

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 340 of 2021

(Arising out of Order dated 05.03.2021, passed by National Company Law Tribunal, New Delhi Bench IV, New Delhi in C.P. No.IB-221/ND/2019)

IN THE MATTER OF:

**Yuvrraj Agarwal,
R/o Vinayak Apartment,
Plot C-58/1,
NTPC Officers SASL,
Sector 62,
Noida,
Uttar Pradesh 201301.**

...Appellant No.1

**Adreel Media Pvt Ltd
701/702, Seventh Floor,
Ocean Complex,
Near Sector 18,
Metro Station,
Sector 18,
Noida 201301**

....Appellant No.2

Versus

**M/s Aspek Media Pvt Ltd,
803, 4th floor, Arjun Nagar,
Kotla Mubarakpur,
New Delhi**

...Respondent

For Appellant:

Mr. Akshay Srivastava, Advocate.

For Respondent:

Mr Atul Verma, Advocated

J U D G E M E N T

(Per: Shreesha Merla, Member (T))

1. Challenge in this Company Appeal (AT)(Insolvency) No.340/2021 is to the Impugned Order dated 05.03.2021 in C.P. No. IB-221/ND/2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi. By the Impugned Order dated 05.03.2021, the Adjudicating Authority has dismissed the Application filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (Hereinafter referred to as 'The Code') by the

Appellants namely Mr. Yuvrraj Agarwaal and M/s Adreek Media Pvt Ltd
observing as under:-

“Having considered the facts and circumstances and the material available on record, it has been observed by the this Adjudicating Authority that Section 8 Demand Notice issued and the application under Section 9 has been filed by both the Operational Creditors jointly. The amount in default is arising out of the claims of a person and a company which is a separate legal entity. In order to deal with the issue in hand we would like to refer to the Judgement of Uttam Galva Steels Ltd V DF Deutsche Forfait AG and Anr (Company Appeal (AT)(I) 39/ 2017 Para as reiterated:

“19. From the aforesaid provisions of Section 8 and 9 of I&B Code, it is clear that unlike Section 7, a notice under Section 8 is to be issued by an ‘Operational Creditor’ individually and the petition under Section 9 has to be filed by Operational Creditor individually and not jointly.

20. Otherwise also it is not practical for more than one operational creditor to file a joint petition individual Operational Creditors will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate Form-3 or Form-4 will have to be filled. Petition under Section 9 in the format will contain, separate individual date.”

19. As per our view, in the present matter the Demand Notice under Section 8 should have been issued by an Operational Creditors individually and further the application under Section 9 has to be filed by Operational Creditors individually and not jointly. For the aforesaid reasons, we hold that a joint application under Section 9 by one or more Operational Creditor is not maintainable.

2. Submissions on behalf of the Learned Counsel for the Appellant.

- It is submitted by the Learned Counsel for the First Appellant/the Director of the Second Appellant company which is engaged in the business of Media Management, that initially the Petition under Section 9 of the Code was filed by the First Respondent as a duly authorised representative of the Second Respondent Company; thereafter the Memo of Parties was amended and the Second Appellant was impleaded as a party to the Application under Section 9 of the Code.
- It is submitted that the Respondent/Corporate Debtor had engaged the services of the Appellants for a long time from April, 2016 onwards.
- The Learned Counsel for the Appellants drew our attention to the Appointment Letter dated 23.12.2015 issued in favour of the First Appellant wherein a monthly remuneration of Rs.4 lakhs was to be paid as job expenses.
- The Corporate Debtor has failed to pay the invoices raised by the Appellants from June, 2018 to September, 2018 and on account of the understanding between the parties, it was agreed that the expenses incurred by the Appellant would be reimbursed by the Corporate Debtor and, therefore the operational debt amounts to a sum of Rs.25,70,656/-.
- The Learned Counsel for the Appellant drew our attention to the stamped Ledger Account of the Corporate Debtor for the period 01.04.2017 to 22.09.2019 where the said amount is stated to be admitted. Subsequently, when an Application was filed under Section

9 of the Code after issuance of Notice under Section 8 of the Code on 24.10.2018, a Notice was issued to the Corporate Debtor vide order dated 29.01.2019 and Reply was filed by the Corporate Debtor on 22.04.2019.

