

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1272 of 2023

(Arising out of Order dated 14.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-IV in C.P. (IB) No. 423 (ND)/2022)

IN THE MATTER OF:

Kavindra Kumar,
R/o WZ 358 E/C Street 16
Sadh Nagar, Palam Colony,
New Delhi-110045.

Yogesh Sinha,
R/o House No. 06, Block III,
Eros Garden,
Faridabad-121009.

Prashant Singh,
R/o M-334, Jal Vayu Vihar,
Sector 25, Noida - 201 301

C. B. Singh, R/o L-468,
Sarita Vihar,
New Delhi - 110 044.

Darpan Singh Negi,
R/o House No. 147,
Bank Colony, Near Gagan Cinema,
New Delhi - 110 093.

Jom Joseph,
R/o 55- B, Pocket - A,
G.T.B. Enclave,
Delhi-110 093.

Mary Joseph,
R/o 55- B, Pocket - A,
G.T.B. Enclave,
Delhi-110 093.

Harish Kumar Gupta,
R/O 67, First Floor, Block 3,
Eros Garden, Surajkund Road,

Faridabad-121009.

S. K. Chatterjee,
R/o D/675 (FF),
Chitranjan Park,
New Delhi-110 019.

Neha Kapoor,
R/o E-322,
Greater Kailash I,
New Delhi-110048.

Kavita Sharma,
R/o F-502,
Pan Oasis Apartments,
Sector 70, Noida,
UP-201301.

Sreelatha Nair,
R/o B 72, SFS DDA Flats,
Sheikh Sarai Phase I,
New Delhi-110 017

.... Appellants

Vs

M/s Desein Private Limited
CIN U74899DL1970PTC005474
Registered Office at: Desein House,
Greater Kailash -II
New Delhi - 110048
Email: info@deseinindure.com;
info@desein.com

.... Respondent

Present:

For Appellants: Mr. Kumar Deepraj, Advocate.

For Respondent: Mr. Krishnendu Datta, Sr. Advocate with Mr. Prashant Mehta, Mr. Varun Gupta, Ms. Simran Wasan, Mr. Akhil G. Kurup and Ms. Ronak Gupta, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal by Appellant and 11 other employees has been filed challenging the order dated 14.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi, Court No.IV rejecting Section 9 application filed by the Appellants on the ground that Appellants do not fulfill the threshold for filing the application. Aggrieved by the said order rejecting Section 9 application, this appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:

- (i) Appellants were appointed with different designations by the Company – M/s Desein Private Limited between the period 1979 to 2018.
- (ii) After June, 2018, the Company failed to pay the monthly salary, allowances and other dues of the Appellants.
- (iii) Appellants jointly sent a demand notice under Section 8 of the I&B Code on 11.03.2022 claiming amount in default of Rs.2,89,73,950/- due with respect to the Appellants. The demand notice was replied by the Company vide letter dated 23.03.2022 stating that there is no provision for joint application/

notice under Section 8. It was stated that individual Operational Creditors have to issue their claim notice under Section 8. By notification dated 24.03.2020, the minimum threshold has been enhanced to Rs.1 Crore. It was stated that notice is for the purpose of recovering of dues which is not the object of IBC. There is pre-existing dispute between the Company and the alleged Operational Creditors. With regard to individual Applicants detail reply was given objecting to the claim.

- (iv) Section 9 application was filed by the Appellants. Notice was issued by the Adjudicating Authority on 02.06.2022. On 26.05.2023, learned counsel for the Operational Creditors prayed for additional time to make appropriate submission as to how the matter is maintainable. The Adjudicating Authority heard the application and by order dated 14.07.2023 has rejected the application relying on judgment of this Tribunal in ***Sadashiv Nomaya Nayak & Ors. Vs. Gammon Engineers & Contractors Pvt. Ltd., Company Appeal (AT) (Ins.) No.218 of 2023*** and other judgment of this Tribunal in ***Mr. Suresh Narayan Singh Vs. Tayo Rolls Limited, Company Appeal (AT) (Ins.) No.112 of 2018***. The Adjudicating Authority held that in event of failure to fulfil the threshold prescribed under law by each and every joint Applicant, the application cannot be maintained. Aggrieved by which order this Appeal has been filed.

