

**IN THE NATIONAL COMPANY LAW APPELLATE
TRIBUNAL, NEW DELHI
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) (Insolvency) No. 82 of 2017

**(arising out of Order dated 28th April, 2017 passed by National
Company Law Tribunal, Allahabad Bench, in Company Petition
No. 36/ALD/2017.)**

JK Jute Mill Mazdoor Morcha Appellant

v.

**Juggilal Kamlapat Jute
Mills Co. Ltd. Respondent**

Present:

For Appellant:- Mr Sanjeev Sen, Sr. Advocate, Mr Ashok Jain, Mr Ankit Kohli and Mr Karan Khanna, Advocates.

For Respondent:- Mr Arvind Kumar, Advocate.

For Interveners:- Mr Abhijit Sinha, Mr Titash Sen, Mr Atanu Mukherjee, Mr Arjun Aggarwal and Ms Vaishali, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellant- JK Jute Mill Mazdoor Morcha (hereinafter referred to as Trade Union) against order dated 28th April, 2017 passed by the Adjudicating Authority (National Company Law Tribunal (hereinafter referred to as Tribunal), Allahabad Bench, in Company Petition No. 36/ALD/2017 whereby and whereunder the application preferred by Appellant/Workmen Association under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I&B Code) has been dismissed.

2. In the impugned order, the Tribunal, taking into consideration different facts, including the documents whereby Appellant in respect of claim/operational debt due on various Heads of workers like payment wages, salaries, bonus, provident fund, gratuity in respect of different workmen held that the application preferred by the Appellant under Section 9 is not maintainable.

3. The only question arises for determination in this appeal is whether an application under Section 9 of the I&B Code is maintainable at the instance of Workmen Association ?

4. Ld. Counsel for the Appellant while submitted that the Adjudicating Authority has accepted that the Respondent/'corporate debtor' cannot deny the liability for making payments of workmen's wages, contended that illegal acts and conduct of the 'corporate debtor' is glaring from the facts as narrated. It was submitted that the conduct of the 'corporate debtor' has already been deprecated by Hon'ble Supreme Court in "*Ghanshyam Sarda v. Shiv Shankar Trading Co. & Ors.*" 2015 (1) SCC 298 and in number of pending proceedings under provisions of SICA, 1985 the 'corporate debtor' obstructed the BIFR from sanctioning the 'revival scheme' envisaging payment of dues of the workmen and adopted all means and methods to ensure that no effective order is passed by BIFR.

5. Referring to various acts on the part of the 'corporate debtor' it was contended that the default by 'corporate debtor' is admitted and borne out from audited balance sheet.

6. Ld. Counsel for the Appellant submitted that if the Appellant is a registered Trade union under sub-section (8) of Section 10 of the Trade Union Act, 1926 and under section 15 of the Trade Union Act,

the General Fund can be used by the Appellant for prosecution or defence of any legal proceeding.

7. It was further contended that the Appellant falls within the meaning of 'operational creditors' under Section 5 (20) of the I&B Code since the 'corporate debtor' owed operational debt to its workmen and employees in respect of services, including employment, as per sub-section (21) of Section 5 of the I&B Code.

8. It was also contended that the Trade union is a 'person' defined under Section 3, sub-section (23) (g) of the Trade Union Act and from collective reading of Section 3 (23) (g) of the Trade Union Act with Section 5 (20) and (21) of the I&B Code, it is clear that the trade union being a 'person' the petition under Section 9 of the I&B Code is maintainable. Reliance was placed on decisions of High Courts which relates to Trade Union Act, however, according to us they are not applicable to the provisions of the I&B Code.

9. Ld. Counsel appearing on behalf of the Respondent/'corporate debtor' submitted that the application under Section 9 of the I&B Code is not maintainable as no 'operational debt' is owed by the corporate debtors to the Appellant/Trade Union under sub-section (2)

of Section 5. Further, according to Respondent, the Appellant/Trade Union does not fulfil the criteria under sub-Section (20) of Section 5 of the I&B Code to come within in the meaning of 'operational creditor'. Furthermore, if sub-section (20) of Section 5 is read with Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority), 2016 (hereinafter referred to Adjudicating Authority Rules), it is clear that application can only be filed by 'operational creditor' i.e., an individual workman himself or person specifically authorized to act on behalf of the workman. As the Appellant is a Trade Union, it lacks authority to issue demand notice/file an insolvency application against the answering Respondent under the I&B Code.