- It is submitted by the Learned Counsel that the Appellant had sent an email dated 28.09.2018 calling upon the Respondent to clear the dues and also sent a reminder on 15.10.2018. Another invoice was raised on 21.10.2018 for an amount of Rs.4,72,000/- and the Appellant sought an acknowledgement from the Corporate Debtor.
- It is further submitted that on 24.10.2018 when the same dues were sought to be paid, the Respondent accused the Appellant of unfair trade practice and sent an email on 24.10.2018 itself terminating the services of the Appellant with immediate effect. Hence the Appellants have sent a combined Notice on 25.10.2018 under Section 8 of the Code demanding a total sum of Rs.25,70,656/-.
- The Learned Counsel strenuously argued that the Adjudicating Authority was not justified in rejecting the Application of the Appellant without adjudicating it on merits. It is further argued that the Adjudicating Authority had dismissed the Application on a hyper technical view that the Section 9 petition can only be filed individually, though both the Operational Creditors were owed an admitted debt above the threshold limit.

3. Submissions on behalf of the Learned Counsel for the Respondent.

- The Learned Counsel for the Respondent company M/s Aspek Media Pvt Ltd contended that a Joint Application by two or more Operational

Creditors under Section 8 and/or 9 of the Code is not maintainable. The Second Appellant is claiming amount for consultancy services which was never rendered by the Respondent Company.

- The Learned Adjudicating Authority has rightly relied on the Judgement of *Uttam Galva Steels Ltd V DF Deutsche Forfait AG and Anr (Company Appeal (AT)(Insolvency) No.39/2017* and rightly concluded that a Joint Application by two or more Creditors under Section 9 is not maintainable.
- The submissions by the Appellants that they had rendered consultancy services is vehemently denied. It is further submitted that there is no written agreement/contract between the Respondent and the Second Appellant. While working as CEO of the Respondent Company, the First Appellant entered into unauthorised business agreements with clients of the Corporate Debtor Company which caused losses to the Company. On gaining knowledge of the same, the Respondent terminated the services of the First Appellant on the grounds of breach of terms of the Appointment Letter. Further, it is submitted that the Frist Appellant till date has not even returned the Lap Top and other equipment given to him by the Company.
- It is contended that the Second Appellant had entered into business agreement against the terms of the Appointment and the same is reflected in the Bank's statements which establishes a pre-existing dispute and, therefore, even on this ground the Application under Section 9 of the Code is not maintainable and hence seek for dismissal of this Appeal.

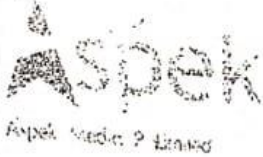
4. The main point which falls for consideration is whether the Adjudicating Authority was justified in dismissing the Application filed under Section 9 of the Code by the Appellants, as not maintainable.

5. It is the main case of the Appellants that the First Appellant is the authorised representative of the Second Appellant and has rendered 'Consultancy Services' to the Corporate Debtor and, therefore, there is a 'Debt and 'Default' and the question whether a Joint Application under Section 9 of the Code was filed by both the Appellants together is of no relevance.

6. In support of his arguments the Learned Counsel relied upon the Judgement of Hon'ble Supreme Court in the case of *JK Jute Mill Mazdoor Morcha Vs Juggilal Kamlapat Jute Mills Company Ltd through its Director and Others (Civil Appeal No.20978 of 2017)* and also on the ratio in the case of *Suresh Narayan Singh Vs Tayo Rolls Ltd (Company Appeal (AT)(I) No.112 of 2018)*.

