NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
IA No. 1293/2025
in
Company Appeal (AT) (CH) (Ins) No.216/2023

In the matter of:

M/S. METALS AND METAL ELECTRIC PRIVATE LIMITED,
Represented by Mr. Gauthamchand Jain Sumermal,
No.136/1, Govindappa Naicken Street,
Parrys, Chennai - 600 001. **… Appellant**

V

M/S. PRINCE FOUNDATIONS LIMITED,
No.61, Ormes Road, Kilpauk,
Chennai - 600 010. **...Respondent**

Present :

For Appellant : Ms. Gopika Nambiar, Advocate
For Mr. Bharat B. Jain, Advocate

For Respondent : Mr. K. K. Vijay Vigneshwar, Advocate

JUDGMENT
(Hybrid Mode)

Per: Justice Sharad Kumar Sharma, Member (Judicial):

The Appellant, in the status of being an operational creditor, had initiated a proceeding under Section 9 of I&B Code against the Respondent, by filing an application in Form-5, as prescribed under Rule 6(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In Part-IV of the said application, the date of default has been shown as to be of 22.02.2022. The proceedings under Section 9 of I&B Code, was contested by the Respondent and the Application was dismissed by the Impugned Order dated 21.02.2023, as passed in CP(IB)/100/CHE/2022 on the grounds that the date of default as mentioned in the Application is later than the date of demand notice, most of the invoices are barred by limitation and that the demand notice did not mention any date of default which is not in consonance with provisions of Section 8 and that 9(3)(b) affidavit has not been attached with the Application.

2) The Appellant contends that the notice of demand was issued by him on 18.02.2022, containing the details of the transactions and the invoices and the financial liabilities accruing from them and that full particulars of the unpaid invoices had been given in Row-7 of the demand notice of 18.02.2022. She has submitted that the format of demand notice used by her did not contain any earmarked space for recording the date of default, that Section 8 of I&B Code dated 18.02.2022, doesn't prescribe for specific mention of the date of default in the demand notice, that the said notice has been prescribed under Rule 5 (1)(b) of the said Rules to be in the shape of Form-4, that Form-4 statutorily doesn't prescribe for a specific mentioning of the date of default for the purposes of initiation of the proceedings under Section 9 of I&B Code and it only prescribes for attaching copy of invoice and therefore non-mention of the date of default does not make his demand notice invalid.

3) It was submitted that when the Appellant had filed an application under Section 9 of I&B Code, in Form-5 as per Rule 6 (sub rule 1), seeking for initiation of the proceedings under Section 9 of I&B Code, The Respondent argued before the Learned Tribunal that in column-2 of Part-IV of the said application, the amount claimed to be in default was mentioned as to be Rs.

1,11,45,932, for which the date of default was shown to be 22.02.2022, that the demand notice was issued on 18.02.2022, under Rule 5(1) of the Rules, 2016 and that the date of default i.e., (which is claimed to be 22.02.2022) cannot be a date later to the date of issuance of notice itself i.e., 18.02.2022, because demand notice is to be issued only in the event of default and therefore, the proceedings under Section 9 of I&B Code, would be vitiated.

4) In response to the argument extended by the Respondent, the Learned Counsel for the Appellant has tried to draw the attention of this Appellate Tribunal to Rule 5 of the Rules, 2016, which prescribes the form and manner of issuance of the demand notice by the operational creditor. The relevant provisions contained under sub rule 1 of Rule 5, which are extracted here under:

> *5.* ***Demand notice by operational creditor****.- 1) An operational creditor shall deliver to the corporate debtor, the following documents, namely:-*
>
> *a) a demand notice in Form 3;* ***or***
>
> *b) a copy of an invoice attached with a notice in Form 4.*

5) She submits that, Rule 5(1) prescribes the form in which the notice of the demand is to be issued by the operational creditor and as per its provisions, the demand notice may be delivered either as a demand notice in Form-3 "**Or**" as a copy of the invoice attached with the notice in Form-4 and that if it is delivered in Form-4 which is invoice-based, there will not be any need for specific mention of date of default. She argues that, in the instant case, the notice of demand dated

18.02.2022, is invoice based and therefore it will have to be treated as to be a notice under Form-4, which under law doesn't contemplate of making any reference to the date of default and hence in the absence of their being any clause prescribed in the said format of notice, non-mentioning of the default date will not be fatal to the proceedings. She has further argued that Form-3 prescribed under Rule 5 (1) (a), particularly mandates providing of record of default with the information utility, whereas, Form-4, prescribed under Rule 5(1)(b) doesn't call for mentioning of any date of default, primarily because the default is easily ascertainable from the invoices.

