

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH  
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**CP (IB) No. 48/CB/2023**

**In the matter of:**

An application filed under 9 of the Insolvency and Bankruptcy Code, 2016;

-And-

**In the matter of:**

**Growel Feeds Pvt. Ltd.** an Unlisted Public Non-Government company limited by shares, having its registered office address at Sy No. 64-67, Chengicharla Village Road, Hyderabad – 500 092, Telangana;

**... Applicant/Operational Creditor**

-Versus-

**Ashadeep Aquaculture Pvt. Ltd.**, having its registered office at Tinipada, Jugalkishorepur, P.O. Khantapada, District- Balasore, Odisha – 756 043.

**... Respondent/Corporate Debtor**

**Order pronounced on: 28.02.2024**

***Coram:***

Shri P Mohan Raj  
Shri Kaushalendra Kumar Singh

Member (Judicial)  
Member (Technical)

***Appearances (Through Hybrid Mode)***

For the petitioner

Mr. Anand Chandra. Swain, Adv  
Mr. Sunshine Anand Swain, Adv.

For Respondent (s)

Mr. Saswat Kumar Acharya, Adv.

**ORDER**

1. The Petitioner/Operational Creditor filed this petition under Section 9 of IBC, 2016 for initiation of CIRP against the respondent/corporate debtor for a default amount of Rs.2,75.35,030/-. A sum of Rs.1,21,73,650/- as principal, a sum of Rs.1,48,95,632/ interest and other charges of Rs. 4,65,748/- towards

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breach of settlement in total a sum of Rs.2,75,35,030/-. In the petition no date of default is given, further notice under Section 8 of IBC, 2016 not given. It is stated that this petition is filed in continuation of earlier petition C.P. No.5/CB/2021 and the petitioner has filed this fresh petition as ordered by NCLAT-Delhi in C.A. No.754 of 2023 by order dated 03.07.2023.

2. When the matter came up for admission, we heard the submission of the petitioner counsel, he reiterated that since the petitioner filed this fresh petition as per the order of NCLAT-Delhi passed in C.A. No.754/CB/2023 dated 03.07.2023, this petition is in continuation of earlier petition C.P. No.5/CB/2022 filed against the same respondent which was disposed on 13.09.2022, the notice issued under Section 8 dated 29.10.2019 *Annexure 12* and filed in the earlier disposed C.P. No.5/CB/2022 is enough, no fresh notice needs to be issued.
3. **The brief background of the case necessary to answer to the point involved in the petition are as follows:** The petitioner is carrying on fish and shrimp feed product manufacturing business. The respondent engaged in prawn culture activities. On the purchase request of the respondent, the petitioner supplied shrimp feed products to the respondent. In this transaction the respondent committed default in payment of amount payable towards the shrimp food supplied. The petitioner sent Section 8 of IBC, 2016 notice dated 29.10.2019 to the respondent, which was received by the respondent on 02.11.2019. Thereafter, the respondent sent reply on 29.11.2019 alleging that defective/bad quality of feeds were supplied, and denied its liability. The petitioner then filed Section 9 of IBC, 2016 petition on 20.09.2021 before this Adjudicating Authority. The respondent appeared and contested the petition. After the completion of pleadings, the parties entered into settlement agreement dated 05.09.2022 and filed a memo on 13.09.2022. In view of settlement memo filed, the petition was disposed of as settled out of court. The petitioner subsequently filed Restoration Application Rst. A. (IB) No. 1/CB/2023 to restore the disposed C.P. No.5/CB/2021 alleging that the

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respondent/corporate debtor breached the terms of settlement agreement dated 05.09.2022. The restoration application was dismissed by this Adjudicating Authority on 27.03.2023. On the ground that no liberty was granted. This petitioner preferred an appeal C.A. No.754 of 2023 before NCLAT-Delhi. The NCLAT-Delhi by order dated 03.07.2023, confirmed the order of this Adjudicating Authority and refused to revive the company petition and disposed of the appeal with the following observations:

*“Subsequent to the said order, it appears that settlement terms were not honoured by the Corporate Debtor. On the breach being committed, an application was filed to revive the CIRP. The Adjudicating Authority has taken the view that there is a fresh cause of action to take appropriate action against the party concerned which has been observed in Paragraph 9 of the Order. It is further stated that Adjudicating Authority in its order dated 13<sup>th</sup> September, 2022 in spite of request to grant liberty to revive has navigated the said request hence the revival cannot be granted.*

*We are of the view that in the facts of the present case, especially when the liberty sought by the memo was not granted by the Adjudicating Authority, the course open for the Appellant was to file a fresh application under Section 9 of the Code and the Adjudicating Authority did not commit any error in refusing to revive the earlier Company Petition.*

*With these observations, we dispose of this Appeal.”*

4. The petitioner filed this present petition on 30.08.2023, without giving notice under Section 8 of IBC, 2016.

**The point for consideration is:**

Whether statutory notice dated 29.10.2019 filed in C.P.No.5/CB/2021 is sufficient to file this fresh Section 9 of IBC, 2016 application?

