

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 777 of 2020

(Arising out of Order dated 31.07.2020 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No.IV) in Company Petition No. IB 1462/ND/2019)

IN THE MATTER OF:

Mukul Agarwal,
Ex-Director
Greatech Telecom Technologies Pvt. Ltd.
R/o: 54-A, Sainik Farms,
Khanpur, New Delhi-110062.

.... Appellant

Vs

1. Royale Resinex Pvt. Ltd.
502, Aggarwal City Plaza-I,
Cyber Plaza, Netaji Subhash Place,
Pitampura, New Delhi – 110034.
2. Greatech Telecom Technologies Pvt. Ltd.
54-A, Sainik Farms,
Khanpur, New Delhi-110062.
Through its IRP

Mr. Manish Kumar Aggarwal,
Interim Resolution Professional,
Greatech Telecom Technologies Pvt. Ltd.,
B-22 (SFS), Sheikh Sarai, Phase-I,
New Delhi-110017.

Also at:

Immaculate Resolution Professionals Pvt. Ltd.
Unit No.111-112, Tower-A,
Spazedge Commercial Complex,
Sector-47, Sohna Road, Gurgaon-122018.

... Respondents

Present:

For Appellant: **Mr. Arun Srivastava, Advocate.**

For Respondents: **Mr. Bharat Arora, Advocate for R-1.
Mr. R. K. Gupta, Ms. Swarlipi Deb Roy
and Ms. Mineesha Dhodi, Advocates
for IRP**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the judgment and order dated 31.07.2020 passed by National Company Law Tribunal, New Delhi, Court No.IV admitting the Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) by the Respondent – Operational Creditor. The Suspended Director of the Corporate Debtor aggrieved by the judgment dated 31.07.2020 has come up in this Appeal.

2. Brief facts and sequence of events necessary to be noticed for deciding this Appeal are:

- (i) The Operational Creditor supplied poly propylene (PP) to the Corporate Debtor as per the demand raised by the Corporate Debtor. Invoices were raised in the name of the Corporate Debtor.
- (ii) The Operational Creditor filed a Civil Suit No.149 of 2015 against the Corporate Debtor for recovery of amount of Rs.16,44,500/-. The suit was Decreed by Additional District Judge, Rohini Court vide judgment and order dated 08.09.2016, decreeing the suit for recovery of Rs.16,44,500/- along with interest @ 12% per annum. The Operational Creditor filed Execution Petition, which was transferred to the

Court of District & Sessions Judge, South District for Execution of the Decree being case No.424 of 2019.

- (iii) The Operational Creditor issued notice under Section 8 of the Code in Form-3, dated 06.04.2019 to the Corporate Debtor claiming amount of debt as Rs.25,04,630/-. The notice under Section 8 of the code was not replied by the Corporate Debtor.
- (iv) An Application under Section 9 was filed by the Operational Creditor before the National Company Law Tribunal, New Delhi being Company Petition No.IB 1462/ND/2019. The Application filed under Section 9 was replied by the Corporate Debtor vide its reply dated 18.09.2019.
- (v) The Adjudicating Authority by the impugned order dated 31.07.2020 has admitted the Application and appointed an Interim Resolution Professional ("**IRP**"), that is, Mr. Manish Kumar Aggarwal. Aggrieved by the order dated 31.07.2020, this Appeal has been filed by the Suspended Director of Corporate Debtor.

3. We have heard Shri Arun Srivastava, learned Counsel for the Appellant and Shri Bharat Arora, learned Counsel appearing for Respondent No.1 – Operational Creditor.

4. The learned Counsel for the Appellant challenging the order of the Adjudicating Authority has raised following three submissions:

- (i) The notice under Section 8 of the Code dated 06.04.2019 issued by the Operational Creditor was not served on the

Corporate Debtor. The Notice dated 06.04.2019 was sent on an incorrect address, that is, '24, Sainki Farms, Delhi-110062. It is submitted that inspite of Adjudicating Authority directing the Operational Creditor to bring material to prove service of notice, the Appellant could not prove service of notice before the Adjudicating Authority. Service of notice under Section 8 is mandatory requirement. Without serving notice under Section 8, no Application under Section 9 can be maintained and the Application filed by Operational Creditor was required to be rejected on this ground alone. The Adjudicating Authority without returning any finding regarding service of notice has admitted the Application.

