

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1010 of 2019

[Arising out of Impugned Order dated 27th August 2019 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No. 1306/KB/2018 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

**K. B. Polychem (India) Ltd.
Having its Corporate Office at:
F-25, Site C, UPSIDC Industrial Area
Sikandra, Agra – 282007 (U.P.)**

**Having Regd. Office at:
Plot No.726, Opposite Metro Pillar No.718
Village Tikri Kalan
Delhi – 110041**

...Appellant

Versus

**Kaygee Shoetech Private Limited
Having its Registered Office at:
41, Matheshwatala Road
Kolkata – 700045
West Bengal**

Also at:

**33-A, Tarachand Dutta Street
6th Floor, Kolkata
West Bengal – 700073**

...Respondent

Present:

**For Appellant: Mr Shailender Kumar, Advocate
For Respondent: Mr Praveen Kumar Aggarwal and Mr Abhishek Grover,
Advocates**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This present Appeal is preferred against the Impugned Order dated 27th August 2019 passed by the Adjudicating Authority/Hon'ble National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No.

1306/KB/2018 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, whereby the Adjudicating Authority has rejected the Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short '**I&B Code**'). The parties are represented by their original status in the company petition for the sake of convenience.

The brief facts as stated in the Appeal is that Appellant/Applicant had filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 after serving the demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Appellant contends that the demand notice dated 30.07.2018/01.08.2018 under Section 8 of the Insolvency and Bankruptcy Code, 2016 was sent by Speed Post, but it was returned with the remark of the Postal Authorities as "not available". The Adjudicating Authority rejected the petition on the ground that service of the demand notice of the Corporate Debtor is not established. The contention of the Operational Creditor that demand notice sent to the Director of the Company is not returned. Hence, demand notice shall be deemed served, given the General Clauses Act, 1987 and Section 114 of the Indian Evidence Act, 1872. The Adjudicating Authority further holds that **I & B Code, 2016** is a complete Code in itself and provisions of Indian Evidence Act, 1872 and General Clauses Act, 1987 is not applicable unless specifically covered in **I & B Code, 2016**, and based on these, the petition has been dismissed.

The Adjudicating Authority further observed that:

"6. It is observed that service/delivery of the notice of demand on the Corporate Debtor by the Operational Creditor is not established. We

also do not agree with the contention of the Operational Creditor that notice of demand sent to the Director of the Company at his residence has not been returned. Hence, it should be deemed to have been served/delivered in view of the General Clauses Act, 1897 and Section 114 of Indian Evidence Act, 1872. As it is an established position that I & B Code, 2016 is complete Code in itself and provisions of Indian Evidence Act, 1872 and General Clause Act, 1897 are not applicable unless specifically covered in IBC, 2016. For this reason only, the Petition is filed by the Operational Creditor, is liable to be dismissed. This view finds support from the order of this Tribunal dated 20th August in the case of Mascot Petrochem Private Limited Vs. Midaas Construction Company Private Limited in CP (IB) No.1692/KB/2018 supra wherein at para 10, this Tribunal has held as under:-

“Having analysed the facts, we have to look at legal provisions. The Operational Creditor is required to deliver the notice of demand along with invoices to the Corporate Debtor in prescribed form and manner as per the provisions of section 8 read with relevant regulations before filing a petition under Section 9 of the I & B Code, 2016. The requirement of service of notice of demand under 8 has been provided to grant an opportunity to the Corporate Debtor to communicate its view point before proceeding under section 9 can be initiated and as per the scheme of I & B Code, 2016. The strict onus lies on the shoulders of Corporate Debtor to show the existence of dispute before delivery of notice u/s 8, otherwise the purpose of section 8 and 9 proceeding would get defeated if frivolous contentions of Corporate Debtor are accepted and, simultaneously, Operational Creditor cannot use the mechanism of I & B Code, 2016 as a recovery tool. It is also noteworthy that this authority is not required to prove the veracity of the claim of either party and is only

concerned with the aspect of existence of dispute prior to delivery of notice u/s 8 of the I & B Code, 2016 for the purpose of deciding the fate of application under Section 9 of I & B Code, 2016.”