10. According to Respondents, there is a pre-existing dispute prior to filing of Section 9 application; a civil suit, "*Juggilal Kamlapat Jute Mills Company Limited vs J.K. Jute Mazdoor Panchayat (CITU) and Ors.*" is pending before the Civil Court of First Additional Civil Judge (CD), Kanpur Nagar. Another Writ Petition titled "*J.K. Jute Mills Mazdoor Ekta Union vs UoI and Ors.*" is pending wherein the Appellant

is also a party and the matter is pending against the Respondent before the High Court of Delhi.

11. It was also submitted that the Respondent/'corporate debtor' is in lockout and no dues are payable to the workmen/employees.

12. Ld. Counsel for the Respondent relied on decision of this Appellate Tribunal in "**Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd**". and submitted that by judgement dated 24th May 2017, this Appellate Tribunal held that where there is a pre-existing dispute, the petition under Section 9 is not maintainable. It was also contended that the Appellant along with application under Section 9 has not provided any certificate from any 'Financial Institution' which is mandatory for filing application under Section 9 as held by the Appellate Tribunal in "**Smart Timing Steel Ltd., v. National Steel and Agro Industries Limited.**"

13. Further according to the Respondent, the demand notice issued by the Appellant was not only defective and incomplete but they also raised false claim without providing the requisite details about how the amount as claimed has been calculated, nor provided the detailed particulars of the workers, such as names, designation and the area

of service, the period of service etc. and no default has taken place. Further, according to Respondents, the petition under Section 9 was filed before the expiry of prescribed period of 10 days from the date of receipt of demand notice.

14. 19 Interveners have intervened who claim to be the members of different Trade Unions of Respondent/'corporate debtor', this apart, some of them are widow, successor of the deceased workers. According to them, inspite of repeated demands and reminders, the Jute Mill failed to make payment for realization of legitimate dues towards: -

- (i) Wage Deduction @ 10% of wages p.m as per MoU
- (ii) Overtime
- (iii) Provident fund
- (iv) Gratuity
- (v) Holiday Arrears
- (vi) Money deposited in company's society and savings, and
- (vii) Wage from the period since the factory has closed.

It is stated that apart from that the minimum wages has also not been paid and total dues to the members of the Interveners are

more than Rs.113.8 lacs. The details of period of lockout etc., has been shown.

15. Another Intervening Application has been filed by Ghanshyam Sarda who claim to be the co-promoter. According to him due to multiple litigations by the 'corporate debtor' under management of Govind Sarda, the Hon'ble Supreme Court earlier directed the BIFR to decide the issue of correct net-worth position and to finalise the DRS. Further according to them, the MoU with the Trade Union is binding on all the signatories. It is further stated that on 18th October 2008, the 'corporate debtor' under Govind Sarda entered into a MoU with 8 Trade Unions for re-scheduling/re-payment of workers' due which has not been honoured by Govind Sarda. According to the intervening co-promoters, such unpaid worker/employee cannot afford to invoke the provision of the I&B Code in view of the cost of litigation and, therefore, the court must give effect to the purport and object of the Act and Rules thereof and 'purposive construction' should be made applicable in the present case. Request has been made to set aside the impugned order and remit the matter to the Adjudicating Authority to admit the application.

16. In this appeal it is not necessary to decide whether the Appellant/Trade Union come within the meaning of 'person' as defined in sub-section (23) of Section 3 of the I&B Code which reads as follows: -

"3. In this Code, unless the context otherwise requires, —

(23) "person" includes— (a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India;"

17. Even if it is accepted that the Appellant/Trade Union come within the meaning of 'person', according to us it do not fall within the meaning the meaning of 'operational creditor' as defined in sub-section (20) of Section 5, which reads as below: -

"5. In this Part, unless the context otherwise requires, —

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

18. 'Operational Debt' as defined in sub-section (21) of Section 5 reads as follows:-

"(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment 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;"

19. From the aforesaid provision we find that the following persons can claim to be an 'operational creditor': -

- (i) The person who has claim in respect of provision of goods (supplied) to the 'corporate debtor';
- (ii) Persons who have provided services to the 'corporate debtor', including those who are in employment; and
- (iii) Central Government, State Government and Local Authorities, who are entitled to claim debt in respect of dues arising under any Law for time being in force.

20. In view of definition aforesaid, while we hold that a workman or employee who has rendered services to the corporate debtor

individually come within the meaning of 'operational creditor'. The Trade Union or Association of Workmen/employee, do not come within the meaning of 'operational creditor' as no services is rendered by the Workmen's Association/Trade Union to the 'corporate debtor' to claim any dues which can be termed to be 'debt' as defined in sub-Section (11) of Section 3, and reads as follows: -

"3. In this Code, unless the context otherwise requires, —

"(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

21. In absence of any liability or application in respect of any claim which is due to Workmen Association/Trade Union from a 'corporate debtor' and as they do not provide any service to the 'corporate debtor', the question of default of debt does not arise and therefore they cannot claim to be 'operational creditor' for preferring any application under Section 9 of the I&B Code.