- (ii) The Application under Section 9 of the Code was filed by the Operational Creditor on the basis of Decree of the Civil Court dated 08.09.2016. The Application filed on the basis of Decree of Civil Court cannot be said to be an Application for an 'operational debt'. The Respondent was not an Operational Creditor and no 'operational debt' being due on the Corporate Debtor, hence, the Application under Section 9 was not maintainable.
- (iii) The Appellant is a going concern. The original claim of Operational Creditor was only for Rs.11 lakhs and to secure interest of Operational Creditor, the Appellant had got prepared a Demand Draft dated 17.08.2020 of the amount of

Rs.16,44,500/-. Photocopy of the Demand Draft was attached along with Appeal, but the said amount has not been accepted by the Operational Creditor. The Corporate Debtor is a going concern and having turnover of approximately Rs.12 crores and there are 100 employees (pre-lockdown) and there is good turnover after lockdown.

5. Shri Bharat Arora, learned Counsel appearing for Respondent No.1 refuting the submissions of learned Counsel for the Appellant contends that notice under Section 8 of the Code dated 06.04.2019 was sent to the Corporate Debtor, which was duly received by it. No reply to Section 8 notice was submitted by the Corporate Debtor and in the reply which was filed to Section 9 Application of the Operational Creditor, there was no pleading on behalf of the Appellant that notice under Section 8 has not been served. The Operational Creditor has filed an affidavit of compliance and an affidavit has also been filed before the Adjudicating Authority along with which, photocopy of the receipt issued by India Post was attached. In the receipt issued by India Post the address of the Corporate Debtor is 24 instead of 54-A, which was mistake by the Postal Authorities. Whereas notice was issued in the name of Corporate Debtor at the correct address of the Corporate Debtor, that is, 54-A, Sainik Farm, Khanpur, New Delhi – 110062. It is clear from the photocopy of the notice brought on the record by the Appellant himself at page 93. It is submitted that the submission of the Appellant that there was no ‘operational debt’ due is incorrect. The debt, which was due on the Corporate Debtor was towards supply of poly

propylene, which was supplied by the Operational Creditor to the Corporate Debtor. The amount of debt stood crystalized by judgment and Decree dated 08.09.2016 in Civil Suit No.149 of 2015. With regard to the third submission of the Appellant, it is submitted that the Corporate Debtor failed to discharge his obligation to pay the debt due to the Operational Creditor. The Operational Creditor had full authority to initiate proceedings under Section 9 of the Code. The Adjudicating Authority has rightly admitted the Application filed by the Operational Creditor.

6. The first submission of the Appellant is regarding service of notice. The notice under Section 8 issued by the Operational Creditor dated 06.04.2019 is at page 93 of the paper-book. True copy of the notice in Form-3 has been annexed, following is the extract from Form-3 notice:

“FORM 3

[See Clause (a) of Sub-rule (1) of Rule 5]

*FORM OF DEMAND NOTICE DEMANDING PAYMENT
UNDER THE INSOLVENCY AND BANKRUPTCY CODE,
2016*

*[Under Rule 5 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016]*

6th April, 2019

*To,
M/s Greatech Telecom Technologies Private Limited,
Through it's Managing director/ Director(s)
54-A, Sainik Farm, Khanpur,
New Delhi-110062. ...Corporate Debtor*

*From
M/s Royale Resinex Private Limited
Through it's Authorised Representative,
502, Aggarwal City Plaza-I,
Cyber Plaza, Netaji Subhash Place,
Pitampura, Delhi. ...Operational Creditor”*