(Quoted verbatim)

This Appeal has been filed mainly on the ground that demand notice sent at the registered office of the Corporate Debtor, was returned with the remarks of the Postal Authorities “not available”. The appellant emphasises on the tracking report of the Postal Authorities, which contains the remark that “item on hold as on 21st August 2018 till 13th September 2018”. The appellant further contends that the Corporate Debtor, after receiving the demand notice, has filed its reply dated 11th April 2019, before the Adjudicating Authority, Kolkata. In para 3 of its reply, the Corporate Debtor stated that *“e-mail was sent on 14th September 2019 and craves leave, referred to the said replies, at the time of the hearing”*.

The appellant raised the argument that the reply of the respondent itself, is a proof of service of notice on the respondent. The respondent in para 6 of the reply, has not specifically denied the service of demand notice. It is further stated that “the alleged claim made by the applicant against Kaygee Shoetech Private Limited, in the purported demand notice, is baseless, false, incorrect and/or denied and disputed in entirety”.

The appellant emphasized on para 6 of the reply by the corporate debtor, which is as under:

“as stated above, the purported demand notice contended false allegations and do not merit any detailed reply”.-----

--- ***“it is stated that the notice under Section 9 of I & B Code, 2016 was not in accordance with the applicable provisions and/or regulations”.***

(Quoted verbatim)

The appellant contends that the averments of the respondent about demand notice in the reply, lead to the only irresistible conclusion that the demand notice under Section 8 of I & B Code, 2016 was duly served upon Corporate Debtor. Appellant alleges that the Adjudicating Authority rejected the Application filed under Section 9 of I & B Code, 2016, based on the premise of non-service of demand notice, even though the Corporate Debtor has itself admitted the service of demand notice, in its reply to the petition.

The point of law which arises for our consideration is as under:

Whether deemed service of demand notice under Section 8 of I & B Code, 2016 is sufficient, to trigger the process U/S 9 of the Code?

We have heard the arguments of the Learned Counsel for the parties and perused the record.

On perusal of the record, it is apparent that the Application filed under Section 9 of I & B Code, 2016 has been rejected by the Adjudicating Authority on the ground that the service of demand notice under Section 8 of I & B Code, 2016 is not established. The contention of the Operational Creditor, that the demand notice sent to the Director of the Company at his residence, is not returned. Thus it should be deemed to be served/delivered, given the General Clauses Act, 1897 and Section 114 of Indian Evidence Act, 1872.

The Adjudicating Authority further observed that the I & B Code, 2016 is a complete Code in itself and provisions of Indian Evidence Act, 1872 and General Clauses Act, 1987 are not applicable unless specifically covered in I & B Code, 2016, and for this reason, only, the petition filed U/S 9 of the Code is rejected by the impugned order passed by the Adjudicating Authority.

The Learned Counsel for the Appellant contends that the demand notice on the Corporate Debtor under Section 8 of I & B Code, 2016 was sent at the registered office of the Company, which was returned with the postal remark “not available”. However, the notice sent to the Director of the Company, at their residential address, was not returned. Thus, as per the provisions of Clause 26, of the General Clauses Act, 1897 and Section 114 of Indian Evidence Act, 1872, there will be deemed presumption of service of demand notice under issued Section 8 of I & B Code, 2016.

The service of demand notice in accordance with the Code is to be assessed on the basis of provisions Section 8 & 9 of I & B Code, 2016 along with Adjudicating Authority Rules, 2016. Section 8 & 9 of the Code and the format of demand notice, as prescribed under Adjudicating Authority Rules, 2016 and Rule 38 of the National Company Law Tribunal Rules, 2016 is given below for ready reference:

Insolvency and Bankruptcy Code, 2016:

Sec8:

(1) An operational creditor may, on the occurrence of a default, **deliver a demand notice** of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, **within a period of ten days of the receipt of the demand notice or** copy of the invoice mentioned in subsection (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

Sec 9 of the Insolvency and Bankruptcy Code 2016:

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under subsection (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (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 operational debt by the corporate debtor; and*

(d) *such other information as may be specified.*

(4) *An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.*

(5) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*

(i) *admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*

(a) *the application made under sub-section (2) is complete;*

(b) *there is no repayment of the unpaid operational debt;*

(c) *the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(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 repayment 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.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