5. The precondition to file Section 9 of IBC, 2016 petition is, the operational creditor shall deliver notice under section 8 of IBC, 2016 to the corporate

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debtor, then the corporate debtor within ten days shall give reply. This is made clear the right to file petition by operational creditor arises only after the expiry of ten days from the delivery of notice under section 8(1) of IBC 2016. Thus, the notice under Section 8 of IBC, 2016 is mandatory. In this regard Hon'ble NCLAT-Delhi held in Company Appeal No.31 of 2017 by order dated 03.05.2017 as follows:

*Admittedly, no notice was issued by Operational Creditor under Section 8 of the Insolvency and Bankruptcy Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days, there was no question of preferring an application under Section 9 of Insolvency and Bankruptcy Code, 2016.*

*The Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld.*

*For the reasons aforesaid, we set aside the order dated 12<sup>th</sup> April, 2014 passed by the Adjudicating Authority. The application preferred by Operational Creditor under Section 9 stands dismissed being incomplete. All orders, interim arrangement etc. as has been made are vacated, moratorium as declared earlier is quashed, appointment of interim resolution professional also stands quashed. All action taken by interim resolution profession is declared illegal. The appeal is allowed with the aforesaid observations.*

6. On the petitioner side argued that this petition is filed in continuation of previous disposed petition C.P. No.5/CB/2021 hence no notice needs to be given again. This contention is not acceptable. The Hon'ble NCLAT in the Appeal No. 754 of 2023 expressed that **the course open for the Appellant**

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**was to file a fresh application under Section 9 of the code.** Fresh application means new application in all aspects. Once the restoration application for restoration of C.P.No.5/CB/2021 was dismissed and the said order is confirmed by the Appellate Authority, the order reached its finality. So, the contention of the petitioner that this petition to be treated as filed in continuation of disposed petition is unsustainable.

7. In the appeal the Hon'ble NCLAT-Delhi referred the para 9 of impugned order dated 18.04.2023 passed in Rst.A.No.1/CB/2023. It runs as follow:

*“Once the lis is validly settled between the parties and accepted by the Court, the lis attains a quietus and terminates since the cause of action for the lis has merged with the final order of settlement. If the terms thereof are violated by any of the parties thereto, the breach thereof provides a fresh cause of action to take appropriate action against the party concerned. However, it shall not under any circumstances restore or revive the cause of action, which had already merged with the final order of settlement.”*

8. The above passage made it clear that the fresh cause of action means which arose when the respondent defaulted in payment in violation of terms of settlement agreement dated 05.09.2022. The Appellate authority referred the right of the petitioner to file fresh petition on the fresh cause of action that arose in terms of violation of settlement agreement. The earlier petition C.P.No.5/CB/2021 was filed for the default committed by the respondent when the respondent failed to pay the amount payable under invoices. This cause of action culminated with the final order passed by this Authority in C.P.N.5/CB/2021 dated 13.09.2022. Now the fresh cause of action arose when the respondent failed to pay the amount in terms of settlement. The petitioner ought to have filed petition under Section 9 of IBC, 2016, if so desires, only on the default committed by the respondent in terms of settlement. In such a situation the petitioner ought to have filed the petition after adhering all the conditions stated in the Code. In the circumstances,

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petition filed without issuing notice under Section 8 of IBC, 2016 is not maintainable.

9. The counsel appearing for petitioner submitted/requested that in the event of this Adjudicating Authority comes to the conclusion that the petition filed without issuing notice under Section 8 of IBC, 2016, is not maintainable, then this Adjudicating Authority may return the petition to cure the defects under Section 9(5)(ii) of IBC, 2016. This request of the petitioner is not acceptable because Section 9(5)(ii) of IBC, 2016 runs as follows:

*(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 [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 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.*

The supra-Proviso to Section 9(5)(ii) is clear, that only in the cases where section 9(5)(ii)(a) of IBC, 2016 attracts, the Adjudicating Authority before rejecting an Application would issue notice of defect to cure the defects in seven days. However, in respect of other defects covered under 9(5)(ii) (b) to (e), the application shall be rejected, and in that case rejection of application should be communicated to the operational creditor and corporate debtor. The filing of petition without issuing notice is covered under Section 9(5)(ii)(c) of IBC, 2016 hence as provided under Section 9(5)(ii), this petition is liable to be rejected and

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no need to give any defect intimation notice, because the defect is incurable in nature. The notice under Section 8 of IBC, 2016 must be prior to file the petition under Section 9 of IBC, 2016 and not after filing the petition.

10. For the reasons stated above it is answered that the statutory notice under Section 8 of IBC, 2016 dated 29.10.2019 filed in C.P.No.5/CB/2021 is not enough to file this fresh Section 9 of IBC, 2016 application, on the different cause of action arose out of violation of terms of settlement. Further this petition cannot be considered as petition in continuation of earlier petition C.P.No.5/CB/2021, thus the point is answered.
11. In the result this petition CP (IB) No. 48/CB/2023 is rejected under Section 9(5)(ii) (c) of IBC 2016. No cost. ✓
12. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
13. Urgent certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

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**Kaushalendra Kumar Singh**  
**Member (Technical)**

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**P. Mohan Raj**  
**Member (Judicial)**

*Signed on this 28<sup>th</sup> day of February, 2024.*

*Kaushal p.s.*