7. From the above, it is clear that notice was addressed at the correct address of the Corporate Debtor, that is, 54-A, Sinik Farm, Khanpur, New Delhi – 110062. However, in the postal receipt, which was issued by the India Post, instead of No.'54-A', '24' was mentioned, on the basis of which postal receipt, the Appellant is submitting that notice was not served on the Corporate Debtor. When the notice was issued by the Operational Creditor at the correct address of the Corporate Debtor, we have no doubt that the envelope containing the address of the Corporate Debtor must be same as reflected in the notice dated 06.04.2019. The mere fact that receipt, which was issued by India Post mentions address of the Corporate Debtor instead of No.54-A, it is mentioned 24, does not bely the sending of notice. We further notice that Corporate Debtor had filed the reply to Section 9 Application, which has been brought on the record at page 99 of the paper-book dated 18.09.2019. In the Application filed under Section 9, there is specific mention of notice dated 06.04.2019 issued by the Operational Creditor. Notice dated 06.04.2019 specifically mentioned in the List of Dates and Events as well as in Part-IV of the Application and copy of notice dated 06.04.2019 was filed as Annexure A-4 along with the Application. In the reply, which was filed by Corporate Debtor dated 18.09.2019, there was no plea that notice dated 06.04.2019 was not served on the Corporate Debtor. Both in the preliminary objection and reply on merits, there is no specific denial of non-receipt of notice dated 06.04.2019, which clearly supports the submission of learned Counsel of the

Operational Creditor that notice was duly issued on correct address and was served on the Respondent – Corporate Debtor.

8. The learned Counsel for the Appellant relied on judgment of this Tribunal in “**Company Appeal (AT) (Ins.) No.961 of 2019 in Anil Syal v. Sanjeev Kapoor & Anr.**” as well as “**Jaya Patel v. Gas Jeans Pvt. Ltd. – Company Appeal (AT) (Ins.) No.308 of 2018**” and contends that service of notice under Section 8 is *sine qua non* for proceedings under Section 9 of the Code. There can be no doubt about the above proposition laid down by this Tribunal in the above cases. However, present is a case where, we are satisfied that notice was duly served by the Operational Creditor on the correct address of the Appellant-Corporate Debtor.

9. Now we come to the second submission of learned Counsel for the Appellant that Application under Section 9 was not maintainable, since there was no ‘operational debt’ due on the Corporate Debtor. The learned Counsel submits that Application based on Judgment and Decree of the Civil Court dated 08.09.2016 cannot be said to be an ‘operational debt’, hence, the Application deserved to be rejected. It is submitted that Operational Creditor having already filed its Application for Execution of the Decree, it ought to have pursued the Execution Application instead of filing Section 9 Application. We need to first notice the nature of debt as detailed in the Application filed by Operational Creditor under Section 9. In Part-IV of the Application under the heading “Details of Transactions on Account of which debt fell due”, following has been stated by Operational Creditor:

“Details of Transactions on Account of which debt fell due

Royale Resinex Private Limited (“Operational Creditor”) is a private limited company incorporated under the Companies Act, 1956, having its registered office at 502, Aggarwal City Plaza-I, Cyber Plaza, Netaji Subhash Place, Pitampura, New Delhi-110034 and is being managed by Directors; Mr. Neeraj Aggarwal and Mehander Prasad.

Greatech Telecom Technologies Private Limited (“Corporate Debtor) is a private limited company incorporated under the Companies Act, 1956, having its registered office at 54-A, Sanik Farm, Khanpur, New Delhi-110062.

The corporate debtor had approached the operational creditor for the supply of poly proplene (pp). Accordingly, as per the demand raised by the Corporate Debtor, material was supplied and against which invoice was raised in the name of Corporate Debtor.

The material ordered by the Corporate Debtor was duly supplied by the Operational Creditor and the same was also duly received by the Corporate Debtor without any dispute.

The Operational Creditor was shocked and surprised, since Corporate Debtor stopped conducting business with the Operational Creditor without clearing the outstanding amount.