Form-4 as provided under I&B (Application to the Adjudicating Authority) Rules, 2016 is extracted here under:

Form 4

(See clause (b) of sub-rule(1) of rule 5)

FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED

(Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[Date…………]

To,

[Name and address of registered office of the corporate debtor]

From,

[Name and address of the operational creditor]

Subject: Notice attached to invoice demanding payment

Madam/Sir,

[Name of operational creditor], hereby provides notice for repayment of the unpaid amount of INR [insert amount] that is in default as reflected in the invoice attached to this notice.

In the event you do not repay the debt due to us within ten days of receipt of this notice, we may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process under section 9 of the Code.

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor
Name in block letters
Position with or in relation to the operational creditor
Address of person signing

6) In order to elaborate her argument, the Learned Counsel for the Appellant has drawn the attention of this Appellate Tribunal to the notice of demand of 18.02.2022, which according to its content, she submits that, it will be falling to be a notice under sub clause (b) of sub rule 1 of Rule 5 of the Rules, 2016, and that as it is notice, which is invoice based, in view of the particulars that has been given in column 7, particular reference of the date of default becomes irrelevant for the purposes of initiation and commencement of the proceedings under Section 9 of I&B Code. She submits that, since the birth of the proceedings is as per Form-4, where reference of date of default is not relevant nor it is mandatory under the format to be specifically provided, in that eventuality, the Application in Form-5 which has been issued as per Rule 5 (1)(b) will continue to remain valid for the purposes of initiation of proceedings under

Section 9 of I&B Code, even if the Appellant has referred the date of default in part IV column 2, as to be 22.02.2022 and it will have no adverse bearing as far as the proceedings of Section 9 of I&B Code are concerned.

7) In elaboration to her argument, she submits that, the issue regards, that the notices contemplated under Rule 5 in the shape of Form-3 and Form-4 are independent and distinct to one another, since the splitting of the provisions has been made by the use of word "**or**" in between sub clause (a) and clause (b) of sub rule 1 of Rule 5 of Rules, 2016. She submits that, the said aspect came up for consideration before the Principal Bench, in the judgment reported in **2020 SCC Online NCLAT Page 445 Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited** and the Learned Tribunal while dealing with the issue had framed the point of determination which was considered in Para 9 of the said judgment, which is extracted here under:

> *9. We have heard the arguments of learned senior counsels for the parties and perused the record. The questions which cropped up for the determination of this appeal are as under:*
>
> *"1. Whether it is the discretion of the operational creditor, or the nature of the operational debt, that determines the issuance of notice in Form 3 or Form 4 under section 8(1) of the Insolvency and Bankruptcy Code, 2016?*
>
> *2. Whether or not, copy of the invoice is a mandatory requirement for issuance of demand notice under section 8(1) of the Insolvency and Bankruptcy Code, 2016, in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ?*

3. Whether or not for filing an application, under section 9 of the Code in Form 5 under (sub-rule (1) of rule 6) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the submission of a copy of the invoice is a mandatory requirement, although the demand notice is served in Form 3?"

8) The point with which we would be concerned presently, would be that as contained under point of determination as contained therein, which has been answered by the Principal Bench in Para 43, 44, **45** & 46 of the said judgment. The Principal Bench has quite clearly and in distinct term has observed, that the use of word "**or**" in Section 8 of the Code which is to be read with Rule 5, cannot be interpreted as such that, the I&B Code has provided a choice or a discretion to an operational creditor intended to provide escape route from submission of the invoice and answered the said question in Para 47 in the matters of Neeraj Jain (Supra), which has made it clear that the choice of issuance of demand notice under Section 8 (1) of I&B Code, could be made either in Form-3 or in Form-4, as prescribed in Rule 5(1) of the Insolvency and Bankruptcy (Application to adjudicating authority) Rules, 2016.

