copy of the invoice/demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.

Annex II

Copies of all documents referred to in this application.

Annex III

Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.

Annex IV

Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex V

Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [WHERE APPLICABLE]

Annex VI

Proof that the specified application fee has been paid.

Note.—Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorised for the purpose.”

14. It is clear from the aforementioned provisions of the Code and also the Regulations therein that unless the Operational Creditor along with its Application furnishes a copy of the invoices, the bank statements and the financial accounts, the Adjudicating Authority is empowered to reject an incomplete Application.

15. Lastly, we address to the Contention of the Ld. Counsel for the Appellant that merely because the Corporate Debtor is a going concern and an MSME, the Adjudicating Authority ought not to have rejected the Application on this ground also.

16. The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. The Parliament has made a conscious effort to ensure that there is a significant difference between 'Resolution' and 'Recovery'. The Hon'ble Supreme Court has time and again observed that the fundamental intent of IBC is 'maximising the value of assets' in the process of 'Resolution'.

In 'MobiloX Innovations Private Limited' Vs. 'Kirusa Software Private Limited', (2018) 1 SCC 353, the Hon'ble Apex Court has examined in detail the United Nations Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures.

If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of 'Reorganising' or 'Resolution of the Company' does not arise. This Tribunal in 'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.', Company Appeal (AT) (Ins.) No. 82 of 2018, has differentiated between 'Recovery' and 'Resolution' and has observed that IBC is not a Recovery Proceeding. 'Recovery' dispossesses the 'Corporate Debtor' of its assets while a Resolution is an effort to keep it afloat. Further, this Tribunal in 'Asset Advisory Services' Vs. 'VSS Projects', CP (IB) No. 96/7/HDB (2017), and also in 'Praveen Kumar Mundra' Vs. 'CIL Securities Ltd.', 2019 SCC OnLine 21 | Page Company Appeal (AT) (Insolvency) No. 512 of 2021 NCLAT 334, has noted that CIRP cannot be initiated with fraudulent intent 'for any purpose other than the Resolution of Insolvency or Liquidation' and therefore it is clearly covered under Section 65 of the Code.

17. The Hon'ble Supreme court in '*Vidarbha Industries Power Ltd. vs. Axis Bank Ltd.*' 2022 SCC Online SC 841 has observed that even if there is a 'debt' and 'default', the Adjudicating Authority should use its discretion in admitting/rejecting an Application. In the instant case, the Adjudicating Authority has rightly rejected the Application on this ground too.

18. For all the aforementioned reasons, this Appeal fails on merits and is accordingly dismissed. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi
05.08. 2022
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