There were various oral communications between the Corporate Debtor and the Operational Creditor regarding the outstanding amount due from Corporate Debtor but the corporate debtor failed to pay the said outstanding amount and interest thereupon.

Thereafter, the operational creditor instituted a suit for recovery against the Corporate Debtor bearing civil suit No.575402 of 2016 titled “M/S Royale Resinex Private Limited versus M/S Greatech Telecom Technologies Private Limited”, wherein Sh. Prashant Kumar, Ld. ADJ, Rohini Court, Delhi on 08.09.2016 was pleased to decree the said suit for recovery in favor of the Operational Creditor herein along with the interest and cost of the suit to be paid by the Corporate Debtor herein.”

10. When we look into the transaction of account on which debt fell due, it is clear that transaction was for supply of poly propylene by the Operational Creditor to the Corporate Debtor and due to non-payment of the amount towards the material supplied by the Operational Creditor, the amount became due. The amount due, thus, is an amount under the provisions of goods and is fully covered with the definition of Section 5(21) of the Code, which is to the following effect:

“5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”

11. Thus, the claim of the Operational Creditor was in respect of provisions of goods, that is, supply of poly propylene. The mere fact that when the Corporate Debtor did not pay the amount, suit for recovery was filed in the year 2016 by the Operational Creditor, which was also Decreed

on 08.09.2016, does not in any manner effect the transaction out of which the amount fell due. The fact that amount was adjudicated and a Decree was passed, in no manner take away the nature of ‘operational debt’. We may notice that under Part-V of Form-3, in Item No.3 following has been mentioned:

“3	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER	Judgment and Decree dated 08.09.2016 passed by Sh. Prashant Kumar, Ld., ADJ, Rohini Court in Civil Suit No.149 of 2015 (New No.575402 of 2016) titled M/S Royale Resinex Private Limited Vs. Greatech Telecom Technologies Private Limited Copy of Judgment and Decree dated 08.09.2016 is annexed herewith and marked as ANNEXURE A-5.”
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12. When the Form-3 itself contemplates about giving details of particular of an order of Court, the Decree of the Civil Court in favour of the Operational Creditor, it in no manner affect the maintainability of the Application filed by the Operational Creditor under Section 9 of the Code. We, thus, are fully satisfied that the Application filed by Respondent under

Section 9 was fully maintainable and the claim of the Respondent was a claim of 'operational debt' and we do not find any merit in the submission of the learned Counsel for the Appellant that there was no 'operational debt'.

13. We may also notice the judgments of this Tribunal relied by learned Counsel for the Appellant in support of his submission that Application under Section 9 filed by Respondent was not maintainable. Learned Counsel for the Appellant has relied on judgment of this Tribunal in ***“International Asset Reconstruction Co. Pvt. Ltd. v. Jayant Vitamins Ltd. – Company Appeal (AT) (Ins.) No.1472 of 2019”***. The above judgment was a case where Application filed by Operational Creditor was dismissed as barred by time. In the above case, Application was filed under Section 9 in the year 2019 whereas suit of recovery was Decreed on 17th October, 2005, which was held to be barred by time. Paragraph 2 of the judgment is as follows:

“2. The Corporate Debtor – ‘Jayant Vitamins Ltd.’ committed default on 13th September, 1996. Thereafter, Appellant filed suit for recovery which was decreed on 17th October, 2005 and a case for execution is pending. Therefore, we find that the application under Section 7 was barred by limitation.”

The above judgment in no manner help the Appellant in the facts of the present case.

14. The next judgment relied by learned Counsel for the Appellant is **“HDFC Bank Ltd. v. Bhagwan Das Auto Finance Ltd. – Company Appeal (AT) (Ins.) No.1329 of 2019”**, which was a case filed under Section 7 by the HDFC Bank. In the above case, this Tribunal came to the conclusion that Application was filed with malicious intent and on the said finding, the Appeal was dismissed. In the present case, the Application filed by Respondent under Section 9 cannot be said to be filed with malicious intent, when inspite of Decree passed by the Civil Court in favour of the Respondent, no payments were made to it. The Operational Creditor had every right to invoke the provisions of Code. The mere fact that Execution Application filed by Operational Creditor is pending in Civil Court was no impediment for initiating proceedings under the Code.