Paras 43, 44, 45, 46 & 47 are Extracted here under:

43. However, it cannot be the discretion of the operational creditor to deliver the demand notice in Form 3 even if the operational debt involves transactions where corresponding invoices are generated but are not filed in court on the pretext that the operational creditor has chosen to send the notice in Form 3.

44. The use of the phrase, "deliver a demand notice of unpaid operational debt or copy of an invoice demanding payrnent of the amount involved" in section 8(1) does not provide the operational creditor, with the discretion to send the demand notice in Form 3 or Form 4 as per its convenience. Rather, it depends directly on the nature of the operational debt and applicability of Form 3 or Form 4 as per the nature of the transaction.

45. It is important to mention that legislative provisions are made with a larger perspective to deal with all the eventualities that may arise in the implementation of the said provisions. Therefore, the use of the word "or" in section 8 cannot be interpreted as such, that the Insolvency and Bankruptcy Code has provided a choice or a discretion to an operational creditor, to provide an escape route from submission of the invoice, which can be treated as the most relevant document to prove the debt and amount in default.

46. On perusal of the language of section B, it is clear that an operational creditor on the occurrence of default has been provided with the option of delivering a demand notice of the unpaid operational debt or raising an invoice demanding payment of the amount involved. The two options available for initiation of the corporate insolvency process are provided to deal with all the eventualities that may occur. For example, if an operational debt is in the nature of salary dues, then in that situation, the question of submitting an invoice does not arise. To deal with such a situation, section 8 contains the provision for issuance of demand notice of the unpaid operational debt. Form 3 of the Adjudicating Authority Rules has only laid down the condition that the applicant has to give the detalls of the amount of debt, details of the transaction on account of which such debt fell due and the date from which such debt fell due, and as per column 7 of the said Form 3, applicant has to attach the documents to prove the existence of operational debt and the amount in default. Likewise, where the operational debt involves the generation of the invoice, then in that case, invoice raising *the demand may be sent to the corporate debtor demanding the invoice amount. In such a situation, the operational creditor has to issue the demand notice in Form 4 along with the invoice.*

47. Thus, it is clear that the choice of issuance of demand notice under section 8(1) of the Insolvency and Bankruptcy Code, 2016, either in Form 3 or Form 4, under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, depends on the nature of operational debt. Section 8(1) does not provide the operational creditor, with the discretion to send the demand notice either Form 3 or Form 4, as per its convenience. The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. It is also made dear that the copy of the Invoice is not mandatory if the demand notice is issued in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application.

9) We see no reasons to take a different view than what has been considered by the Principal Bench, with regards to distinction in Form-3 and Form-4 provided under Rule 5 of Rules and its purpose. Supporting her argument on the basis of the aforesaid determination made by the Principal Bench, she contends that, if her notice of demand of 18.02.2022, itself is taken into consideration, as it has been issued under Rule 5 and considering it in the light of the contents of the said notice, particularly that, as given in column 7, it is invoice-based and it will have to be treated to be a demand notice in Form-4, in which a specific reference of the date of default is not mandated as per the form as provided under Rule 5(1)(b), which has been extracted herein above. In these eventualities, she has submitted that the reason which has been adduced by the

Tribunal while rejecting the application under Section 9 of I&B Code, by making observations in Para 1 of the impugned order, pertaining to the date of default occuring at a date subsequent to the date of demand notice will have no bearing when the law itself doesn't contemplate, reference of the date of default to be made in the application itself, which is the birth place of the proceedings under Section 9 of I&B Code. Thus, the observation made in the impugned order for arriving at a conclusion as to be a reason to reject, the application under Section 9 of the I&B Code, itself is fallacious and cannot be sustained.

