

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 12 of 2018

[Arising out of Order dated 15th November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in CP (IB) No. 177/9/HDB/2017]

IN THE MATTER OF:

Crompton Greaves Consumer Electricals Limited

Equinox Business Park,
Tower 3, 1st Floor,
Kurla (West)
Mumbai – 400 070.

...Appellant

Vs

K. P. R. Industries (India) Limited

Survey No. 1, 2, 3, 4, Kanedu Metta Road,
Balabhadrapuram, Bicavolu Mandal,
East Godavari District,
Guntur,
Andhra Pradesh – 533 343.

....Respondent

Present:

For Appellant: Mr. Hemant Daswani and Ms. Ishanki Gupta,
Advocates.

For Respondent: Mr. Mullapudi Rambabu and Ms. Vijayshree Pattnaik,
Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

The Appellant/Operational Creditor – M/s Crompton Greaves Consumer Electricals Limited approached the Adjudicating Authority

(National Company Law Tribunal), Hyderabad Bench, Hyderabad with an application under Section 9 of Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') seeking to trigger Corporate Insolvency Resolution Process (CIRP) against Respondent/Corporate Debtor – M/s K. P. R. Industries (India) Limited for committing default in respect of unpaid operational debt amount of Rs.34,42,005.57. The Appellant claimed to have sold, supplied and delivered to the Respondent/Corporate Debtor material for designing, engineering, manufacturing, testing, supply, erection and commissioning spares of industrial light fixtures with accessories in terms of purchase order dated 25.07.2014 placed by the Respondent/Corporate Debtor with it. It was alleged by the Appellant/ Operational Creditor that despite raising invoices on the Respondent/Corporate Debtor as specified in para 4 (vi) of the impugned judgement on service of notice of demand, the Respondent/Corporate Debtor failed to clear the outstanding dues, thereby leaving the Appellant/ Operational Creditor with no option but to seek triggering of CIRP under Section 9 of the I&B Code.

2. Respondent/ Corporate Debtor filed a counter affidavit before the Adjudicating Authority raising many pleas to contest the application which primarily related to non-compliance with mandate of Section 8 of I&B Code.

3. The Adjudicating Authority, upon consideration of the material brought on record by the parties, found that the Appellant/Operational Creditor had

submitted the letter dated 11.09.2017 from ICICI Bank confirming that no amount had been received in the account of Appellant/Operational Creditor from any account of the Respondent/Corporate Debtor since 07.07.2016 till 11.09.2017. However, despite such finding the Adjudicating Authority rejected the application of the Appellant/ Operational Creditor on the ground that notice of demand issued by the advocate of the Appellant/Operational Creditor under Section 8(1) of I&B Code was not in the format as prescribed and that no authority of the Board of Directors for issue of the aforesaid notice had been submitted. Rejection of the application under Section 9 of the I&B Code in terms of impugned order dated 15.11.2017 was partially based on the decision rendered by this Appellate Tribunal in ***'Uttam Galva Steels Limited' Versus 'DF Deutsche Forfait AG & Anr.'*** in ***Company Appeal (AT) (Insolvency) No.39 of 2017 on 28th July, 2017.***

4. Appellant/ Operational Creditor has assailed the impugned order on the ground that the Adjudicating Authority even after noticing that there was an admitted liability by the Respondent/Corporate Debtor failed to appreciate that the Appellant/ Operational Creditor had issued two demand notices in terms of provisions of I&B Code calling upon the Respondent/ Corporate Debtor to pay the debt amount of Rs.34,42,005.57 being the amount due. According to the Appellant the Adjudicating Authority was bound to admit the application once it had found that the Respondent had admitted its liability and expressed its inability to make the due payment after receipt of the

demand notice. However, the Respondent reiterated that the demand notices were defective and did not comply with the mandatory statutory provisions of the Code.

5. Assailing the impugned order, learned counsel for the Appellant submits that despite admission of liability by the Respondent, the Adjudicating Authority overlooked the fact that the Appellant had issued demand notices calling upon the Respondent to pay the outstanding dues to the tune of Rs.34,42,005.57. It is contended that once the Respondent admitted its liability and expressed its inability to make the due payment in response to the demand notice, the Adjudicating Authority was left with no option but to pass order of admission of application. It is further contended that since Respondent had taken objection to first demand notice dated 17.04.2017 as not complying with the requirement of law, the Appellant had sent another demand notice in conformity with the law laid down in **'Macquarie Bank Limited' Vs 'Shilpi Cable Technologies Ltd.'** which was returned back on 04.05.2017 with endorsement '*Refused hence returned to sender*'. It is contended that the Adjudicating Authority has not even referred to the second demand notice issued by the Appellant, which formed annexure to the application and the impugned order came to be passed ignoring the same. Per Contra, learned counsel for Respondent submits that though the Appellant claimed to have issued three demand notices respectively dated 07.07.2016, 07.04.2017 and 25.04.2017, Respondent had received the first

two notices which were defective and same were replied by the Respondent. However, third notice was not received by the Respondent and no proof of service thereof was produced by the Appellant before the Adjudicating Authority. Learned counsel for Respondent supported the impugned order as according to him the demand notices were defective as not being in the prescribed form.

