

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 221 of 2017

IN THE MATTER OF:

Kanti Commercials Pvt. Ltd.

...Appellant

Vs.

**Belthangady Taluk Rubber
Growers Marketing & Processing
Co-operative Society Limited & Ors.**

...Respondents

**Present: For Appellant: - Mr. Rajshekhar Rao, Mr. Amit A. Pai and
Mr. Ashok Kumar Jain, Advocates.**

**For Respondents:- Mr. Prashanth B. K and Ms.
Sangeetha. M.S. Advocates for 1st Respondent.**

**Mr. Vaibhav Srivastava and Mr. Nand Kumar Sagar,
Advocates.**

**Mr. Krishnamurthy, Mr. Apratim Animesh Thakur,
Advocates for IRP.**

ORDER

08.03.2018- This appeal has been preferred by 'M/s. Kanti Commercials Private Limited', Shareholder of 'Falcon Tyres Limited' ('Corporate Debtor') against order dated 30th August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in CP (IB) No. 01/BB/2017, whereby and whereunder the application preferred by the Respondents- 'Belthangady Taluk Rubber Growers Marketing & Processing Co-operative Society Ltd & Ors'. ('Operational Creditor') under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been

admitted, order of 'Moratorium' has been passed and 'Interim Resolution Professional' has been appointed with certain directions.

2. As the appeal can be disposed of on short point, it is not necessary to discuss the detailed facts, except the relevant one.

3. The 'Operational Creditor' supplied goods to the 'Corporate Debtor' and certain amount, having not paid initially, issued notice under section 434(1) (a) of the Companies Act, 1956; in spite of the same, the amount was not paid. The 'Operational Creditor' filed the suit bearing OS No. 83 of 2017 before the Addl. Senior Civil Judge and CJM, Mysuru on 20th January, 2017. However, it appears that subsequently the 'Operational Creditor' issued a demand notice under sub-section (1) of Section 8 of the 'I&B Code' on 24th January, 2017 demanding repayment of the alleged outstanding of Rs. 1,18,34,618.66/-, which was not paid. The 'Operational Creditor' thereafter filed an application under Section 9 of the 'I&B Code' on 23rd February, 2017, wherein the impugned order was passed. The main ground taken by the Appellant is that the suit was pending as on the date of admission and prior to issuance of notice under sub-section (1) of Section 8 of the 'I&B Code'.

4. According to 'Operational Creditor' after admission of the application under section 9 of the 'I&B Code' suit was withdrawn by the 'Operational Creditor'.

5. Mr. Vaibhav Srivastava, learned counsel appearing on behalf of the workmen, submits that workmen have also not been paid the wages since January, 2014. Hence, it is a fit case for initiation of 'Corporate Insolvency Resolution Process'.

6. Mr. Krishnamurthy, learned counsel appears on behalf of the 'Insolvency Resolution Professional'.

7. In the present case, it is not necessary to decide whether there is an 'existence of dispute' between the parties or not, as we find that the suit between the parties was pending since prior to issuance of demand notice under sub-section (1) of Section 8 of the 'I&B Code'.

8. The Hon'ble Supreme Court in "***Mobilox Innovations Private Ltd v. Kirusa Software Private Ltd, (2018) 1 SCC 353***", having noticed the provisions of Sections 8 and 9 of the 'I&B Code', observed and held as follows: -

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e, on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing - i.e it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the

adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the

application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso (Section 9(5)(ii)(a)). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b)), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c)). It may also reject the application if the

notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility (Section 9(5)(ii)(d)). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected (Section 9(5)(ii)(e)).

34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the

receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

9. As, admittedly the suit between the parties was pending before the date on which demand notice was issued under sub-section (1) of Section 8 of the 'I&B Code' and was also pending when the application under Section 9 of the 'I&B Code' was admitted, we hold that the application under section 9 of the 'I&B Code' was not maintainable. For the reasons aforesaid, we set aside the order dated 30th August, 2017 passed by Adjudicating Authority, Bengaluru Bench in CP (IB) No. 01/BB/17 and allow the appeal.

10. However, suit having already been withdrawn, it is open to any of the 'Financial Creditors' or 'Operational Creditors', including the 1st

Respondent and the workmen to move fresh application under sections 7 or 9 of the 'I&B Code', if not preferred.

11. It is informed that some other applications under Section 9 of the 'I&B Code' have been filed against the Appellant-'Corporate Debtor' and are pending before the Adjudicating Authority. The Adjudicating Authority may consider the same independently uninfluenced by the impugned order dated 30th August, 2017 and order passed by this Appellate Tribunal.

12. In effect, order (s) passed by Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. Learned Adjudicating Authority will close the proceeding. The 'Corporate Debtor' company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect, if no other proceeding under 'I&B Code' is initiated.

13. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the 'Corporate Debtor' will pay the fees for the period he has functioned. The appeal stands disposed of with

aforesaid observation and liberty. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

Ar/g