

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 172 of 2020

[Arising out of Order dated 13 December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in Company Petition (IB) No. 252/NCLT/AHM/2019]

IN THE MATTER OF:

**Tek Travels Private Limited
Plot No. 183, Udyog Vihar Phase 1
Sector 20, Gurugram – 122008
Haryana**

...Appellant

Versus

**Altius Travels Private Limited
1, Mudra Apartments
Near Stadium Petrol Pump, Navrangpura
Ahmedabad – 380014, Gujarat**

...Respondent

Present:

For Appellant : Mr Rachit Kohli, Advocate

**For Respondent : Mr Malak Bhatt, Mr Rajat Bector & Mr Shivankar,
Advocates.**

J U D G M E N T

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

This appeal emanates from the Order dated 13 December 2019 passed by the Adjudicating Authority in Company Petition (IB) No. 252/NCLT/AHM/2019, whereby the Application filed by Appellant under Section 9 of the I&B Code 2016 was rejected on the ground of maintainability for want of proper Authorisation, which is of the year 2013 when I&B Code 2016 was not in existence. The parties are represented by their original status in the Company Petition for the sake of convenience.

Appellants Contention;

2. The Applicant/Appellant filed an Application under Section 9 of the I&B Code 2016 (in short 'code'), which was dismissed on the ground that the Authorisation annexed with the application was of the year 2013, i.e. before the Insolvency & Bankruptcy Code, 2016 came into force.

3. It is contended that there is no specific provision neither in the Code nor under the Rules and Regulations made thereunder, which mandates authorisation post-enactment of the Insolvency & Bankruptcy Code 2016. Instead of deciding the Section 9 Application on merit, the Learned Adjudicating Authority rejected the application as not maintainable for want of proper Authorisation, which happens to be of 2013 when the I&B Code was not in existence.

4. The Appellant contends that the Adjudicating Authority should have granted the liberty to rectify the defects if any. However, the Learned Adjudicating Authority failed to provide an opportunity of being heard to the Appellant either on account of principles of natural justice or account of non-compliance of the proviso to Section 9(5) (ii)(a) of the Code.

Respondent's Contention

5. The Respondent/Corporate Debtor contends that the Application filed by the Operational Creditor under Section 9 of the Code is based on a Board Resolution passed by the Appellant Company in the year 2013, which limits itself to recovery proceedings on behalf of the Appellant. The Authorisation

contemplated under the Insolvency and Bankruptcy Code could only be of the post-enactment of the Code.

6. It is stated that the Appellant was not at all entitled to be granted seven days under the proviso to Section 9(5) (ii) (a) of the Code to rectify the defects in the Application concerning the issue of Authorisation. The proper and specific Authorisation forms the basis of entire proceedings under the Code. Since Authorisation goes to the root of the matter, the same cannot be treated as a 'curable defect' that can be rectified within seven days. An incomplete or improper authorisation vitiates the entire proceedings at the inception itself. The period provided under the proviso to Section 9(5) (ii) for curing a defect is only concerning the sufficient details of the Company and about mistakes in the Application filed under Section 9 of the Code. An invalid authorisation vitiates the very foundation of Application and cannot be cured in Section 9 (5) (ii) of the Code.

Discussions and Finding:

7. The present Appeal arises out of the Order dated 13 December 2019 against the dismissal of the Application filed under Section 9 of the Code. The Authorisation annexed with the application was of the year 2013, i.e. much before the Insolvency and Bankruptcy Code 2016.

8. The Adjudicating Authority has rejected the Application only on maintainability ground without deciding the Application on merit. The question that arises for our consideration is as follows;

1. Whether Authorisation for filing a petition under Section 9 of the Code before the commencement of the Code can be treated as a valid authorisation?

2. Whether Adjudicating Authority instead of dismissal of the Petition should have given the opportunity to rectify the defects as per proviso to Section 9 (5) (ii)(a) of the Code?

Issue No's 1 and 2;

9. The Adjudicating Authority has dismissed the Petition because the Authorisation to file the Petition is of 2013, whereas the Insolvency and Bankruptcy Code came into existence in 2016. The Appellant contends that the Adjudicating Authority should have granted the liberty to the Appellant to rectify the defects if any. It is also contended that neither the Code nor any Rules and Regulations made thereunder mandates the authorisation post the enactment of the I&B Code.

10. The Learned Counsel for the Appellant has placed reliance on the decision of this Tribunal in the case of Ramesh Murji Patel v Aramex India Pvt Ltd. Company Appeal (AT) (Ins)No 1447 of 2019 wherein it is held that; ***'authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code'***.

11. The Learned Counsel for the Appellant also placed reliance on the judgement of this Tribunal in case of Palogics Infrastructure Private Limited v ICICI Bank, Company Appeal (AT) (Ins) No 30 of 2017 wherein it is held that;

"36. In so far as, the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general Authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor' / 'Operational Creditor'! 'Corporate Applicant', mere use of word 'Power of. Attorney' while delegating such power will not take away the Authority of such officer and 'for all purposes it is to be treated as an 'authorisation' by the 'Financial Creditor'! 'Operational Creditor'! 'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'.

37. As per Entry 5 & 6 (Part I) of Form No. 1, 'Authorized Representative' is required to write his name and address and position in relation to the 'Financial Creditor'/Bank. If there is any defect, in such case, an application under section 7 cannot be rejected and the applicant is to be granted seven days' time to produce the Board Resolution and remove the defect.'

