NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1295 of 2023

IN THE MATTER OF:

Hardik ...**Appellant**

Versus

Ramdeo R. Agarwal & Anr. ...**Respondents**

Present:

For Appellants : Mr. Amit R Agarwal, Adv.

For Respondent : Mr. Bharat Gupta, Varun Tyagi, Vishesh Chouhan, Ishan Srivastava, Adv. for R1

Mr. Abhishek Bhardwaj, Deepanshu Mathpal, Adv. for R2

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Suspended Director of the Corporate Debtor, namely, Harkar Developers Pvt. Ltd. under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the order dated 18.07.2023 passed in CP (IB) No. 162/MB/C-IV/NCLT/IBC/Sec 9/2021 by the NCLT, Court IV, Mumbai (in short 'the Tribunal') admitting the application filed under Section 9 of the Code by Mr. Ramdeo R. Agarwal/Operational Creditor for the total amount of Rs. 1,89,57,920/- and appointed Mr. Amit Chandrashekhar Poddar as the Interim Resolution Professional (IRP).

2. The facts captured by the Tribunal in the impugned order are that the OC / Respondent No. 1 filed the Company Petition under Section 9 on 10.02.2021 in which the total amount claimed as on 15.12.2020 was Rs. 1,89,57,920/-. The OC had specifically mentioned the date of default as 27.02.2018. It is alleged that the CD had approached M/s Agarwal Coal

Depot, which is the proprietorship firm of Respondent No. 1 for supply of coal. It is alleged that M/s Agarwal Coal Depot supplied the coal to the CD from financial year 2015-16 till the month of March, 2018 and raised the invoices. The last payment was made by the CD on 26.02.2018 to the tune of Rs. 18,10,737/- and the CD made default in making payments amounting to Rs. 1,12,67,715/- claimed on the basis of the invoices raised till 10.03.2018.

3. The OC sent a demand notice in form No. 3 on 22.12.2020 to the CD at the registered office of the CD, vide email on the registered email address of the CD and also to the directors of the CD. The demand notice sent by RPAD to the CD was returned undelivered with remark Insufficient Address but the demand notice sent through email was received by the CD on 12.01.2021, therefore, it was alleged to have been duly served. The copies of the demand notice sent to the registered addresses of the directors of the CD were also duly delivered to 2 out of total 3 directors and copy sent to the third director was returned with the remark 'address cannot be located'.

4. The Tribunal has observed that the matter was listed on 10.03.2021 and notice was issued to the CD. Thereafter on 02.08.2021 the OC was directed to issue personal notice to the CD. On 22.10.2021 the OC informed the Court that the personal notice has been returned undelivered with an endorsement 'addressee left', therefore, the OC was directed to serve the CD through substituted services by way of publication which is alleged to have been completed on 17.12.2021. Since, no one appeared despite substituted services also, therefore, the CD was proceeded against ex-parte on

24.12.2021 and after hearing the OC exparte, the Court made the following observation in para 4 of the impugned order "4. The Operational Creditor has placed on record the copy of GST returns and TCS returns to prove the supply of goods to the Corporate Debtor. In the absence of any response from the Corporate Debtor, the matter placed on record shows that there exists debt and default in payment thereof. The petition filed is also within limitation. Thus, the present Company Petition satisfies all the necessary requirement for admission. This Tribunal has jurisdiction to adjudicate the Company Petition filed by the Operational Creditor."

5. The Tribunal thus admitted the application by way of impugned order and appointed the IRP besides imposing the moratorium under Section 14 of the Code.

6. Aggrieved against this order, the present appeal has been preferred.

7. Counsel for the Appellant has submitted that statutory notice under Section 8 of the Code dated 22.12.2020 was never served. It is further submitted that even the said notice dated 22.12.2020, if received by the Appellant, was only issued to the directors of the CD in their individual capacity. It is further submitted that the statutory notice was served upon the email address of the erstwhile company secretary of CD on 12.01.2021 but it was disputed that hardik.jaiswal117@gmail.com happened to be the email address of the Appellant. It is also submitted that the Appellant has wrongly been proceeded ex-parte by the Tribunal. It is further submitted that the Tribunal has committed an error in recording the finding in para 4 of the impugned order.

8. On the other hand, Counsel for Respondent No. 1 has submitted that the Appellant has not come to the Court with clean hand and has been playing hide and seek since the beginning. In this regard, it is submitted that the Respondent had been selling coal to the CD since 2016-17 and had continued to sell coal to CD till 10.03.2018. It was agreed between the parties that the goods were to be supplied by OC directly to Anand Distilleries Pvt. Ltd. (ADPL) and invoice were to be raised by OC on CD and the CD used to raise invoice on ADPL. It is further submitted that part payments were received sometimes by OC from the CD and sometimes on instructions of CD, ADPL also made direct payments to OC and the said amount was duly credited by OC in the account of CD but sum of Rs. 1,12,67,715/- remained outstanding apart from the agreed interest @ 24% i.e. Rs. 76,90,205/-. It is further submitted that demand notice dated 22.12.2020 was issued by the OC to the CD and sent to its directors by post and email. In this regard, he has referred to the postal receipts attached with reply alongwith tracking reports but no response was received to the statutory demand notice issued under Section 8 of the Code. It is further submitted that the application under Section 9 was filed on 10.02.2021 but despite service of the notice, the CD did not choose to appear, therefore, the Tribunal had to pass the order of substituted service. The said order dated 24.12.2021 is reproduced as under:-