3. We have heard Shri Kumar Deepraj, learned counsel for the Appellants and Shri Krishnendu Datta, learned senior counsel appearing for the Respondent.

4. Learned counsel for the Appellants submits that judgment of this Tribunal in **Sadashiv Nomaya Nayak & Ors. Vs. Gammon Engineers & Contractors Pvt. Ltd.** does not lay down the correct law. Learned counsel for the Appellants relying on Note of Part V in Form 5 under Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 submits that in case of workmen/ employees application may be made either in individual capacity or in joint capacity, hence, with regard to workmen/ employees there is a departure from the normal rule of fulfilling the threshold by each applicant. When the application is allowed by rules to be filed jointly by the Applicants, the threshold has to be looked into on the basis of total dues of all Applicants jointly and in the present case total dues of the Applicants jointly is an amount of Rs.2,89,73,950/-, hence, the application was fully maintainable. It is submitted that the Adjudicating Authority has overlooked the legislative intent of the Note appended to Form 5. It is submitted that the exception was carved out for the simple reason that the workmen/ employees can join and file a single petition/application, as the legislature was conscious of the fact that that a workmen or an employee will not be able to individually meet the threshold limit. This Tribunal in **Sadashiv Nomaya Nayak** has erroneously interpreted the intention of the legislature. With regard to

Financial Creditors in a joint petition claims of each Financial Creditors can be added to complete the minimum threshold of Rs.1 Crore. The same principle has to be applied for workmen/ employees. The mere fact that the judgment of this Tribunal in **Sadashiv Nomaya Nayak** was not interfered by the Hon'ble Supreme Court in appeal under Section 62 by its order dated 15.05.2023 cannot be read to mean that the issue has attained finality and is binding. Learned counsel for the Appellants has referred to judgment of Hon'ble Supreme Court in **"Experion Developers (P) Ltd. Vs. Himanshu Dewan, 2023 SCC OnLine SC 1029"** to submit that the Hon'ble Supreme Court has held that if the Appeal is dismissed *in limine* without any reason, the same is not binding. The *Doctrine of Stare Decisis* does not apply in this case.

5. Shri Krishnendu Datta, learned senior counsel appearing for the Respondent refuting the submissions of the Appellants submits that scheme of I&B Code for filing Section 7 application and Section 9 application are entirely different. Section 7 application can jointly be filed which is permitted by statute itself but there is no indication in Section 9 of a joint application by Operational Creditors. It is submitted that operational debt owed to each creditor is different debt and scheme contemplate issuance of separate notice under Section 8 and neither joint notice can be issued under Section 8 nor joint petition can be filed under Section 9 and even if, a joint application can be filed, each Applicant has to fulfil the threshold of Rs.1 Crore. The Note under Part V, Form 5 only

permits filing of application in joint capacity which does not dilute the requirement of threshold for each Applicant. While Trade Unions, as in ***JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. through its Director & Ors.***, are allowed to file joint application, the individual employees do not have same privilege. The Rules framed under the act cannot travel beyond the scope of the existing act nor they can be read contrary to the legislative scheme under the act. Rules are subservient to the principle enactment and cannot travel beyond the scope of parent act. Rules cannot be made which are inconsistent or repugnant to the provisions of the parent act. It is submitted that there was pre-existing dispute and detailed reply to the demand notice was given. Section 10A also bars initiation of insolvency during the period from 25.03.2020 to 24.03.2021. Applications are also barred by limitation. I&B Code is not a debt recovery mechanism.

6. We have considered the submissions of learned counsel for the parties and perused the record.

7. Chapter II of Part II of the I&B Code deals with Corporate Insolvency Resolution Process. Section 8 and 9 deals with Operational Creditors, which provisions are as follows:

“8. Insolvency resolution by operational creditor. — (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, ¹[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 ²[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.*

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding ²[payment] of the operational debt in respect of which the default has occurred.