22. This apart, members of a Trade Union/Workmen Association, who are workman or employee of a 'corporate debtor', some amount may be due to such individual workman/employee from a 'corporate debtor' including salary, gratuity, provident fund etc., in view of services rendered by them,

but in such cases, in respect of each workman there will be separate cause of action, separate claim and separate date of default of debt.

23. For example, as pleaded by 19 Interveners, each workman/employee and those deceased and now represented through their widows or legal heirs/legal representatives in respect of each of them, there are separate claim of salary or retirement benefits or other dues for different period. In majority of the cases, the date of default of debt will also be different. Without ascertaining any such amount no application under Section 9 in Form 5 will be complete nor the Adjudicating Authority can give any finding with regard to the individual claim nor it will be in possible for the Interim Resolution Professional to collect the details.

24. There may be workmen/employees who are also member of the Workmen Association/Trade Union but may not have any claim at all. In absence of their debt or default no application on behest of such members can be maintained by Trade Union under Section 9.

25. In the case of "**Uttam Galva Steels Limited V. DF Deutsche Forfait AG & Anr**" in Company Appeal (Insolvency) No. 39 of 2017, this Appellate Tribunal by Judgement dated 28th July 2017 held that joint application under Section 9 is not maintainable and observed as follows: -

"17. Under sub-section (1) of Section 8 of the I&B Code, an 'Operational Creditor' on occurrence of a default, is required to

deliver the notice of payment of unpaid debt or get copy of the invoice payment of the defaulted amount served on the Corporate Debtor. This is the condition, precedent under Section 8 & 9 of the I&B Code, unlike Section 7 before making an application to the adjudicating authority under Section 9 of the I&B Code. Under sub-Section (1) of Section 9 of the Code, the right to file an application accrues after expiry of ten days from the delivery of demand notice or copy of invoice, as the case may be if the operation creditor does not receive payment from the corporate Debtor or notice of dispute under sub Section (2) of Section 8, the Operational Creditor only thereafter may file an application before the Adjudicating Authority for the initiation of corporate insolvency resolution process.

18. An application under Section 9 of I&B Code is required to be filed in such, format and manner and accompanied by such fee, as may be prescribed. The Operational Creditor along with the application is required to furnish documents as mentioned in clause (a), (b), (c) and (d) of sub-Section (3) of Section 9 of I&B Code, and quoted below: -

“9. Application for initiation of corporate insolvency resolution process by operational creditor - (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process. (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed. (3) The operational creditor shall, along with the application furnish— (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt; (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operation debt by the corporate debtor; and (d) such other information as may be specified. (4) An operational creditor initiating a corporate insolvency process

under this section, may propose a professional to act as an interim resolution professional. "

19. From the aforesaid provisions of Section 8 and 9 of I&B Code, it is clear that unlike Section 7, a notice under Section '8 is to be issued by an "Operational Creditor" individually and the petition under Section 9 has to be filed by Operational Creditor individually and not jointly.

20. Otherwise also it is not practical for more than one 'operational creditor' to file a joint petition. Individual 'Operational Creditors' will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate Form -3 or Form -4 will have to be filled. Petition under Section 9 in the format will contain separate individual data."

26. In view of the finding as recorded above, we hold that the application under Section 9 at the instance of Appellant-JK Jute Mill Mazdoor Morcha - is not maintainable. The Adjudicating Authority has rightly rejected the claim though for some other reason.

27. However, it does not mean that an application under Section 9 of I&B Code is not maintainable at the instance of an individual employee/workman who has rendered services to the 'corporate debtor' and if there is debt and default: such individual workman/employee can prefer an application under Section 9 giving details of debt and date of default but it should not be less than one lakh rupees in view of Section 4 of the I&B Code. In such cases if corporate insolvency resolution process is started against the corporate debtor, it is always open to the other creditors,

including workmen/employees, their legal heirs to file claim before the Insolvency Resolution Professional once notice is published in the newspaper under Section 15 of the I&B Code and/or prior to completion of insolvency resolution process. This observation we are making so that in such case the 'corporate debtor' cannot take plea that earlier the application moved by workers' association/Trade Union in respect of such workmen/employee/legal heirs of deceased employees under Section 9 and the appeal under Section 61 have been rejected.

28. In absence of any merit the appeal preferred at the instance of JK Jute Mill Mazdoor Morcha is dismissed with liberty to individual workman/employee to raise such claim, if there is a debt and default. However, in the facts and circumstances, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

12th September, 2017