6. Heard learned counsel for the parties. It appears that the Adjudicating Authority relied upon the judgment of this Appellate Tribunal rendered in **‘Uttam Galva Steels Limited’ Versus ‘DF Deutsche Forfait AG & Anr.’ in Company Appeal (AT) (Insolvency) No.39 of 2017 on 28th July, 2017** in arriving at the conclusion that an advocate holding no position with or in relation to the Operational Creditor, in absence of any authority of the Board of Directors, cannot issue any notice under Section 8 of the I&B Code. The aforesaid judgement has been set aside by the Hon’ble Apex Court in **‘Macquarie Bank Limited’ Vs ‘Shilpi Cable Technologies Ltd.’ in Civil Appeals No. 15135, 15481 and 15447 of 2017 decided on 15th December, 2017**, it being held that the expression “*an Operational Creditor*” may on the occurrence of a default deliver a demand notice under Section 8 of the I&B Code must be read as “*including an Operational Creditor’s authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicating Authority Rules*”. Even the Respondent has

accepted this legal position as emanates from his written submissions. In view of the same the impugned order cannot be supported.

7. The requisite conditions necessary to trigger the CIRP under Section 9 by an Operational Creditor are:

- (i) occurrence of a default;
- (ii) delivery of a demand notice of an unpaid operational debt;
- (iii) non-receipt of payment by the Operational Creditor from the Corporate Debtor within the period of 10 days of receipt of the demand notice or receipt of reply from the Corporate Debtor not indicating existence of a pre-existing dispute or repayment of the unpaid operational debt.

If the aforesaid conditions exist, the Operational Creditor may file an application under Section 9(2) of the I&B Code in the prescribed manner alongwith the requisite fee. A copy of the invoice demanding payment or demand notice delivered by the Operational Creditor to the Corporate Debtor has to be furnished with the application. This is clearly borne out by conjoint reading of Section 8 and 9 (1) of the I&B Code. The Hon'ble Apex Court while dealing with this aspect in '**Macquarie Bank Limited**' (*Supra*) held that the requirement of an application filed under Section 9(2) of the I&B Code being accompanied by an invoice/ demand notice is a mandatory condition precedent to the filing of the application.

8. Adverting to the facts of instant matter, be it seen that the Appellant/ Operational Creditor served demand notice dated 7th April, 2017 on the Respondent/ Corporate Debtor in terms of Section 8 of the I&B Code. Respondent/ Corporate Debtor claimed that the demand notice was defective. The Adjudicating Authority observed that the demand notice had been issued by the advocate of the Operational Creditor and the same was not in the format as prescribed. Relying upon the decision of this Appellate Tribunal in **‘Uttam Galva Steels Limited’** (*Supra*), the Adjudicating Authority rejected the application of Operational Creditor seeking triggering of CIRP. As already observed in this judgement elsewhere, the decision of this Appellate Tribunal in **‘Uttam Galva Steels Limited’ Versus ‘DF Deutsche Forfait AG & Anr.’** has been set aside by the Hon’ble Apex Court in **‘Macquarie Bank Limited’** (*supra*). It has been held that a notice sent on behalf of an Operational Creditor by a lawyer would perfectly be in order. The impugned order could be set aside on this ground alone. However, the second issue raised in regard to demand notice is required to be dealt with. As held by the Hon’ble Apex Court in **‘Innoventive Industries Ltd.’ versus ‘ICICI Bank & Anr.’, Civil Appeal Nos.8337-8338 of 2017 decided on 31st August, 2017**, under Section 8 of I&B Code, the Operational Creditor is, on the occurrence of a default required to first deliver a demand notice of the unpaid debt to the Corporate Debtor in the manner provided in Section 8(1) of the I&B Code and the Corporate Debtor is, under Section 8(2), required to bring to the notice of the Operational Creditor, within a period of 10 days of receipt of demand

notice, the existence of dispute or pendency of a suit or arbitration proceeding which is pre-existing. Proof of existence of a debt and a default in relation to such debt can be proved by documentary evidence as contemplated by Section 9(3)(d) of the I&B Code. Section 8 does not prescribe any particular method of proof of occurrence of default. In the instant case it has been noticed by the Adjudicating Authority that the Operational Creditor had submitted a letter dated 11.09.2017 from ICICI Bank confirming that no amount had been received in the account of Operational Creditor from any account of the Corporate Debtor since 07.07.2016. The existence of debt and default were satisfactorily established by the Operational Creditor. No pre-existing dispute was brought to the notice of the Adjudicating Authority to reject the application. Assuming that there was a defect in the demand notice, the Adjudicating Authority was required to provide opportunity to the Operational Creditor to remove the same. The Adjudicating Authority appears to have overlooked the legal aspects. It also appears that the Appellant had sent another demand notice which was received back as '*refused*'. This is claimed to have been filed as an Annexure with Form-5 filed by the Operational Creditor before the Adjudicating Authority. The Adjudicating Authority appears to have ignored the same, for no valid reason.

9. In view of the foregoing discussion, the impugned order cannot be supported. The appeal is allowed and the impugned order is set aside. The case is remitted back to the Adjudicating Authority to admit the application

in terms of provisions of Section 9(5)(i). If any defect is noticed in the application for initiation of CIRP by Operational Creditor, the Adjudicating Authority shall provide adequate opportunity to the Operational Creditor to remove the same.

10. The appeal is accordingly disposed of.

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

12th April, 2018