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 ¹[by the corporate debtor, if available;]
- ²[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- (e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(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 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 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.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

8. In contrast we may also notice the provision of Section 7 which deals with initiation of corporate insolvency resolution process by Financial Creditors. Section 7 Sub-section (1) begins with words, “*A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process*”. However when we look into the provision of Section

8(1) it begins with words, “*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*”. Unpaid operation debt which are contemplated under Section 8(1) are qua an Operational Creditor. There may be several Operational Creditors to a Corporate Debtor and each Operational Creditor can on occurrence of default can initiate CIRP. Further Section 8 requires issuance of notice to the Corporate Debtor demanding the payment and under Section 9(1) after expiry of 10 days from delivery of notice or invoice. Operational Creditor if does not receive payment from the Corporate Debtor, may file an application under Section 9. The contrast in the provisions of Section 7 and 9 clearly indicate that legislature while permitted the Financial Creditors to jointly file application, it has not been provided for the Operational Creditor in scheme under section 8 and 9.

9. Learned counsel for the Appellants has placed reliance on Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rules provides for application by Financial Creditor, Demand Notice by Operational Creditor and Application by Operational Creditor. Rule 5 and Rule 6 which deals with the Operational Creditor are as follows:

“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 acknowledgement 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.”

10. Whereas similarly in Rule 4 which deals with Financial Creditor, expression used is “*A financial creditor, either by itself or jointly, shall make an application.*”. Application under Rule 6 is to be filed in Form 5. Form 5 which is part of the Rules has been relied by learned counsel for the Appellants. The Note on which reliance has been placed is part of the instructions in Part V of Form 5. Note to Part V of Form 5 is as follows:

“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.”*

11. The above Note permits application to be made either in individual capacity or in a joint capacity by one of them. The said expression at best relates to filing of application. The expression ‘*or in a joint capacity by one of them*’ only entitled for filing of the application by one person in joint capacity. The said Note cannot be read to mean that Note permits Operational Creditors to also jointly file the claim. The purpose of Note cannot be read beyond the purpose for which it was included in Part V. Whether Operational Creditors can jointly file an application to meet the threshold of Rs.1 Crore amount which is fixed by Section 4, cannot be shown from the above Note. The said question has to be answered by

statutory scheme. Thus, the Note which has been relied by learned counsel for the Appellants does not support his submission that application can be jointly filed by the Operational Creditors and amount jointly due on the Corporate Debtor if it exceeds Rs.1 Crore, the application is maintainable.

12. Now we come to the judgment of this Tribunal in **Sadashiv Nomaya Nayak & Ors. Vs. Gammon Engineers & Contractors Pvt. Ltd.** which judgment according to the Appellants does not lay down correct law. In the case of **Sadashiv Nomaya Nayak** facts have been noticed by this Tribunal in Paras 2 and 3 of the judgment, which are as follows:

“2. Shorn of necessary details, the issue involved in this Appeal is as to whether the claim set up by all three appellants, namely, the Appellant No. 1 of an amount of Rs. 87,69,909/-, the Appellant No. 2 of Rs. 9,49,377/- and Appellant No. 3 of Rs. 25,35,830/- together can be taken to cross the threshold of Rs. 1 Crores as provided under Section 4 of the Code for maintaining the application under Section 9 of the Code?

3. Counsel for the Appellant has vehemently argued that if the amount of Rs. 87,69,909/-, Rs. 9,49,377/- and Rs. 25,35,830/- is added then it would come to Rs. 1,22,55,116/- which is more than the amount Rs. 1 Crore and thus the petition filed by one of them as representative of the others is maintainable.”

13. This Tribunal also noted the judgment of Hon'ble Supreme Court in **"JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. through its Director & Ors., (2019) 11 SCC 322"** in para 4 of the judgment, which is as follows:

"4. In this regard, he has relied upon a decision of the Hon'ble Supreme Court rendered in the case of JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. through its Director, (2019) 11 SCC 332. He has argued that the Application under Section 9 is to be filed in terms of Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which prescribes Form 5 for the purpose of filing the application. He has referred to the note appended to Form 5 which read thus:

"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 authorized for the purpose."

14. This Tribunal after considering the judgment of **JK Jute Mill** and also another judgment of this Tribunal in **"Mr. Suresh Narayan Singh Vs. Tayo Rolls Limited, Company Appeal (AT) (Ins.) No.112 of 2018"** laid down following in Paras 9 and 10:

"9. In support of his submissions, he has relied upon a decision of this Tribunal in the case of Mr. Suresh Narayan Singh Vs. Tayo Rolls Limited, Company Appeal (AT) Ins. No. 112 of 2018, to contend that issue

involved in the present case has been answered in manner that “only if in an individual claim of ‘Operational Creditor’ the amount of debt is less than one lakh rupees, it can be rejected being not maintainable”. It is further submitted that in that case, all the employees/workmen had the claim of Rs. 1 lakh which was the threshold amount at that time therefore the application was held to be maintainable.

