

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) Insolvency No. 210 of 2021

IN THE MATTER OF:

Mr. Hardik Fakirchand Shah
Proprietor of Cotton Hub
Vs.

...Appellant

Male Square Retails Pvt. Ltd.

...Respondent

For Appellant: Mr. Arjun Padhiyar and Mr. Vikky Dang, Advocates

For Respondent:

ORDER
(Virtual Mode)

19.01.2022: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed against the Judgment dated 29th January, 2021 passed by Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court-1) in CP(IB) 39 of 2020 whereby Ld. Adjudicating Authority rejected the Application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC in short). Appellant claiming to be an Operational Creditor who has supplied 'Readymade-Garments' to the Corporate Debtor between 01.10.2015 to 05.06.2016 raised 10 invoices having total amount claimed of Rs. 12,53,080/- and against the said amount, the Appellant received three payments on 04.07.2016, 15.09.2017 and 26.11.2018 for a sum of Rs. 17,350/-, 15,500/0 and 7,500/- respectively. A notice was issued by the Appellant in the prescribed format in Form-3 dated 03.09.2019 claiming an amount of Rs. 23,96,742/- which also included the interest and the in the notice, the last date of default

has been mentioned as 26.11.2018. Copy of the Invoices and Ledger Account were also annexed with the Notice No Reply to the Notice was given by the Corporate Debtor. The Appellant filed CP(IB)39/2020 in which notices were issued by the Adjudicating Authority but no one appeared on behalf of Corporate Debtor hence the notices were also got published in the Newspaper but still Corporate Debtor did not appear, Ld. Adjudicating Authority proceeded ex-parte and by the Impugned Order rejected the Application on the ground that it is barred by limitation.

3. Ld. Adjudicating Authority took the view that the last invoice is dated 04.11.2015 and the Application was filed on 12.12.2019 which is beyond the period of three years from the date of default. Ld. Adjudicating Authority also in para 7 has made certain comment against the invoice No. 17/B dated 08.07.2017. With regard to the payment received by the Appellant it has been observed that all amounts claimed to have been received by Cash and no documentary evidence duly acknowledged by the Corporate Debtor has been filed.

4. We have considered the submissions of Learned Counsel for the Appellant and perused the record. In spite of service of notice, no one appeared for the Corporate Debtor in this Appeal. Notice which was issued by the Operational Creditor in Form-3 dated 03.09.2019, the date of default mentioned is 26.11.2018 and copy of the Ledger Account from April, 2011 to 31st August, 2019 was mentioned and all the 10 invoices were also annexed with the Application which has been filed under Section 9 of the Code and part-IV of the Application giving particulars of Operational Debt which has been mentioned at Page 70 to 71 are as under:

1	Total amount of debt, details of transactions on account of which debt fee due, and the date from which such debt fell due	Total Amount of Debt: Rs. 24,42,730/-(Rupees Twenty Four Lakh Forty Two Thousand Seven Hundred Thirty Only) towards the supply of readymade garments to the Corporate Debtor company to which the principal outstanding amount of Rs. 12,67,665/-(Rupees Twelve Lakh Thirty Four Thousand Eight Hundred Fifteen Only) along with the interest @24% p.a. which sums to the value of Rs. 11,75,065/- (Rupees Eleven Lakh Seventy Five Thousand Sixty Five Only) as determined via 10 invoices raised against the supplied made to the corporate debtor company is due and payable by the corporate debtor. 1. The Applicant was thus constrained to issue Demand Notice dated 05.09.2019 in prescribe form 3 and form 4 under the provisions of the Insolvency and Bankruptcy 75,00/-(Rupees Seventy Five Hundred) on 26.11.2018 which has been reflected in the working computation and the ledger of the corporate debtor. Last Date of Default: 26.11.2018 The Corporate Debtor have not made payments
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		from 26.11.2018 till date. Copy of the working computation is annexed herewith as Annexure-II/5.
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5. Learned Counsel for the Appellant has also referred to an earlier letter dated 11.02.2019 sent by the Appellant to the Corporate Debtor where payment against the invoices raised was called for. The said letter was replied by the Corporate Debtor by letter dated 20th February, 2019 which is filed at Page 54 of the Appeal Paper Book where the Corporate Debtor does not dispute the claim rather expressed his Financial Crisis for not processing payment and further requested to reconsider interest value against invoices.

6. The present is a case where Corporate Debtor in spite of several notices issued by the Adjudicating Authority did not appear to contest the Application. The date of default having been specifically mentioned in the Demand Notice as well as in the Section 9 Application as 26.11.2018, there was no material with the Adjudicating Authority to take any contrary view regarding the date of default. The observations of the Adjudicating Authority that last invoice dated 08.07.2017 which does not appear to be correct which is in altogether different format as compared to other 9 invoices. The mere fact that the invoice dated 08.07.2017 was sent in different format was not any factor on which the invoice could have been ignored. The 10 invoices have been referred to in the Demand Notice as well as in the Section 9 Application. With regard to the payment received by the Appellant, the Adjudicating Authority has observed that since there is no documentary

evidence duly acknowledged by the Corporate debtor attached hence payment cannot be also believed. Operational Creditor has acknowledged the payments which have been noticed by the Adjudicating Authority in Paragraph 8 of the Impugned Order, the amount of Rs. 1,36,500/- was received through Bank and other amounts were received in cash. When Operational Creditor was accepting the payment of amount in Cash and there was nothing to suggest to the contrary there was no occasion for Adjudicating Authority to disbelieve the said payments.

7. We are further of the view that even if there were any more papers or documents required by the Operational Creditor to be filed and the Application was found to be incomplete, it was the obligation of the Adjudicating Authority to give an opportunity to the Operational Creditor by giving a notice to the Applicant to rectify the defect in his Application within 7 days from the receipt of notice which is required by Section 9 sub-section 5 proviso which reads as under:

“9(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 pending⁴ 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.”

8. When the Corporate Debtor has chosen not to oppose the Application, we fail to see that on what basis the Adjudicating Authority has returned the finding that Cash Payment made to the Appellant is not acceptable and further the invoice dated 08.07.2017 being in different format cannot be accepted.

9. The last payment having been made on 26.11.2018 and the Application filed on 12.12.2019 was well within time and we are thus of the view that Adjudicating Authority without any basis rejected the Application of the Operational Creditor as barred by time.

10. In view of the above observations, we set aside the Order dated 29.01.2021 and remit the matter to the Adjudicating Authority to pass an appropriate Order of admission of the Application after 30 days from today giving liberty to the parties to settle, if they so desire in between.

The Appeal is allowed, accordingly.

[Justice Ashok Bhushan]
Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

Basant/nn