

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 58 of 2018

IN THE MATTER OF:

Phoenix Marketing

...Appellant

Versus

United Breweries Ltd.

...Respondent

Present:

For Appellant : **Mr. Sakal Bhushan and Mr. Rohit Gandhi, Advocates**

For Respondent: **Mr. Ashish Aggarwal and Mr. Gurcharan Singh,
Advocates**

O R D E R

14.03.2018 The appellant preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code'). On appearance, the respondent – 'Corporate Debtor' brought to the notice of the Adjudicating Authority (National Company Law Tribunal) Bengaluru Bench that two suits pending is with regard to the money claim. In view of the stand taken by the respondent and the pendency of the suit, the Adjudicating Authority dismissed the application preferred by the appellant which giving rise to the present appeal.

2. Learned counsel appearing on behalf of the appellant submits that the appellant agrees that a suit is pending but according to him that suit is frivolous

and therefore that should not have been taken into consideration by the Adjudicating Authority. He place reliance on the decision of the Hon'ble Supreme Court in "*Mobilox Innovations Private Limited vs. Kirusa Software Private Limited – 2017 SCC OnLine SC 1154*" wherein the Hon'ble Supreme Court observed and held as follows :

"54. According to the learned counsel for the respondent, the definition of "dispute" would indicate that since NDA does not fall within any of the three sub-clauses of Section 5(6), no "dispute" is there on the facts of this case. We are afraid that we cannot accede to such a contention. First and foremost, the definition is an inclusive one, and we have seen that the word "includes" substituted the word "means" which occurred in the first Insolvency and Bankruptcy Bill. Secondly, the present is not a case of a suit or arbitration proceeding filed before receipt of notice—Section 5(6) only deals with suits or arbitration proceedings which must "relate to" one of the three sub-clauses, either directly or indirectly. We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6). The correspondence between the parties would show that on 30-1-2015, the appellant clearly informed the respondent that they had displayed the appellant's confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of NDA between the parties.

They were further told that all amounts that were due to them were withheld till the time the matter is resolved. On 10-2-2015, the respondent referred to NDA of 26-12-2014 and denied that there was a breach of NDA. The respondent went on to state that the appellant's claim is unfounded and untenable, and that the appellant is trying to avoid its financial obligations, and that a sum of Rs 19,08,202.57 should be paid within one week, failing which the respondent would be forced to explore legal options and initiate legal process for recovery of the said amount. This email was refuted by the appellant by an email dated 26-2-2015 and the appellant went on to state that it had lost business from various clients as a result of the respondent's breaches. Curiously, after this date, the respondent remained silent, and thereafter, by an email dated 20-6-2016, the respondent wished to revive business relations and stated that it would like to follow up for payments which are long stuck up. This was followed by an email dated 25-6-2016 to finalise the time and place for a meeting. On 28-6-2016, the appellant wrote to the respondent again to finalise the time and place. Apparently, nothing came of the aforesaid emails and the appellant then fired the last shot on 19-9-2016, reiterating that no payments are due as NDA was breached.”

3. Referring to the aforesaid paragraph, learned counsel for the appellant submitted that the Adjudicating Authority was required to see whether there is a plausible contention which requires further investigation and that the dispute is not patently feeble legal argument or an assertion of fact unsupported by the

evidence. He further submits that such procedure is important in pending suit or arbitration. However, we do not accept the submission made on behalf of the appellant as it is clear from the provisions of the law and the decision of the Hon'ble Supreme Court as referred to and quoted above that where a suit or arbitration proceedings is pending between the parties and such matter is brought to the notice of the Adjudicating Authority, the Authority is bound to reject the application.

4. We find no merit in this appeal, which is accordingly dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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