> "1. Mr. Harsh Kesharia, Ld. Counsel for the Petitioner present. No representation on the part of the Respondent.
>
> 2. This matter first came up for hearing on 10.03.2021 and thereafter on 02.08.2021 & 09.09.2021. On the last date of hearing i.e. on 22.10.2021, the Petitioner was directed to take

> out substituted service by way of publication in two daily leading newspapers. Counsel for the Petitioner submits that the paper publication was carried out in 'Hitvada' in English and 'Deshunnati' in Marathi vide circulation at Nagpur on 17.12.2021.
>
> 3. Today even after the matter called twice no representation on the part of the Respondent. Respondent is set exparte.
>
> 4. List this matter on 14.03.2022 for final hearing."

9. It is further submitted that the Appellant is guilty of suppressing the fact and making false suggestion because the CD, through the present appellant, filed an application dated 20.06.2022 (Annexure R2) seeking to set aside the exparte order but the application was not pursued. It is also submitted that in the said application it has been admitted by the CD that "Respondent/CD has received the demand notice from the petitioner somewhere in the month June, 2021 and the respondent has replied the same." However, alleged reply to the notice was not filed alongwith application filed for recall of the exparte order. Besides this, it is also submitted that the Appellant had even appeared through his counsel on 01.11.2022. In this regard, the Tribunal has also recorded the presence. The said order is also reproduced as under:-

> The Court is convened through Video Conference.
>
> 1. Mr. Harsh Kesharia, Ld. Counsel for the Petitioner present. Mr. Radhe Agrawal, Ld. Counsel for the Respondent present.
> 2. List this matter for hearing on **20.12.2022.**

10. It is further argued by Respondent that NCLT directed Respondent vide its order dated 20.12.2022 to file documents in support of sales to CD.

Respondent filed affidavit with records of returns of tax collected at source (TCS) and records of Goods and Services Tax (GST). It is alleged that all invoices of the Respondent were charged with additional 1% TCS and said amount of TCS was duly deposited by Respondent with Income Tax in PAN number of the CD. Respondent also updated details of all its sales invoices on GST portal which was never disputed or reversed by CD. It is also submitted that the Tribunal being satisfied with records of TCS and GST, and other documents filed on record, admitted the application filed under Section 9 of the Code.

11. Counsel for the Respondent has further submitted that the CD purposefully did not file the reply to the statutory notice and in spite of having been served with the notice issued under Section 9, did not contest the application though the Counsel for the CD had once appeared on 01.11.2022 as has been indicated in the order which has already been reproduced.

12. It is further submitted that the Tribunal has rightly recorded the finding in para 4 of the impugned order which is the proof of claim as provided under Regulation 7 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016.

13. We have heard Counsel for the parties and perused the record with their able assistance.

14. The Conduct of the CD since the beginning is not above board because, firstly, it denied to have received the statutory notice issued under Section 8 but later on it admitted to have received the same in the application filed for setting aside the exparte order which was not even persued for the reasons

best known to the CD. It is alleged that reply to the said notice was filed but the said reply was not annexed with the said application filed for recalling of the order of ex-parte passed against the CD. Besides this, the CD made all efforts to avoid receipt of notice issued by the Court, therefore, the Court had to pass the order of substituted services upon CD by way of publication in the newspaper. CD had even once appeared through his counsel, namely, Radhe Agarwal, as has been recorded in the order dated 1.11.2022 but then started absenting from the hearing. The CD was thus proceeded against exparte on 24.12.2021 and it has been recorded by the Tribunal in the impugned order that "thereafter, this matter was listed on 10 occasions and CD never came up. The CD was never represented in any of the hearing nor any reply was filed".

15. The very fact that the CD did not give reply to the demand notice which was the first stage, envisaged in the Code for contesting the claim of the OC and then did not choose to appear in court to contest the application filed under Section 9 and even did not file the reply despite the fact that the Court had adjourned the case many times to await the appearance of the Respondent for completion of the pleadings and ultimately it was found that the CD is deliberately avoiding to contest the application filed under Section 9 and hence, the Tribunal on the basis of the record of the copy of GST returns and TCS returns which proves that the goods were supplied to the CD, has rightly admitted the application filed under Section 9 on the ground that there is debt and default both present in the lis which are sufficient for the court to push the CD into insolvency by appointing the IRP.

16. Looking from any angle, there is hardly any merit in the present appeal for the purpose of interference with the impugned order. Consequently, the present appeal is hereby dismissed though without any order as to costs. I.As, if any, pending are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi

29th August, 2025

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