(verbatim copy)

12. It is pertinent to mention that this Appellate Tribunal has already taken the view that if the Adjudicating Authority finds any defect in the Application filed under Section 7 or 9 of the Code, then instead of rejecting the Application, the Applicant should be granted seven days' time to remove the defect.

13. Further, in case of Rajendra Narottamdas Sheth v Smt Heenaben Rajendra Kumar Sheth Company Appeal (AT) (insolvency) No 621 of 2020 this Appellate Tribunal has held that;

"we do not find any substance in the argument that as such general power of attorney was executed before coming into force of insolvency and bankruptcy code hence, the said chief manager did not have Authority. In our view, it is general power of attorney and not confined to any particular Act or Acts. We do not find any defect on this account with the application under section 7 of IBC."

(Emphasis supplied, verbatim copy)

14. In the case of Ramesh Murji Patel(supra) and Rajendra Narottamdas Sheth (supra), this Appellate Tribunal has already taken the view that if Authorisation is prior to the enactment of the Code, then it can not be treated as a defect in the Application and 'authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code.

15. In order to ascertain the mandatory conditions of Section 9(5)(ii)(a) of the Code, it is necessary to go through the statutory provision of the Code.

Section 9 of the Insolvency and Bankruptcy Code 2016 is reads as under;

“9. Application for initiation of corporate insolvency resolution process by Operational Creditor.—

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (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.

(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 3[payment] 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 4[payment] 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.

16. Thus it is clear that if Applications filed under Section 9 of the Code is found incomplete, then Adjudicating Authority in compliance of proviso to Section 9 (5) (ii)(a) of the Code is obliged to issue notice on the applicant and provide an opportunity to rectify that the defects within seven days, failing which petition can be rejected.

17. In the instant case, the Adjudicating Authority noticed that the Authorisation was much before the commencement of the I&B Code, and only on this basis, the Application under Section 9 of the Code was rejected without allowing the applicant to rectify the mistakes, is against the statutory provision of the Code.

18. The Learned Counsel for the Respondent argues that the Appellant was not at all entitled opportunity to rectify the defect in compliance with Section

9(5)(ii)(a) of the Code because Authorisation forms the foundation of entire proceedings under the I&B Code. Since the authorisation issue goes to the root of the matter, the same cannot be treated as a "curable defect". An incomplete or improper authorisation vitiates the entire proceedings at inception, rendering legal action devoid of Authority.

19. The Learned Counsel for the Respondent further placed reliance on the direction of Hon'ble Delhi High Court in the case of Nibro Ltd v National Insurance Company, AIR 1991 Delhi 25 wherein it is held that the question of the Authority to institute a suit or a claim on behalf of the Company cannot be termed as a technical matter.

20. It is pertinent to mention that the Insolvency and Bankruptcy Code is a self-contained Code. It has made provision for providing an opportunity to rectify the defects of application, and in any position, it can not be denied.

21. In case of *Surendra Trading Co. v. Juggilal Kamlapat Jute Mills Co. Ltd.*, (2017) 16 SCC 143 : 2017 SCC OnLine SC 1208 : (2018) 2 SCC (Civ) 730 at page 149 Hon'ble Supreme Court of India has held that the time provided for rectifying the defection application under Section 9 (5) of the Code is directory in nature and in the given circumstances the tribunal can provide time more than 7 days to rectify the defect. Hon'ble Supreme Court has held that;

"5. One of the conditions, with which we are concerned, is that application under sub-section (2) has to be complete in all respects. In other words, the adjudicating Authority has to satisfy that it is not defective. In case the adjudicating Authority, after the scrutiny of the application, finds that there

are certain defects therein and it is not complete as per the provisions of sub-section (2), in that eventuality, the proviso to sub-section (5) mandates that before rejecting the application, the adjudicating Authority has to give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.

6. *Sub-section (5) of Section 9, thus, stipulates two time periods. Insofar as the adjudicating Authority is concerned, it has to take a decision to either admit or reject the application within the period of fourteen days. Insofar as defects in the application are concerned, the adjudicating Authority has to give a notice to the applicant to rectify the defects before rejecting the application on that ground and seven days' period is given to the applicant to remove the defects.*

22. *Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the applicant from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.*

23.2. *When the application is listed before the adjudicating Authority, it has to take a decision to either admit or reject the*

application. For this purpose, fourteen days' time is granted to the adjudicating Authority. If the application is rejected, the matter is given a quietus at that level itself. However, if it is admitted, we enter the third stage.

24. Further, we are of the view that the judgments cited by NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating Authority has to pass the Order is not mandatory but directory in nature would equally apply while interpreting the proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

25. Thus, **we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature.** However, we would like to enter a caveat.

28. In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds **the proviso to sub-section (5) of Section 7 or the proviso to sub-section (5) of Section 9 or the proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure, applications to be rejected, is set aside.** No costs.”

(Verbatim copy,

22. In the instant case, we find that the Adjudicating Authority has dismissed the Petition for want of proper Authorisation. However, the Adjudicating Authority has not considered providing an opportunity to the

Applicant to rectify the defects. In contrast, proviso to Section 9(5)(ii)(a) of the Code makes it mandatory to provide an opportunity to the applicant for rectifying the defects of the application. In the circumstances stated above, we are of the considered opinion that the Adjudicating Authority has erred in dismissing the Application for want of Authorisation, without even providing an opportunity to rectify the defects in compliance with Section 9(5)(ii)(a) of the Code.

23. In fine, the Appeal is allowed, and impugned Order is set aside. No Order as to Costs. The Adjudicating Authority is directed to decide the application afresh at the earliest in the light of the directions above.

[Justice Anant Bijay Singh]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
19th APRIL, 2021

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