NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT)(Ins.)No. 319 of 2019

IN THE MATTER OF:

CIL Australia North Pty.Ltd. .....Appellant

Vs.

M/s. Sharp Corp Ltd. .....Respondents

Present :

For Appellant: Mr. Sudhanshu Batra with Ms. Damayanti, Senior Advocates and Mr. Aditya Mishra, Advocates

For Respondents: Mr. Arvind Gupta, Ms. Henna George, Mr. Ishan Bisht, Advocates

O R D E R

02.05.2019 - This appeal has been preferred by Appellant ('Operational Creditor') against order dated 12th February, 2019 whereby the Adjudicating Authority (National Company Law Tribunal) *(in short 'NCLT'),* New Delhi, Court No. IV rejected the application filed by the Appellant u/s 9 of the Insolvency & Bankruptcy Code ('I&B' Code), 2016 on the ground of pre-existing dispute.

When the matter was taken up on 5th April, 2019, learned counsel for Appellant submitted that Demand Notice u/s 8(1) was issued on 5th October, 2018 and suit was filed subsequently on 16th October, 2018 and, therefore, it cannot be stated to be a pre-existing dispute.

....contd./

Learned counsel for Respondent referred to notice dated 5th October, 2018 and submitted that the said letter is a general notice for arbitration and do not amount to Demand Notice in terms of section 8(1) of 'Insolvency & Bankruptcy Code' *(in short I&B) Code.*

We have also perused the said letter dated 5th October, 2018 and find that general notice in terms of settlement and is not a Demand Notice u/s 8(1). In fact the Demand Notice was issued by Appellant subsequent to filing of suit on 30th October, 2018.

Learned counsel appearing on behalf of the Appellant submitted that the suit is filed in a court which has no jurisdiction and the suit has been filed based on no evidence. Reliance has been placed on the decision of Hon'ble Supreme Court in the case of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited in civil appeal number 9405 of 2017.***

Heard learned counsel for Appellant and learned Counsel for Respondent and perused the record.

Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407]"* observed that the moment the Adjudicating Authority finds that there is a pre-existing dispute, the 'Operational Creditor' gets out of clutches of the Court as quoted below:-

> *"29 The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

The aforesaid observation of the Hon'ble Supreme Court was reiterated by the Hon'ble Supreme Court in the case of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited in civil appeal number 9405 of 2017,*** wherein the Hon'ble Supreme Court also observed:

"51. *It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or*

illusory, the adjudicating authority has to reject the application"

Admittedly the suit in question relates to same agreement pursuant to which the claim has been made by the 'Operational Creditor'. The suit has been filed by the Respondent ('Corporate Debtor') prior to issuance of Demand Notice u/s 8(1). Whether the suit is maintainable or not, such question cannot be determined by National Company Law Tribunal (NCLT) or by this Appellate Tribunal. Therefore, the argument that the suit is not maintainable cannot be raised nor to be decided. Further the question as to whether the plea as taken therein is a sham or not also cannot be decided by National Company Law Tribunal (NCLT) while dealing with an application under section 9. It will otherwise amount to rendering a decision on merit of the suit which is not permissible.

The fact being there is pre-existing dispute, we also hold that the application u/s 9 is not maintainable. In the absence of any merit, the appeal is dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

ss/gc