National Company Law Tribunal Rules, 2016:

Rule 38 Service of Notices and processes.- (1) Any notice or process to be issued by the Tribunal **may be served by post or at the e-mail address as provided in the petition or application or in the reply;**

(2) **The notice or process if to be served physically may be served in any one of the following modes as may be directed by the Tribunal; –**

(a) **by hand delivery through a process server or respective authorised representative;**

(b) **by registered post or speed post with acknowledgement due; or**

(c) **Service by the party himself.**

(3) Where a notice issued by the Tribunal is served by the party himself by hand delivery, he shall file with the Registrar or such other person duly authorised by the Registrar in this behalf, **the acknowledgement together with an affidavit of service and in case of service by registered post or by speed post,** file with the Registrar, or such other person duly authorised by the Registrar in this behalf, an affidavit Of service of notice along with the proof of delivery,

(4) Notwithstanding anything contained in sub-rules (1) and (2), the Tribunal may after taking into account the number of respondents and their place of residence or work or service could not be effected in any manner and other circumstances, direct that notice of the petition or application shall be served upon the respondents in any other manner,

including any manner of substituted service, as it appears to the Tribunal just and convenient.

(5) A notice or process may also be served on an authorised representative of the applicant or the respondent, as the case may be, in any proceeding or on any person authorised to accept a notice Or a process, and such service on the authorised representative shall be deemed to be proper service.

(6) Where the Tribunal directs a service under sub-rule (4), such amount of charges, as may be determined by the Tribunal from time to time, but not exceeding the actual charges incurred in effecting the service, shall be deposited with the registry of the Tribunal by the petitioner or applicant.”

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

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.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of Section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

6. Application by operational creditor.—(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under Section 9 of the Code in Form, 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

Thus the language of Sec 9 leaves no doubt that delivery of demand notice is necessary, for initiating the corporate insolvency resolution process under Sec 9 of the Code.

Mode of service of demand notice is provided in Rule 5 of the Adjudicating Authority Rules.

In the case in hand, in the reply of the corporate debtor, it is noted that:

“It is stated that the notice issued under IBC was not in accordance with the applicable provisions and/or Regulations. **The applicant is trying to mislead the Hon’ble NCLT as inspite of receiving reply from KSPL to demand notice**; as KSPL has given reply to the said demand notice wherein all facts were again repeated whereas the applicant in the affidavit annexed to the application has stated that no reply has been given by the corporate debtor relating to a dispute of

unpaid operational debt and are silent about reply received from KSPL”

(Quoted verbatim)

Based on the above reply of the corporate debtor, it is apparent that the corporate debtor has not denied the service of demand notice in its reply to the petition. It is apparent that initially, the corporate debtor took the plea that demand notice was not as per applicable Rules and Regulations. The corporate debtor in its reply further stated that it is incorrect to allege that the corporate debtor has not given a reply to demand notice and has not raised the dispute of unpaid operational debt.

The Appellant has given sufficient evidence to show the delivery of demand notice. There is no specific denial of service of demand notice. The corporate debtor has itself stated that in reply to the demand notice, he had raised the dispute of unpaid operational debt. But no document is placed before us to show the existence of dispute before issuance of demand notice. Copy of invoices, demand notice, bank statement all other documents are placed before us which clearly shows that the corporate debtor failed to pay off the operational debt of more than Rs One Lac, despite service of demand notice.

It is apparent that the Application for Initiation of Corporate Resolution Process was filed on 15th September, 2018, and impugned invoices were raised between 03rd March, 2017 to 27th March, 2017. The Corporate Debtor made the last payment of Rs.4,08,205/- partial liability on 20th June, 2017, therefore, it is apparent that petition is within statutory

period of limitation i.e. 3 years. Thus we are of the considered opinion that the Adjudicating Authority erred in rejecting the application filed u/s 9 of the Code.

Therefore, the Appeal is allowed. Impugned order is set aside. The Adjudicating Authority is directed to pass the order of admission. Parties are directed to be present before the Adjudicating Authority on 24th February, 2020.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
11th FEBRUARY, 2020

pks/md