

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1516 of 2019

[Arising out of orders dated 30.09.2019 in CP (IB) No. 976/KB/2018 by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata)]

IN THE MATTER OF:

M/s Quippo Infrastructure Limited,

(Formerly Known as Quippo Construction Equipment Limited)

Having its registered office at

NAC Campus, Izzat Nagar,

Kondapur, Post Cyberbad,

Telangana, Hyderabad 5000084

..... Appellant.

Versus

M.R. Nirman Private Limited,

287/3, East Sinthee Road,

Ground Floor, Kolkata 700030

..... Respondent.

Present:

For Appellant: Mr. Nikhil Jain, Advocate.

**For Respondent:- Mr. Abhijit Kumar Chattopadhyay, Sr. Advocate
with Mr. Abhilash Chatterjee, Ms. Arina
Bhattacharya, Mr. Sandeep Lamba, Advocates.**

J U D G M E N T
(5thAugust, 2022)

[Per: ShreeshaMerla, Member (T)]

This Appeal is preferred under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) against the impugned order dated 30.09.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata), whereby the Adjudicating Authority has rejected the Application filed under Section 9 of the Code on the following grounds:-

“7 We have considered the submissions made by both the sides and have perused the materials on record. As per provision of Sec.8(1) of Insolvency and Bankruptcy Code, 2016, an operational creditor on occurrence of a default is required to deliver a demand notice to which the corporate debtor is required to respond within a period of 10 days from the date of receipt of such notice.

8. As per provision of Sec.9 (5)(ii) clause (c) Insolvency and Bankruptcy Code, 2016 the Tribunal will reject the application if the creditor has not delivered invoice or notice for payment to the corporate debtor. We have gone through the records produced before us and proof of delivery of such notice is not found. This being incurable defect, we reject this petition for this reason only. We would like to mention that claim of receipt of money in May 2016 is not evidenced by the documentary evidence of Banker’s Certificate or details of cheques or any DD Note details. Hence, this also goes against the claim of the operational creditor. In view of this, we do not

consider it necessary to go into other aspects. This petition is dismissed accordingly, however, no order as to costs.”

2. The Learned Counsel for the Appellant strenuously contended that the Demand Notice was served by the Appellant on the Respondent under Section 8 of the Code on 12.12.2017, demanding payment of Rs. 43,00,510/- which is inclusive of the principal amount of Rs. 19,50,000/-.

3. It is submitted that the Demand Notice was delivered to the Respondent on 20.12.2017 at his Registered Office address and also that the Respondent has not specifically denied the receipt of the Demand Notice in their Affidavit of Reply. It is further submitted that the Registered Office address is 287/3, East Sinthee Road, Ground Floor, Kolkata 700030. It is also contended that the Application under Section 9 of the Code was also duly served on the Respondent at the very same Registered address, apart from the other letters and communications sent to this address.

4. It is also the case of the Appellant that proof for the receipt of payment in May 2016 was duly placed on record and was also reflected in the certificate of the financial institution and therefore, the Adjudicating Authority erroneously observed that the Application was not accompanied by any documentary evidence and Banker's Certificate. The entry in the statement provided by the financial institution clearly specified the receipt of Rs.50,000/- on 23.05.2016 through cheque bearing no. 238019 and therefore the Adjudicating Authority ought to have considered this aspect while passing the impugned order.

5. The Learned Sr. Counsel for the Respondent submitted that the Appeal was barred by limitation.

6. This Tribunal vide Orders dated 07.01.2020, taking in to consideration the nature of the case and being satisfied with the grounds shown, on the delay of 13 days in preferring the Appeal, the same was condoned.

7. The Learned Sr. Counsel for the Respondent further submitted that creation of the operational debt in lieu of rent against hiring of the rig, by the Corporate Debtor is not maintainable under Section 8 and 9 of the Code. Further, in the absence of any proof of delivery of the Demand Notice alleged to have been delivered on the Corporate Debtor on 14.12.2017, it cannot be said that the Corporate Debtor was in the knowledge of the said Demand Notice. In compliance of the General Clauses Act, 1897 the Appellant ought to have submitted the copy of the proof of delivery of the Demand Notice.

