



**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH,
PRAYAGRAJ**

CP (IB) No.36/ALD/2020

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

**MR. DINESH KUMAR GOEL
PROPRIETOR OF M/S KRITIKA ENTERPRISES
OFFICE SITUATED AT:**

53, SHED NO.7 RAGHUVIR COLONY,
SIHI GATE, BALLABGARH, FARIDABAD,
HARYANA-121004

...OPERATIONAL CREDITOR/APPLICANT

Versus

**M/s SHANTI REFRIGERATION INDUSTRIES PRIVATE LIMITED
REGISTERED OFFICE:**

PLOT NO. 27 & 28, SECTOR 7,
I.I.D.C., I.I.E. PANT NAGAR,
UTTARAKHAND, 263145

CIN: U74991UR2007PTC032487

... CORPORATE DEBTOR/RESPONDENT

Order pronounced on 20th July, 2023

CORAM:

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

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PRESENT-

Sh. Amitabh Agarwal, Adv. : For the Operational Creditor

NONE : For the Corporate Debtor

ORDER

1. This application has been filed on 16th January, 2020 by the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the “I & B Code, 2016”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as “the Rules”) stating that the default amount of Rs.13,51,340/- for supply of the goods “connector” to the Respondent/Corporate Debtor. And the first due date as per the Part IV mentioned is 27th September, 2016 and thereafter the amount which has been claimed is Rs.17,69,488/- which includes an amount of interest of Rs.4,18,148/- in addition to the principal amount of Rs.13,51,340/-. The date of default as mentioned in Part IV is thus 27th September, 2016.



2. A demand notice dated 09th October, 2019 was issued to the Respondent/Corporate Debtor wherein at Page 48 it was mentioned that an amount of Rs.17,69,488/- has become due as on 28th September, 2016 as being the date of default.
3. The reply has been filed on behalf of the Corporate Debtor, through its Director. The objections have been raised by the Corporate Debtor that the bill amounts are incorrect as the material supplied by the Operational Creditor through the purchase order were found to be defective and were returned and the Operational Creditor without correcting the amount has filed the bills in original. The Corporate Debtor has placed on record a copy of the e-mail dated 5th September, 2016 to the effect that the connector 3-Way supplied against the purchase order, while using AC line getting broken and screw thread free problem. It was further mentioned in the e-mail to please take corrective and preventive action in urgent for further lot. Hence, we are returning the goods/connector purchased by us against your invoice dated 26th August, 2016.



Another e-mail was sent on 27th October, 2016 stating that after several e-mails still there are huge quality issues in your 3-Way connector, quantity delivered by you through purchase orders. It has been found that quality of the connector are very bad and cannot be used in manufacturing line, hence, the goods/connector are being returned. Similar e-mails were sent subsequently on 19th November, 2016 and on other several dates.

4. Written submissions have been filed on behalf of the Operational Creditor wherein it has been submitted that the Respondent/Corporate Debtor is a private limited company and is engaged in the business of manufacturing and supplying refrigeration products, sheet metal components and electrical components and that the Operational Creditor has supplied goods/connector to Corporate Debtor from January, 2016 against various invoices. It is further stated on behalf of the Operational Creditor that the Corporate Debtor defaulted in making payments against the invoices raised towards supply of the connectors and as such defaulted amount



accumulated to Rs. 17,69,488/- whereupon a demand notice in Form 3 of the Code has also been issued to the Corporate Debtor.

5. The Operational Creditor in response to the objection of the Corporate Debtor that a sole proprietorship firm cannot initiate proceedings under Section 9 of the Code has relied upon a judgment passed by the NCLT Amrawati Bench in CP(IB) No.359/2018 dated 3rd September, 2019 and NCLT Kolkata Bench in CP(IB) No.22/2018 dated 14th January, 2019 as well as the judgement and order dated 28th December, 2020 passed by the National Company Law Appellate Tribunal New Delhi in Company Appeal (AT) No.776 of 2020 whereby the Hon'ble Tribunals have been pleased to interpret that the sole proprietorship concern is entitled to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.
6. While hearing the submissions made by Ld. Counsel representing the Operational Creditor, we specifically made a query about the date of default being mentioned as 27th September, 2016 in Part IV at Page 13, in the context of



limitation in filing the present application which infact has been filed in January, 2020. It was also further noted that even in the demand notice dated 9th October, 2019 at Page 48, the date of default has been shown as 28th September, 2016. The Ld. Counsel submitted that the last payment was received from M/s Shanti Refrigeration Industries Private Limited in this account on 22nd June, 2017 as per letter dated 11th December, 2019 issued by the Bank of Baroda as per Annexure J at Page 43 and therefore, the cause of action continues and the application under Section 9 filed in January 2020 would thus be maintainable.

