

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

CP(IB) 849/9/NCLT/AHM/2019

Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE
AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 03.05.2021

Name of the Company:

POP Chem (India) Pvt Ltd

V/s

Millenium Papers Pvt Ltd

Section:

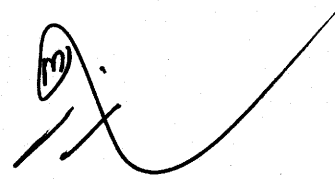
9 of the Insolvency & Bankruptcy Code, 2016

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

Dated this the 3rd day of May, 2021.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

CP (IB) No.849/9/NCLT/AHM/2019

In the matter of:

M/s. Pap Chem (India) Private Limited,
Having its registered office at:
311, 3rd Floor, RG Mall,
Opp. Dharmkunj Apartment,
Sector 9,
Rohini, Delhi – 110085.

... Petitioner/ Operational Creditor

V/s.

M/s. Millanium Papers Pvt. Ltd.,
Having its registered office at:
Survey No.105/1,
Lalpur 8-A,
National Highway,
Morbi – 363642,
Gujarat.

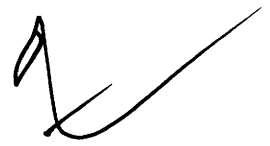
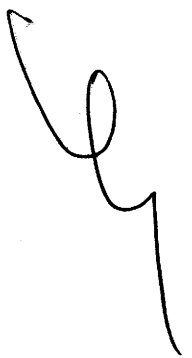
... Respondent/Corporate Debtor

**Date of Hearing: 22th March, 2021
Date of Pronouncement: 3rd May, 2021**

**Coram: Madan B. Gosavi, Member (Judicial)
Virendra Kumar Gupta, Member (Technical)**

Appearance:

Learned Counsel Mr. Arpit Singhvi, for the Operational Creditor.
Learned Counsel Mr. Arjun Sheth along with Ms. Rhea Sevak for
the Corporate Debtor.



ORDER

[Per: Madan B. Gosavi, Member (Judicial)]
(Through Video Conferencing)

1. This application, under Section 9 of the I.B. Code, filed by M/s. Pap Chem (India) Private Limited - Operational Creditor against M/s. Millanium Papers Private Limited - the Corporate Debtor to start Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor on the ground that the Corporate Debtor committed default in paying operational debt of Rs.11,43,802/-.
2. The Operational Creditor stated that under various invoices from 07.12.2012 to 26.12.2012, it sold and supplied the Corporate Debtor certain chemical items. As the Corporate Debtor did not pay the price of goods, the Operational Creditor has filed in the Court of District Judge-1, Rohini, Delhi a suit for recovery of amount. That suit was decreed by the Additional District Judge-1 vide judgment of order dated 09.12.2016. Thereafter, the Operational Creditor sent the Corporate Debtor, notice of demand under Section 8 of the I.B. Code dated 01.10.2018. In spite of receipt of demand notice, the Corporate Debtor did not clear the debts nor replied the notice pointing out the dispute. Hence, this application is filed to initiate the CIRP of the Corporate Debtor.
3. Notice of this application is served on the Corporate Debtor. It's Manger, Mr. Manish Kumar Harjibhai Patel appeared and filed the affidavit in reply.

4. It is contended that since, the default amount is less than rupees one crore, this Adjudicating Authority has no jurisdiction to entertain and admit this application. The Corporate Debtor did not receive any demand notice under Section 8 of the I.B. Code and in absence of delivery of notice, this application under Section 9 of the I.B. Code is not maintainable. The date of default is stated as 23.01.2013 (i.e., last payment allegedly made by the Corporate Debtor). And this application is filed in the year 2019. It is filed beyond the period of limitation. It is also contended that debt claimed herein, is still subject to the dispute in Civil suit. The Operational Creditor did not comply Section 9(3)(b) and 9(3)(c) of the I.B. Code. For these reasons this application is not maintainable and it may be rejected.
5. We have gone through the evidence and material on record. We heard the Learned Counsel for the Operational Creditor and Learned Counsels for the Corporate Debtor. We have perused the rulings/ orders of Hon'ble NCLAT relied on by both the counsels.
6. From the pleadings, we can safely conclude that there appears no dispute to the fact that in the year 2012, the Operational Creditor sold and supplied to the Corporate Debtor certain chemical goods to which the Corporate Debtor did not pay the price in full. It is also not in dispute that the operational debt to the extent of

Rs.11,43,802/- is still due and payable by the Corporate Debtor to the Operational Creditor. The Operational Creditor's Suit was decreed for the recovery amount by order dated 09.12.2016.

7. On the basis of these admitted facts, we have to consider the defense as raised by the Corporate Debtor. It appears that the Corporate Debtor raised defenses (i) since the debt amount is less than rupees one crore, this application is not maintainable (ii) the Operational Creditor did not serve the notice under Section 8 of the I.B. Code to the Corporate Debtor, (iii) It is a time barred debt.

8. At the outset, we reject the Corporate Debtor's first defense, challenging maintainability of this proceeding on the ground that the debt i claim is less than rupees one crore. It is not in dispute that the default in paying the debt of Rs.11,43,802/- has occurred in the year 2013, i.e. even prior to coming in the operation of I.B. Code, 2016. Section 4 of the I.B. Code is amended on 24.03.2020 by increasing minimum default amount to rupees one crore in place of rupees one lakh. It is now well settled that this amendment cannot be read in retrospection. Since, this application under Section 9 of the I.B. Code on 03.02.2019 and as Section 4 is amended, after filing of this application by increasing threshold limit; we hold that the amendment does not relate back to the date of default in this case.