10. We have heard Counsel for the parties and after perusal of the record are of the considered view that there is no merit in the present appeal because the Judgment relied upon by Counsel for the Appellant in the case of JK Jute Mill (supra) does not apply to the facts and circumstances of the present case because the question which has been answered in the JK Jute Mill is altogether different from the issue involved in the present appeal because the issue here in this case is as to whether all the workmen can together by adding their amount which is being claimed against the Corporate Debtor can cross the threshold set up under Section 4 of the Code. In our considered opinion, the Judgement relied upon by Counsel for the Respondent in the case of Mr. Suresh Narayan Singh (supra) answers the question.”

15. This Tribunal took the view that question which was up for consideration in **JK Jute Mill** is different from the issue which was involved in the appeal. Judgment of this Tribunal in **Mr. Suresh Narayan Singh Vs. Tayo Rolls Limited** was relied and followed. It is also relevant to notice

that against judgment dated 07.03.2023 in **Sadashiv Nomaya Nayak** Civil Appeal No.3220 of 2023 was filed which was dismissed by the Hon'ble Supreme Court by following order:

"ORDER

1. *We are not inclined to interfere with the impugned order of the National Company Law Appellate Tribunal dated 7 March 2023 in Company Appeal (AT) (Ins) No 218 of 2023.*
2. *The appeal is accordingly dismissed.*
3. *However, this would not come in the way of the petitioners pursuing their remedies in accordance with law in regard to their dues.*
4. *Pending application, if any, stands disposed of."*

16. Learned counsel for the Appellants although contended that the judgment of this Tribunal in **Sadashiv Nomaya Nayak** does not lay down correct law but has not been able to substantiate his argument that judgment of this Tribunal in **Sadashiv Nomaya Nayak** can be held to be not laying down correct law. This Tribunal in the above judgment has also noticed Note of Form 5 on which much reliance is placed by learned counsel for the Appellants at Para 4 of the judgment. We have already noticed Note of Form 5 and has taken a view that said Note of Form 5 is for limited purpose of filing appropriate application in individual or joint capacity by one person but said Note cannot be read in any manner to empower

different/ other Operational Creditors to join in one application for completing the threshold for filing Section 9 application.

17. Section 4 of the I&B Code provides that matter relating to insolvency of corporate debtors where the minimum amount of the default is one lakh rupees which now has been specified as Rs. 1 Crore by Notification dated 24.03.2020 by the Central Government. The purpose of keeping a threshold of default for initiating Corporate Insolvency Resolution Process against a Corporate Debtor has its own statutory object. The debts of lesser amount cannot be basis for initiating any CIRP against the Corporate Debtor.

18. Coming to the case of workmen/ employees as submitted by learned counsel for the Appellants which according to the Appellants has to be read as exception with regard to other Operational Creditors. Debt or default of each employee may arise at different period and may have different amount. Demand Notice as contemplated under Section 8 gives an opportunity to the Corporate Debtor to make the payment within 10 days. Thus, in event there are employees who have given notice under Section 8, the Corporate Debtor is entitled to avail the provision by making payment within 10 days. Each employee is a different Operational Creditor and are required to give separate notice under Section 8(1) and any clubbing of operational debts cannot be done to complete threshold for Corporate Debtor to make payment within 10 days. Judgment of **Mr. Suresh**

Narayan Singh Vs. Tayo Rolls Limited of this Tribunal has been relied by learned counsel for the Respondent and has also relied by the Adjudicating Authority in support of interpretation which we have put. In the above case, each workman had dues of more than one Lakh, which was threshold. In Paras 5, 6 and 7 following was laid down:

“5. The basic schme of the law, as enunciated in Section 8 and 9, has been explained by the Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank" (2018) 1 SCC 407", wherein the Hon'ble Supreme Court observed:

“29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing-i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

6. Therefore, it is clear that if there is a 'debt' and there is a 'default' which in this case has not been disputed by Tayo Rolls Limited' ('Corporate Debtor'), the application being complete, the Adjudicating Authority should have entertained the application,

instead of raising a technical ground that it was filed on behalf of 284 workmen.