7. It is seen from the record that vide order dated 07.12.2020 the Learend Adjudicating Authority had given time to the Applicants/Appellants herein to file the corrected Memo of Parties which was thereafter corrected. The matter was heard and an opportunity was also given to file additional documents but it is recorded in the order dated 07.12.2020 that no additional documents were filed. It is the main case of the Respondent Company that the First Appellant has rendered services to them as an employee but without the knowledge of the Corporate Debtor entered into agreements with other competing companies in the same line of work and hence the Corporate Debtor terminated the services of the First Appellant vide email dated 24.10.2018, the relevant letter is reproduced as hereunder:

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CIN : U22222DL2014PTC332210

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CONFIDENTIAL

Dated: 24th October 2018

To,
MR. YUVRRAJ AGARRWAL
63, VINAYAK APARTMENTS
NTPC OFF SASL, C - 58 / 1,
SECTOR - 62, NOIDA - 201307

Dear Mr. Yuvrraj Agarrwal,

LETTER OF TERMINATION FROM THE POSITION OF CEO

This refers to the letter of offer of employment dated 24th December 2015 issued by the Board of directors of Aspek Media Private Limited (the "Company") appointing you as the "Chief Executive Officer" of the Company.

The Company is forced to dismiss your services without notice, and without compensation for lack of notice, on the grounds of misconduct or conduct inconsistent with the fulfillment of the express or implied conditions of your service, including but not limited to your abject failure to perform all of the duties and obligations as required of and from the company.

It is further submitted that you did not discharge your duties with utmost care, with honesty and devotion during your period of employment. The deliberate acts committed by you constitutes misconduct and resultantly your services have been terminated with immediate effect.

More specifically you have been found to violate the basic premise of an employment of not to, directly or indirectly, engage or participate in any capacity in any other business, trade, or occupation during the term of the employment.

That you have been found to have working relationships with entities other than the company, with whom you have entered in business endeavours for your personal benefits, that you have sources of income from such endeavours and that you have

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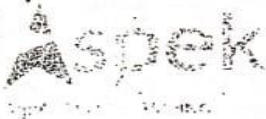
Registered Office:
603, 6th Floor, Anand Nagar, Kirti 4, Subhashpur, New Delhi-110003, Tel: +91-11-42612170
Email to: info@aspekindia.com

Y. Agarrwal

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been using the companies premises and other infrastructures to cater to such business endeavours.

That you have employed your own employees who operate out of the company's premises and are paid by you / a company / firm controlled directly or indirectly by you to provide services for such business endeavours of yours.

Further, all of above have been done by you without any information in writing or otherwise to us.

That as a result of your pre-occupation with your own business endeavours you have failed to devote sufficient time and attention to the business of the company. That as a result of such activities and your lack of attention, the performance of the company has suffered to a large extent leading to monetary losses and an irreparable loss of goodwill of the company threatening the survival of the company itself. During your employment period to the company both sales and collections of the company has shown a downward trend.

One of your crucial KRA was to act as the representative and face of the company with our principal's namely M/s ECL, not only have you failed to do that, the relations have so deteriorated that in the recent past we have started receiving adverse notices from them , threatening to cancel the contract.

You are requested to immediately hand over all the properties of the company in your possession peacefully to the Management / representative of the management and ensure that none of the documents / disks / laptops / files / etc. in the offices are destroyed or misplaced. We reserve all our rights to protect the company under all circumstances and to pursue all legal remedies available to the company under any law, Act or otherwise, without prejudice to any existing right or claim.