Assessment

8. At the ought set, we address ourselves only to the issue as to whether the Adjudicating Authority was justified in rejecting the Section 9 Application on the ground that the Demand Notice under Section 8 was not duly served on the Corporate Debtor and also that receipt of money in May 2016 is not evidenced by any Banker's certificate or details of cheque.

9. Firstly, we address to the issue as to whether the Section 8 notice was duly served on the Corporate Debtor or not. Page 184 of the Appeal Paper Book

reflects the Demand Notice dated 12.12.2017 which was sent by the Appellant to the Respondent seeking payment of Rs. 43,00,510/- including interest. At page 276 of the Appeal Paper Book is the Speed Post receipt and tracking consignment report evidencing that the Demand Notice was indeed duly served on the Corporate Debtor on 20.12.2017, vide consignment no. RH305164857IN. Therefore, the contention of the Learned Sr. Counsel for the Respondent /Corporate Debtor that the Section 8 notice was never delivered upon is untenable, specially keeping in view that the address written is the registered Office address, which is undisputed. We also find force in the submissions of the Learned Counsel for the Appellant that the Section 9 Application was also addressed to the same Registered Office. Therefore, they cannot be any ambiguity with respect to the Registered Office address of the Corporate Debtor. Having regard to the fact that the Demand Notice, as mandated under Section 8 of the Code, was duly served upon the Respondent / Corporate Debtor, we are satisfied that the requirement under Section 8 of the code, is complete.

10. Now, we address to the observations of the Adjudicating Authority that the claim of receipt of money in May 2016 was not evidenced by any Banker's certificate or details of cheque. The Appellant has filed the Bank Statement which clearly shows that the receipt of Rs. 50,000/-, received vide cheque no. 238019 on 23.05.2016. The proof of receipt of this payment was placed on record by the Appellant in the Section 9 Application, showing an entry in the

statement of the Appellant, provided by Axis Bank. The Ld. Counsel for the Appellant also drew our attention to the said Bank Statements. The Hon'ble Supreme Court in the case of '**Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.**' in para 30 has observed as follows: -

“

30. *Item 2 in Box 5.2 does show that for the corporate debtor to trigger the IRP, it must be able to submit all the documentation that is defined in the Code and that different documentation is required insofar as financial creditors and operational creditors are concerned, as is evident from Item 4 in Box 5.2. The sentence which is after Box 5.2 is significant. It reads, “therefore, the Code requires that the creditor can only trigger the IRP on clear evidence of default.” Nowhere does the report state that such “clear evidence” can only be in the shape of the certificate, referred to in Section 9(3)(c), as a condition precedent to triggering the Code. In fact, in Item 2(c) in Box 5.3, the Committee, by way of drafting instructions for how the IRP can be triggered, states:*

“If an operational creditor has applied, the application contains: i. Record of an undisputed bill against the entity, and where applicable, information of such undisputed as filed at a registered information utility.”

11. From the aforementioned ratio, it is clear that a Banker's Certificate is not mandatorily required to trigger CIRP under Section 9 of the Code. It is significant to mention that this Tribunal has not gone into the merits of the

matter with respect to 'debt' or 'default', we only addressed to the issue of the service of Demand Notice on the Corporate Debtor and that a Banker's certificate is not essential to trigger CIRP under Section 9 of the Code.

12. For all the afore-noted reasons this Appeal is allowed and the impugned order dated 30.09.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) is set aside and the matter is remanded back to the Adjudicating Authority to decide the Application preferred by the Appellant under Section 9 of the Code, on merits. It is reiterated that this Tribunal has not made any observations regarding the merits of the matter. The Adjudicating Authority shall proceed in accordance with law and dispose of the Application as expeditiously as practicable, uninfluenced by observations, if any, in this order. The Respondent is at liberty to raise all other issues, if any, before the Adjudicating Authority.

13. The Registry is requested to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata), forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi
05th August, 2022
Ram N.