7. If the application is maintainable by one of the workmen, in that capacity, it should have been treated to be an application of 'Operational Creditor' and others could have been asked to file their respective claim before the 'Resolution Professional'. Even in a demand notice under Section 8(1), the details of operational debt of each 'Operational Creditor' can be shown by the authorized person. Only if in an individual claim of 'Operational Creditor' the amount of debt is less than one lakh rupees, it can be rejected being not maintainable.”

19. In the present case, copy of demand notice dated 11.03.2022 has been brought on record as ‘Annexure-O’ to the appeal, which gives details of dues of all Appellants individually. Perusal of said details indicate that dues of Appellant No.1 – Mr. Kavindra Kumar is Rs.35,26,000/- and similarly the dues of all other Appellants’ are less than amount of Rs.1 Crore individually. Thus, none of the Appellants’ fulfill the threshold of Rs.1 Crore for initiating CIRP.

20. Learned counsel for the Appellants submits that the judgment of **Sadashiv Nomaya Nayak** has been affirmed by the Hon’ble Supreme Court shall not make the judgment of this Tribunal binding. Even if judgment of Supreme Court dismissing the appeal does not contain any specific reason for dismissing the appeal, the judgment of this Tribunal is

precedent which needs to be followed by this Tribunal, since learned counsel for the Appellants has failed to point out any ground on which said judgment can be held to be not laying down a good law.

21. Judgment of Hon'ble Supreme Court in **“JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. through its Director & Ors., (2019) 11 SCC 322”** has been noticed by this Tribunal in **Sadashiv Nomaya Nayak's Case** also, where it was held by the Hon'ble Supreme Court that a Trade Union falls within the definition of person under Section 3(23) of the I&B Code, hence, in Para 12 of the judgment following has been held:

“12. On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute, namely, the Trade Unions Act, and would therefore fall within the definition of "person" under Section 3(23) of the Code. This being so, it is clear that an "operational debt", meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act.

Equally, the general fund of the trade union, which inter alia is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.”

22. The Hon’ble Supreme Court also held that the trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. In Para 16 of the Hon’ble Supreme Court laid down following:

“16. Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing Individual petitions would be burdensome as each workman would thereafter have to pay Insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen

and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice. This Court, in Kailash v. Nanhku³, put it thus: (SCC p. 495, paras 28-29)

“28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar are pertinent: (SCC p. 777, paras 5-6)”

“5.... The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

6. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly Inequitable.... Justice is the goal of jurisprudence processual, as much as substantive.”

29. In State of Punjab v. Shamlal Murari the Court approved in no unmistakable terms the

approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)

‘Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.’

In Ghanshyam Dass v. Union of India the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.”

This judgment was followed by the Constitution Bench decision in Sarah Mathew v. Institute of Cardio Vascular Diseases, SCC para 49.”

23. In the case before the Hon’ble Supreme Court, NCLAT has taken the view that Trade Union is not covered under the definition of ‘Person’ under Section 3(23). It is useful to extract Para 17 of the judgment of Hon’ble Supreme Court, which is as follows:

“17. The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union will come within the definition of “person” under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered

by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.”

24. The Hon’ble Supreme Court also held that Trade Union can file application under Section 9, however, it is relevant to notice that the question as to whether Operational Creditors can jointly file an application and for fulfilling the threshold their dues can be combined, neither had come up for consideration nor answered in the said judgment. The said judgment of the Hon’ble supreme court, thus, lays down that Trade Union can file an application under Section 9 and it is an Operational Creditor.

25. In view of the foregoing discussion, we are of the view that no case has been made out to hold the judgment of this Tribunal in **Sadashiv Nomaya Nayak** not laying down correct law. Judgment of this Tribunal in **Sadashiv Nomaya Nayak** is a precedent which needs to be followed.

We have also in foregoing paragraphs considered that statutory scheme under I&B Code and also has considered Note to Form 5.

26. In view of the foregoing discussion and conclusions, we are of the view that the Adjudicating Authority did not commit any error in rejecting Section 9 application filed by the Appellants. There is no merit in the Appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

1st May, 2025

Archana