15. We may refer judgment of this Tribunal in **“Punjab National Bank vs. M/s Vindhya Cereals Pvt. Ltd. – Company Appeal (AT) (Ins.) No.854 of 2019”**, where this Tribunal laid down following in paragraphs 8 and 9:

“8. This Tribunal in the case of Company Appeal (AT) (Ins) No. 323/2019 (Neeraj Jain Vs. Yes Bank Ltd. & Anr.) decided on 10.04.2019 held that Section 7 being an independent proceedings is nothing to do with the pendency of Criminal Case relating to misappropriation of funds. This Tribunal in the case of Comp. App. (AT) (Ins) No. 1021/2019 (Karan Goel Vs. M/s Pashupati Jewellers & Ors.) decided on 01.10.2019 held that merely because suit has been filed by the Financial

Creditor and pending, cannot be ground to reject the application under Section 7 of the I&B Code.

9. In the light of above pronouncement, we are of the considered view that the Financial Creditor can proceed simultaneously under SARFAESI Act, 2002 as well as under I&B Code. Section 238 of I&B Code provides that the provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by the virtue of any such law. Thus, the non-obstante clause of the I&B Code will prevail over any other law for the time being in force.”

16. In the above case, it is held that the provisions of the Code namely under Section 238 shall have an overriding effect. Hence the Application under Section 9 filed by the Operational Creditor cannot be defeated on the ground that any Application for execution was pending, more so, when inspite of Decree passed on 08.09.2016, no payment was made by the Corporate Debtor.

17. Another judgment relied by learned Counsel for the Appellant in ***Company Appeal (AT) (Ins.) No.452 of 2020 – Sh. Sushil Ansal v. Ashok Tripathi and Ors.*** where the Appellant was a home buyer and an allottee and in whose favour there was already a certificate issued by UP RERA. In the above circumstances, this Tribunal held that the Decree holder though

come within the definition of ‘creditor’, does not fall within the definition of ‘financial creditor’ and cannot file an Application under Section 7 due to the above reason, the said Appeal was allowed and Application filed under Section 7 by allottee was held to be not maintainable. The above judgment does not help the Appellant in the present case. The judgment of this Tribunal in **“Digamber Bhonwen v. JM Financial Asset Reconstruction Company Limited – Company Appeal (AT) (Ins.) No.1379 of 2019”** as well as Sushil Ansal (supra) were also to the same effect, where the Appeal was allowed by rejecting the submission that in Section 3(10) of the Code, the definition of ‘creditor’, the ‘decree holder’ is included. In the above cases, the Application came for consideration was an Application under Section 7 and the question was as to whether the Applicant was ‘Financial Creditor’, where it was held that Applicant was not ‘Financial Creditor’. The above judgment is clearly distinguishable.

18. We have already held in foregoing paragraphs that Respondent was ‘Operational Creditor’ and the nature of transaction was ‘operational debt’, hence, we do not find any substance in submission of the learned Counsel for the Appellant that Application under Section 9 was not maintainable.

19. Now we come to the last submission of the learned Counsel for the Appellant that Corporate Debtor is a going concern, hence, the Application under Section 9 was not maintainable. We do not find any substance in this submission. Even when a going concern is unable to discharge its debt, the Operational Creditor is entitled to invoke Section 9, hence, the Application filed by Operational Creditor under Section 9 cannot be said to

be non-maintainable on the ground that Corporate Debtor is a going concern. We thus reject this submission.

20. In view of the forgoing discussions, we do not find any substance in any of the submission of the learned Counsel for the Appellant. We do not find any error in the judgment of the Adjudicating Authority admitting Section 9 Application filed by the Respondent. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

NEW DELHI

30th March, 2022

Ash/NN