10) Further, Learned Counsel for the Appellant has contended that, the reason which has been assigned by the Learned Tribunal to declare majority portion of the amount claimed as time-barred is not sustainable. She has stated that after going through the list of invoices provided in the Application, Learned Tribunal has determined that, each of the invoices as detailed prescribes are to be paid within 7 days from the date of the invoice and in that eventuality, the majority portion of the demand raised by the applicant/appellant would be barred by limitation as most of the invoices have been raised between 31.08.2017 to 18.12.2018, which will be time barred as on date of demand notice and that the amount covered by remaining invoices falling due to be paid would be falling below the threshold. But the Learned Counsel for the Appellant has drawn our attention to the terms and conditions of each of the invoices and the last being that of 10.08.2020, which contains the following conditions:

1. Payment Cash on demand.

2. *Interest @ 24% will be charged if Bill/s unpaid over Seven Days after delivery.*
3. *Delivery ex-godown:- our risk and responsibility ceases after goods leave our godown.*
4. *We are not responsible for any loss or damage in transit as goods are despatched on account and risk of purchaser.*
5. *Any dispute against this sale is Subject to Chennai's Jurisdiction only.*
6. *Goods once sold will not be taken or exchanged under any circumstances.*

11) She has further stated that, clause 2 of the aforesaid terms and conditions as provided in the invoices has to be compositely read so as to give a logical interpretation as to, whether each of the invoices could be independently read for the purposes of determining limitation and attracting the bar of threshold limit as contemplated under Section 4 of I&B Code. She has argued that, the aforesaid clause 2, contemplates that the amount covered under a particular invoice is to be paid within 7 days from the date of delivery, and since the date of 'delivery' for each of the invoices would be a variable factor, it will not be correct to compute limitation from a period of 7 days from the date of the invoice and since there is a provision of paying the dues with interest @ 24 percent, beyond the 7 days period, the date of default will become variable, and default will arise only when the payment is demanded and not paid. In that eventuality, the transactions will be of a continuous nature and the limitation will have to be computed from the last transaction which is on 10.08.2020, in which case the

application having been filed on 27.04.2022 will not be barred by limitation as per Section 137 of Limitation Act.

12) We see logic in the argument extended by the Counsel for the Appellant, that this particular clause contained in the invoice, which equally binds the parties, by providing for payment beyond 7 days period with interest, makes the invoices as to be the running invoice though they prescribe for payment of the amount within 7 days of the delivery and because of it, expiry of 7 days from the date of invoice and should not be taken into consideration for the purposes of computing limitation period for each invoice and to treat them as barred by limitation.

13) Learned Counsel for the Appellant has further submitted that as per the provisions contained under Section 9 of I&B Code, which contemplates initiation of CIRP proceedings by the operational creditor, the conditions for rejection of the application has been prescribed in sub section 5(ii) of Section 9 is extracted here under:

> *(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 pending 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.

14) Upon the aforesaid conditions, we are of the view that, none of the conditions prevailed, which could be cited for the purposes of rejection of the application, at the hands of the adjudicating authority, as the application thus preferred didn't suffer from any of the discrepancies as specifically identified by the legislature under Section 9(5)(ii). Hence, when the statute has assigned the conditions under which the application under Section 9 of I&B Code could be rejected, and if it doesn't fall to be within those conditions as provided under Section 9(5)(ii) of I&B Code, any other reasoning cannot be assigned by the Learned Tribunal to reject an application under Section 9 of I&B Code. Further, discrepancy in the date of default is a rectifiable defect and the statute permits Learned Adjudicating Authority to allow the Applicant to make new corrections/amendments, if necessary.

15) Thus the very reasoning, which has been assigned in the impugned order while rejecting the Application that, there was no mention made of the date of default, in the face of the provision of invoice-based demand notice in Form-4 and in the face of non-consideration of the terms and conditions of the invoices, do not appear to be logical. Hence the impugned order is hereby quashed. All pending Interlocutory Applications would stand closed. The matter is remitted

back to the Learned NCLT, Chennai, for a fresh decision on the application under Section 9 of I&B Code, preferred by the appellant exclusively on its merits.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

24/10/2025

YS/MS/AK