7. We have perused the record and heard the Ld. Counsel representing the Operational Creditor. There was no representation on behalf of the Corporate Debtor.
8. While perusing the contents of the application particularly Part IV, it is clearly discernible that the date of default admittedly is stated by the Operational Creditor as 27th September, 2016. The same is also reiterated in the demand notice dated 9th October, 2019 at Page 48 wherein the date of



default has been mentioned as 28th September, 2016. As per the mandatory disclosure as required to be made in the Part IV of the Application, the date of default therefore is to be taken as 27th September, 2016. In our considered view, the said date of default cannot be permitted to be shifted or extended to a later date merely because some payment was received from the Corporate Debtor, as the date of default has already been taken to be 27th September, 2016. Moreover, there are no averments mentioned in the application with regard to any continuing cause of default date and the ground that some amount was received from the Corporate Debtor at a later point of time was raised while making oral submissions. Merely receiving of an amount at some date would not shift the date of default which has already been stated as a mandatory disclosure in accordance with the Part IV of the Code. On the contrary, there is a consistent stand of the Operational Creditor that the date of default is 27th September/28th September, 2016. In view of this, the application having been filed on January, 2020 is thus, clearly barred by limitation.



9. Keeping in view the forgoing discussions regarding limitation, we are not inclined to deal with the other aspects of the matter concerning the objection raised by the Corporate Debtor about the maintainability of the application filed by the Operational Creditor in the capacity of being a sole proprietor or the objection of the Corporate Debtor about the pre-existing disputes with respect to the goods supplied by the Operational Creditor which were found to be allegedly not of a good quality and therefore, were returned by e-mails sent on several occasions.
10. The Hon'ble NCLAT in a recent judgment in Case of **Yatra Online Limited vs. Ezeego One Travel and Tours Limited Company Appeal (AT) (Ins.) No.387 of 2023 dated 31.03.2023**, has held that notice under Section 8 of the Code is a *sine qua non* to maintain an application under Section 9 of the Code. The relevant part of the judgment is reproduced as under:-

15. Admittedly, the application under Section 9 has to



be filed after a notice under Section 8 of the Code is delivered. Meaning thereby notice under Section 8 of the Code is a sine qua non to maintain an application under Section 9 of the Code. Section 8 of the Code provides that the Operational Creditor shall deliver a demand notice upon the Corporate Debtor who may within a period of 10 days of the receipt of the demand notice either raise the issue of an existing dispute or bring to notice of the Operational Creditor that the payments have been made/paid of operational debt and an application under Section 9 of the Code could be filed only after the expiry of period of 10 days from the date of delivery of notice. The Resolution Professional who was appointed on 09.03.2021 and is familiar with the provisions of the Code mentioned the date of default as 30.10.2020 in the notice and after the notice, the application under Section 9 of the Code too contained the date of default as 30.10.2020. Thus, the positive case before the Adjudicating Authority, at the instance of the Resolution Professional, was that the date of default is 30.10.2020 and not July 2019 but while contesting the application filed under Section 10A the RP conveniently changed the date of default from 30.10.2020 to July, 2019 in order to wriggle out of the rigour of Section 10A of the Code.

16. In the background of the aforesaid facts and circumstances of the case, the question thus would arise as to whether the date of default, mentioned in the demand notice as well as in the application filed under Section 9 of the Code, which has not been amended even if it was allegedly wrongly mentioned, can be changed in the litigation which arises from a miscellaneous application?

17. In this regard, this case is squarely covered by the decision of the Hon'ble Supreme Court



rendered in the case of Ramesh Kymal (supra) in which it has been held that the date of default cannot be changed. But in the case of Dena Bank (Supra) the Hon'ble Supreme court has found that there are situation when either the Operational Creditors or the Corporate Debtor may commit a mistake in the pleadings, therefore, it provided a window to the parties for amendment of their pleadings. The said window was also available to the present Respondent if the date of default has been inadvertently mentioned as 30.10.2020 in the demand notice as well as in the application filed on Form-4 but the Respondent did not seek the amendment of the said date and has rather brought out a new date while contesting the miscellaneous application filed under Section 10A of the Code. It is also worthwhile to mention that the judgment which has been relied upon by the Respondent are on the application filed under Section 7 of the Code whereas the judgment in the case of Ramesh Kymal (Supra) is in regard to the application filed under Section 9 of the Code.

18. In view of the aforesaid discussions, we are totally satisfied that there is an error in the approach of the Adjudicating Authority in allowing the Respondent to bring a new date of default dehors the fact that another date of default is still existing in the pleadings which were filed at the inception of the litigation and has not yet been amended. Thus, the present appeal has been found meritorious and the same is hereby allowed, the impugned order is set aside and as a result thereof, the application filed under Section 9 of the Code is also dismissed. No costs.

[Emphasis Supplied]



11. In view of the foregoing judgment of the NCLAT, we are our considered view that the date of default cannot be changed at the stage of argument a what is shown in notice u/s 8 and in application u/s 9.
12. In view of our foregoing discussions, we hold that the present application is clearly barred by limitation and is therefore dismissed, with no orders as to costs.

-Sd-

**(Ashish Verma)
Member (Technical)**

-Sd-

**(Praveen Gupta)
Member (Judicial)**

Priya Agarwal
(Stenographer)