9. The Corporate Debtor contended that the Operational Creditor did not serve upon it the notice of demand under Section 8 of I.B. Code prior to filing of this application which is a mandate of law. It cannot be disputed by anyone that the provisions of Section 8 of I.B. Code are mandatory in nature. That it states that: **“an operational creditor may on the occurrence of default deliver demand notice for unpaid operational debt of invoices demanding payment to the Corporate Debtor.** The explanation to the said section states that:

“for purpose of this Section and demand notice means notice served by an operational creditor to the Corporate Debtor.”

Section 9 of the I.B. Code states that:

“after expiry of ten days from the date of delivery of notice demanding payment as per Section 8 of the I.B. Code, if the Operational Creditor does not receive payment or notice pointing out dispute , the Operational Creditor may file such application.”

In short, if provisions of Section 8 and Section 9 of the I.B. Code are read together, then inevitably **inference is** that delivery of notice under Section 8 of I.B. Code by the Operational Creditor to the Corporate Debtor before filing application under Section 9 of the I.B. Code is *sine-qua-none* to maintain the application.

10. Now, we examine the factual aspects of the case. The Operational Creditor produced on record a copy of demand notice as annexure -I (page-9). It states that it was sent by India Post as well as by a private courier service. As far as service of notice through a private courier is concerned, it is not a prescribed mode under the Law. Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) & Rules, 2016 recognizes only three modes of service of such notice.

- (i) By a speed post, a registered post A.D.
- (ii) By a hand delivery and
- (iii) Through an electronic email service.

11. In this case, it is the contention of the Operational Creditor that demand notice was served to the Corporate Debtor by a private courier service which is, we hold that it is not a legally recognized mode of service. The Operational Creditor further stated that notice was also served by speed post. For this, he relied on postal-track report at page no. 165-169. We perused that the notice was not delivered to the Corporate Debtor. It has been mentioned in the track-report "Out for delivery." In-short, there is not clear and convincing evidence produced on record by the Operational Creditor to prove the fact that before filing this application against the Corporate Debtor, the demand notice under Section 8 of the I.B. Code was being served. For want of such evidence, we hold that this application is not maintainable.

12. This now takes to consider the next defense raised by the Corporate Debtor. According to the Corporate Debtor, it is a time barred debt.

13. The Operational Creditor himself contended that the date of default is 13.09.2019. However, it is apparently misleading statement made by the Operational Creditor. It is not in dispute that he had filed a suit for recovery of the said amount in the court of District Judge, Rohini, New Delhi (Civil Suit No.58419 of 2016). He produced copy of are plaint in that suit (page no. 31). In that plaint, the Operational Creditor stated that he had received last payment from the Corporate Debtor on 25.01.2013. According the Operational Creditor, cause of action to file suit has arisen to him on that date. In short, on 23.01.2013 is the date of default for the Operational Creditor to file that suit. We failed to understand a how this date of default can be shifted to 30.09.2019 as stated by the Operational Creditor in his application under Section 9? It is now a well settled law that the date of default never shifts. The Operational Creditor may claim benefit of exclusion of period of limitation under Section 14 of the Limitation Act because he was pursuing his remedy to recovery amount in Civil Court or the Operational Creditor may seek benefit under Section 18 of the Law of Limitation stating that the Corporate Debtor had acknowledged the debt within three (03) years from the date of default and thereby he

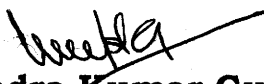



is entitled for extension of limitation period for three more years but the Operational Creditor did not put forth before us his such contention. From the evidence on record, it appears that the debt is time barred.

14. The Operational Creditor in his rejoinder relied on an order of Hon'ble NCLAT in the matter of **G. Shivramkrishna Vs. M/s. IsgecCovema Limited [Company Appeal (AT) (Insolvency) No. 1109 of 2019]**. We have gone through that order. Hon'ble NCLAT has held that the date of arbitral award is the date on which the debt to be due against the Corporate Debtor. In those facts, it was held that the application was not time barred. In this case, the Operational Creditor raised his claim of recovery of debt on the basis of decree dated 09.12.2016 stating that from the debt became due / this application is filed six days earlier before the expiry of three years therefrom. However, as far as application under Section 9 based on decree in civil court is concerned, the Hon'ble NCLAT in case of **Ishrat Ali Vs. Cosmos Cooperative Society Limited (Company Appeal No.121 of 2019)** it has been held that:

"15. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of decree or date of payment for execution. Decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues."

15. If this statement of Law is accepted and made applicable to the facts of this case, then we have to hold that it is a time barred debt because, according to the Operational Creditor himself, the debt was due on 23.01.2013 when default occurred. This application is filed three years beyond that period and hence, it is time barred.
16. Considering the facts and evidences relating to the facts, we hold that this application is not maintainable on two grounds that there is no evidence of service of demand notice under Section 8 of the I.B. Code and the debt is time barred, we pass following order.
17. Accordingly, CP(IB) 849 of 2019 stand dismissed and disposed of.
18. Urgent certified copy of this order may be issued to all concerned parties, if applied for, upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
Member (Technical)


(Madan B. Gosavi)
Member (Judicial)

AT