For ASPEK MEDIA PRIVATE LIMITED

[Signature]
Director



Harish Chaudhary

(Authorised by and on behalf of the Board of Directors)

[Handwritten signature]

Advertising Space From: 10/10/2021 To: 10/10/2021

Registered Office:
503, 4th Floor, Rajiv Nagar, Kirti Vihar Sector, New Delhi-110005. Tel: +91-11-41012375
Email Id: info@aspekmedia.com

Emphasis supplied

8. On 02.11.2018 the Corporate Debtor served a Notice of Dispute in reply to the Appellant Notice dated 24.10.2018.

9. The Learned Adjudicating Authority has dismissed the Application on the ground that Section 8 Notice was issued by two Operational Creditors jointly placing reliance on the Judgement of this Tribunal in *Uttam Galva Steels (Supra)* in which it is observed as follows:-

20. Otherwise also it is not practical for more than one operational creditor to file a joint petition individual Operational Creditors will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate Form-3 or Form-4 will have to be filled. Petition under Section 9 in the format will contain, separate individual date.”

10. From the aforementioned judgement, it is clear that two ‘Operational Creditors’ cannot file a Joint Application under Section 9 of the Code. The contention of the Learned Counsel for the Appellant that the ratio in *J.K. Jute Mill Mazdoor Morcha (Supra)* is applicable to the facts of this case is untenable, having regard to the fact that in *J.K. Jute Mill Morcha (Supra)* the Hon’ble Supreme Court has held that a ‘Trade Union’, representing all workmen, can file as an Operational Creditor, but does not anywhere state that two Operational Creditors can file one Joint Application.

11. Secondly, even the reliance on Mr *Suresh Narayan Singh (Supra)* is misplaced as in that case an authorised representative of 284 workers was considered to be having the locus standi to file an Application under Section 9 of the Code.

12. In the instant case it is the case of the Appellants that they had rendered consultancy services which is completely denied by the Corporate Debtor. The material on record evidences that the services of the First Appellant was terminated on the ground that he was engaged in business agreements with other competing companies.

13. Section 5(20) of the Code defines an Operational Creditor as hereunder:_

(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

14. Further we hold that an Operational Creditor can apply himself or through a person authorised to act on behalf of the Operational Creditor. In the instant case the contention of the Appellant that he is acting on behalf of the Second Appellant who is also arrayed as an Operational Creditor, has not established his position with or in relation to the Corporate Debtor seeking the payment of dues alleged to be payable, keeping in view that there is no documentary evidence with respect to Consultancy Services having been hired by the Corporate Debtor as there was no Agreement/letter which deals with any ‘Consultancy’. Hence we find no merit in the submission of the Appellant that a Joint Application is maintainable that the Corporate Debtor hired the services of the 2nd Appellant and that the Appellant is acting on behalf of the 2nd Appellant, specifically in the light of the termination letter issued by the Corporate Debtor, terminating the service of the 1st Appellant, in his capacity as an ‘Employee’.

15. Section 9 of the Code reads as follows:-

“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,

(d) such other information 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.

16. It is clear from the provisions of Section 8 and 9 of the Code, that unlike under Section 7, a Notice under Section 8 is to be issued by an ‘Operational Creditor’ individually and the Petition under Section 9 has to be filed by the Operational Creditor individually and not jointly. Individual Operational Creditor will have to issue their individual claim notice under Section 8 of the Code. Each claim will vary and would be different. The date of notice under Section 8 would also be different and vary on a case to case basis. The notices

have to be issued in specific forms filling separately Form 3 and Form 4. Petition under Section 9 in the Form would contain separate individual data.

17. A bare perusal of Form 3 & 4 read with Sub-Rule (1) of Rule 5 and Section 8 of the Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of the Operational Creditor. At the cost of repetition the person who is authorised to act on his behalf, is required to state his relation and his position vis a vis the Operational Creditor.

18. In the light of the ratio of the Judgement in *Uttam Galva Steel (Supra)* and keeping in view the facts and circumstances of the present case on hand this Tribunal is of the earnest view that there is no illegality or infirmity in the order of the Adjudicating Authority. Hence this Appeal fails and is accordingly dismissed.

19. The Registry is directed to upload the Judgement on the website of this Tribunal and send a copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms Shreesha Merla]
Member (Technical)**

**New Delhi
18th April, 2022**

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